A COMPARATIVE LEGAL ANALYSIS OF THE EFFECTS OF DIVORCE ON MARITAL PROPERTY

By

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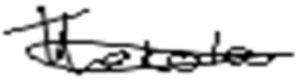
I declare that the above dissertation/thesis is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.



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SUMMARY

The movement of people from county to country brought about an increase in international marriages. However, South African private international law rules with regard to the proprietary consequences of marriage are not on par with their foreign counterparts. The prejudicial rule which governs proprietary consequences of marriage has raised difficulties for our courts in past and recent cases. The advent of a new constitutional dispensation in South Africa forbids discrimination based on sex, gender and marital status. Furthermore, the question is asked whether parties to a marriage with a foreign matrimonial domicile may rely on section 7(3) of the Divorce Act 70 of 1979. The classification of redistribution orders in private international law matters has given rise to uncertainty.

The objectives of the study are to suggest workable alternatives to the current connecting factor for proprietary consequences of marriage in South African private international law and to investigate the availability of redistribution orders to spouses applying for divorce in South Africa.

KEY TERMS

Choice of law

Classification

Closest connection

Conflict of laws

Connecting factor

Constitutionality

Divorce matters

Domicile

Habitual residence

Lex domicilii matrimonii

Lex fori

Maintenance

Matrimonial property

Private international law

Proprietary consequences of marriage

Redistribution orders

Same-sex marriages

CHAPTER 1: GENERAL INTRODUCTION

1.1 Introduction

Globalisation has brought about a marked increase in the movement of persons around the world, for work or personal reasons. Often, therefore, a person may marry in one country while domiciled in another, acquire property in several countries and then get divorced in yet another jurisdiction. This gives rise to complicated legal questions.

In terms of the South African private international law; the validity of marriage is governed by the laws of where the marriage was celebrated,[1] while the proprietary consequences of marriage are governed by the law of the husband's domicile at the time of the marriage.[2]

It is trite knowledge that the practice of family law is not the same across the world.[3] This may cause difficulties in determining which legal system is applicable when resolving a legal dispute with a foreign element. A four-step process may be used when resolving a dispute involving a foreign element to find the applicable legal system and solve the dispute.[4] The first step is to look at jurisdiction – the local court must have jurisdiction to hear the matter.[5] The second step is classification – the matter needs to be placed in the correct legal category.[6] The third step is determining the *lex causae* – once the matter is placed within the correct legal category, we can determine the relevant legal system that is identified by the connecting factor.[7] The connecting factor points to the applicable law.[8] The final step is ascertaining the content of the *lex causae* – once the applicable law has been determined, the content of the relevant rules must be ascertained in order for it to be applied to the matter at hand.[9]

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[1] Forsyth *Private international law* 280.
[2] Brooks 1976 *CILSA* (9) 99-106.
[3] Hodson *A practical guide to international family law* 7.
[4] Forsyth *Private international law* 10.
[5] Forsyth *Private international law* 10.
[6] Forsyth *Private international law* 11.
[7] Forsyth *Private international law* 11-12.
[8] Forsyth *Private international law* 11-12.
[9] Forsyth *Private international law* 12.

When dealing with a private international law question, classification is arguably the most important step in solving the matter.[10] The *lex domicilii* of the spouses at the time of the act governs the personal consequences of marriage, while the *lex domicilii matrimonii* governs the proprietary consequences of marriage.[11] It is often difficult to determine whether the rules purported to apply to a dispute relate to a personal or proprietary consequence.[12] The distinction between personal and proprietary consequences will be discussed in detail in chapter 2.

1.1.1 The effects of divorce on marital property

When spouses marry in one jurisdiction, move to another jurisdiction and later get divorced, difficult questions may arise and consequently have an effect in respect of their marital property. These questions include determining the law applicable to the proprietary consequences of their marriage and the availability of a possible redistribution order, as well as the classification of the latter.

1.1.2 Lex domicilii matrimonii

In terms of the South African principles of private international law, the proprietary consequences of marriage are governed by the *lex domicilii matrimonii*, which is interpreted as the law of the husband's domicile at the time of entering into the marriage.[13]

It was also held in *Frankel's Estate and Another v the Master* [14] that in the absence of an antenuptial contract, the patrimonial consequences of marriage are governed by the *lex domicilii* of the husband.[15]

South Africa adheres to the doctrine of immutability with regards to the legal system that governs the proprietary consequences of marriage. Therefore, the law

[10] Schulze 2006 *Annual Survey of South African Law* 836.
[11] Forsyth *Private international law* 291.
[12] Forsyth *Private international law* 291.
[13] Forsyth *Private international law* 291.
[14] *Frankel's Estate and Another v the Master* 1950 (1) SA 220 (A).
[15] *Frankel's Estate and Another v the Master* 1950 (1) SA 220 (A) [251].

designated by the husband's domicile at the time of the marriage as the *lex causae* is immutably fixed.[16]

Forsyth highlighted that an important cultural and legal change in several countries has been the recognition of same-sex unions.[17] Section 9 of the Constitution[18] prohibits discrimination, *inter alia*, on the grounds of sex, gender and sexual orientation. The current connecting factor for proprietary consequences of marriage clearly falls foul of the equality clause.[19] In the matter of *Sadiku v Sadiku*,[20] Van Rooyen AJ questioned whether the application of the *lex domicilii* of the husband is still acceptable within a gender-equal society.[21] The connecting factor for the proprietary consequences of marriage is therefore in urgent need of reform.

1.1.3 Classification of the redistribution of assets

An additional concept that has an effect on marital property in divorce proceedings is the classification of redistribution of assets. The principles of the Divorce Act[22] in respect of the division of assets upon divorce can be applied in pure domestic marriages with relative ease. However, when a divorce action is brought before a South African court in respect of a marriage with a foreign matrimonial domicile, the application of the Divorce Act becomes far more complicated.

Section 7 of the Divorce Act[23] makes provision for the division of assets and maintenance of the parties. However, the legislature did not give thought to cases of private international law with specific regard to section 7(3) of the Divorce Act.

Section 7(3) provides that:

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16 Brooks 1976 *CILSA* (9) 99.
17 Forsyth *Private international law* 278.
18 Constitution of the Republic of South Africa, 1996, hereinafter referred to as the Constitution.
19 "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth"; Forsyth *Private international law* 300.
20 *Sadiku v Sadiku* Case no 30498/06 (unreported) (hereinafter the *Sadiku* case).
21 *Sadiku* case [par 10 p 4].
22 Divorce Act 70 of 1979 (hereinafter the Divorce Act).
23 Divorce Act.

> A court granting a decree of divorce in respect of a marriage out of community of property
>
> (a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; or
> (b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1927 as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988,
>
> may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets of the other party as the court may deem just be transferred to the first-mentioned party.

In addition, for a party to rely on section 7(3) of the Divorce Act, the court needs to be satisfied that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses that would otherwise have been incurred, or in any other manner, and that it is equitable and just.[24]

It has been argued that section 7(3) is only applicable if South African law is the *lex domicilii matrimonii*. [25] The legislator attempted to make provision for parties whose proprietary consequences of marriage are governed by a foreign matrimonial domicile by inserting section 7(9) into the Divorce Act. Section 7(9) provides that:

> … (W)hen a court grants a decree of divorce in respect of a marriage the patrimonial consequences of which are according to the rules of the South African private international law governed by the law of a foreign state, the court shall have the same power as a competent court of the foreign state concerned would have had at that time to order that assets be transferred from one spouse to the other spouse.[26]

[24] Section 7(4) of the Divorce Act.
[25] Neels 1992 *TSAR* 336.
[26] Section 7(9) of the Divorce Act.

However, it may happen that the courts of the matrimonial domicile have no or much less discretionary redistribution powers than a South African court applying the *lex fori*.

A party to a marriage governed by a foreign matrimonial domicile may therefore wish to rely on section 7(3) rather than section 7(9) of the Act. The question of whether a spouse to a marriage with a foreign matrimonial domicile may rely on section 7(3) of the Divorce Act will depend upon whether a redistribution order is classified as a proprietary consequence of marriage or as a divorce matter.[27]

Section 7(3) has also been criticised from the perspective of domestic law in that it only provides parties to certain marriages with the possibility of applying for a redistribution order.[28] It also infringes on the constitutional right to equality before the law and equal protection and benefit of the law.[29]

The connecting factor for proprietary consequences of marriage and the classification of redistribution orders will be expanded in greater length in chapter 2 of the dissertation.

1.2 Problem statement

In light of the above effects of divorce on marital property, the questions this dissertation aims to answer are:

a) What are the alternatives to the current connecting factor for proprietary consequences of marriage?
b) Can a party to a marriage with a foreign *lex domicilii matrimonii* rely on section 7(3) of the Divorce Act to obtain a redistribution order?
c) How can the courts classify redistribution orders?

[27] Schoeman, Roodt and Wethmar-Lemmer *Private international law in South Africa* 87.
[28] Heaton *South African family law* 136.
[29] Section 9(1) of the Constitution.

1.3 Purpose of the study

The current connecting factor for proprietary consequences of marriage is unconstitutional. It is proposed that a suitable alternative connecting factor be found through conducting relevant comparative research in this field.

Section 7(3) of the Divorce Act is problematic on several grounds. There is difficulty in determining whether the rules supposed to apply to redistribution orders relate to a personal or proprietary consequence.

This research aims to suggest workable alternatives to the current connecting factor for proprietary consequences of marriage in South African private international law and to investigate the availability of redistribution orders to spouses applying for divorce in South Africa and the classification of redistribution orders.

1.4 Limitations of the study

This study will not focus on the grounds of divorce, matters relating to jurisdiction, or recognition and enforcement of foreign divorce orders. The research will investigate the constitutionality of the law applicable to proprietary consequences of marriage and the investigation of the classification of redistribution orders in terms of private international law.

1.5 Hypothesis

The current connecting factor for proprietary consequences of marriage is unconstitutional. It is proposed that a suitable alternative connecting factor be found through conducting relevant comparative research in this field.

Section 7(3) of the Divorce Act is problematic on several grounds. It is proposed that the legislature steps in to follow the developments in other jurisdictions with regard to redistribution orders, to provide for all spouses who seek a just and equitable distribution of marital assets upon divorce.

1.6 Comparative study

It is acknowledged that confronting abovementioned issues on the constitutionality of the *lex domicilii matrimonii* and the investigation into the classification of redistribution orders necessitates a comparative approach.

Historically, South African private law was based on Roman-Dutch principles introduced by the first European settlers in the 17th century. Subsequently, British colonialisation introduced English legal principles and traditions that shaped procedural and mercantile law. [30] The relevant South African rules and principles will be compared to the relevant principles of Dutch and English law. The Dutch and English legal systems provide a good start for a comparative study due to the historical ties between South Africa and England and the Netherlands respectively.

In order to undertake a comparative study, a brief summary of the various matrimonial property regimes will be discussed below. A matrimonial property regime may be defined as the set of legal rules relating to the spouses' financial relationships resulting from their marriage, both with each other and with third parties. These are the matrimonial property rights of the spouses.[31]

1.6.1 South Africa

In South Africa, there are three main matrimonial property systems, namely universal community of property, complete separation of property and the accrual system.[32]

1.6.2 England

In England, the default matrimonial property system is out of community of property.[33] "During a marriage each spouse retains ownership and control over his or her property, whether acquired before or during the marriage."[34]

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[30] Cotton *The dispute resolution review* 578.
[31] EU *Green paper* 2.
[32] Heaton *South African family law* 100.
[33] Rešetar 2008 *EJCL* 3.
[34] Probert *Family law in England and Wales* 181.

1.6.3 Netherlands

In the Netherlands, the current default matrimonial property system is universal community of property.[35] Under Dutch law, spouses that do not conclude a marriage contract live under a system of full joint ownership of assets and liabilities.[36] However, on 28 March 2017, the Upper House of the Dutch Parliament adopted a proposal first submitted in 2014, providing for a change in the law on matrimonial property.[37] The new regime is set to take effect in 2018.[38] The new law will entail that matrimonial community of property will consist exclusively of goods acquired by or on behalf of both spouses during the course of the marriage.[39] Gifts, inheritances or any pre-existing debts will be regarded as being personal property and will therefore not form part of the community.[40]

The comparative literature review will be conducted by looking at legislation, case law, common law, international treaties and instruments, textbooks, journal articles and electronic material with regard to the two main problem statements. The findings will be used to come up with workable alternatives to the current position in South Africa.

1.7 Scope of study

This dissertation has five chapters, which will be divided into various topics. Chapter 1 is the introductory chapter, which gives an ephemeral introduction and background to the topic of the two problem statements.

Chapter 2 discusses the principles of South African private international law. This chapter provides a background to developments in terms of the South African private international law, a discussion on the South African marital property law

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35 Article 94 of the Dutch Civil Code.
36 Van Rooij and Polak *Private international law in the Netherlands* 195.
37 Blomjous https://rwv.nl/en/news/2017/03/new-dutch-law-on-matrimonial-property-puts-an-end-to-the-community-of-property (Date of use: 25 September 2017).
38 Blomjous https://rwv.nl/en/news/2017/03/new-dutch-law-on-matrimonial-property-puts-an-end-to-the-community-of-property (Date of use: 25 September 2017).
39 Maric https://rwv.nl/en/news/2017/02/new-dutch-matrimonial-property-regime-a-limited-community-of-property (Date of use: 25 September 2017).
40 Maric https://rwv.nl/en/news/2017/02/new-dutch-matrimonial-property-regime-a-limited-community-of-property (Date of use: 25 September 2017).

and private international law rules in respect of propriety consequences of marriage and an investigation into redistribution orders.

Chapter 3 focuses on the principles of English private international law. The chapter will give an overview of the relevant legal developments in England. The chapter will also look into English marital property law and private international law rules in respect of propriety consequences of marriage and redistribution orders.

Chapter 4 investigates the principles of Dutch private international law. The chapter will give an overview of the developments in the Netherlands. The chapter will also investigate Dutch marital property law and private international rules in respect of propriety consequences of marriage and redistribution and look at the Hague Convention.

Chapter 5 is the comparative and concluding chapter. The chapter will compare the principles and lessons learnt from other jurisdictions, and conclude and make recommendations for South African private international law.

CHAPTER 2: PROPRIETARY CONSEQUENCES OF MARRIAGE AND THE CLASSIFICATION OF REDISTRIBUTION ORDERS IN SOUTH AFRICA

2.1 Introduction

When parties institute divorce proceedings in a South African court but the marriage was concluded while domiciled in another country, conflict of laws questions arise. As will be seen in the discussion of the relevant conflict of laws rules, the world has moved away from the unequal treatment of sexes. However, some aspects in South African private international law remain overdue for change.

According to the principles of South African private international law, the proprietary consequences of marriage are governed by the *lex domicilii matrimonii*, interpreted as the domicile of the husband at the time of the conclusion of the marriage.[41] This is anomalous to the Bill of Rights of the Constitution, which enshrines the principle of equality. In this chapter, this rule of private international law will be analysed with reference to case law and scholarly opinion. Since the substantive rules of matrimonial property are of relevance, the discussion of the private international law principles relating to proprietary consequences will be preceded by an analysis of the South African marital property regime.

From the outset, it is important to distinguish between personal matters and proprietary consequences of marriage, since the former are not governed by the *lex domicilii matrimonii*, but indeed by the *lex fori.*[42] In some instances it is not entirely clear whether a matter should be classified as a divorce matter or a proprietary consequence of marriage. An example of this is the classification of a redistribution order upon divorce.[43] This matter will also be dealt with in detail in this chapter.

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41 Forsyth *Private international law* 291; *Brown v Brown* 1921 AD [478]; *Frankel's Estate and Another v the Master* 1950 (1) SA 220 (A); *Sperling v Sperling* 1975 (3) SA 707 (A).

42 *Holland v Holland* 1973 (1) SA 897 (T) [900A and 904G]; Forsyth *Private international law* 307.

43 Heaton *The law of divorce and dissolution of life partnerships in South Africa* 647.

2.2 South African matrimonial property law

When couples decide to enter into a marriage, they have to decide on the matrimonial property regime that will govern their marriage. In South African law, there is a rebuttable presumption that when a couple gets married they are marrying in community of property.[44] Marriage in community of property is also the most common matrimonial system.[45] The presumption can be rebutted by proving that there is an existing valid antenuptial contract in which community of property and community of profit and loss are excluded, or the existence of a valid postnuptial contract in which community of property and community of profit and loss are excluded, or the husband's *lex domicilii* at the time of the marriage provides that the marriage is out of community of property.[46] Where spouses are African persons who enter into a civil marriage which is governed by section 22(6) of the Black Administration Act 38 of 1927, they are also deemed to be married out of community of property.[47]

It is therefore advisable for persons who intend to enter into a marriage to have knowledge of the different matrimonial property options available to them. The different matrimonial property regimes each have advantages and disadvantages,[48] which will be discussed below.

2.2.1 Marriage in community of property

In terms of a marriage in community of property, the couple becomes joint owners of all assets and liabilities acquired before and during the subsistence of the marriage.[49] Not all assets are part of the joint estate.[50] The exclusions from a joint estate are[51] assets excluded in an antenuptial contract, assets excluded by will or

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[44] Heaton *South African family law* 65; De Jong and Pintens 2015 *TSAR* 551; Heaton *The law of divorce and dissolution of life partnerships in South Africa* 59.
[45] Heaton *The law of divorce and dissolution of life partnerships in South Africa* 59.
[46] Heaton *The law of divorce and dissolution of life partnerships in South Africa* 60-62; De Jong and Pintens 2015 *TSAR* 551.
[47] Heaton *South African family law* 65-66.
[48] Heaton *South African family law* 100-101.
[49] Monareng *A simple guide to South African family law* 13; Heaton *The law of divorce and dissolution of life partnerships in South Africa* 62.
[50] Section 7(7) of the Divorce Act.
[51] Heaton *South African family law* 67-70.

deed of donation, assets subject to a *fideicommissum* or usufruct; engagement gifts, benefits under the Friendly Societies Act,[52] non-patrimonial damages, damages as a result of personal injury inflicted by the other spouse, costs in matrimonial action, and proceeds excluded by the court in terms of the Prevention of Organised Crime Act.[53]

When persons get married in community of property, they should be aware that "marriage in community of property can be described as a universal economic partnership of the spouses in which all their assets and liabilities are merged in a joint estate in which both spouses, irrespective of the value of their contributions, hold equal shares".[54]

Marriage in community of property has certain advantages and disadvantages. The main advantages of this regime include the fact that it applies by operation of law and without the execution of an antenuptial contract. This will then be an effortless and less costly experience for the spouses.[55] All assets accrued during the subsistence of marriage are automatically shared by the spouses.[56] Antenuptial assets are also shared. This can be both an advantage and a disadvantage. Spouses also share credit-worthiness during the subsistence of marriage, which may also be an advantage or a disadvantage.[57]

One of the main disadvantages of the system is the fact that spouses are not protected from each other's creditors due to joint liability of debts. Furthermore, spouses cannot recover delictual damages from each other's insurers or from each other, unless the damages are payable because of personal injury. The administration of the joint estate during the subsistence of marriage is more complex in nature. Lastly, liquidation of assets may be problematic if the marriage is terminated by the death of one of the spouses.[58]

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[52] Friendly Societies Act 25 of 1956.
[53] Prevention of Organised Crime Act 121 of 1988.
[54] Robinson 2007 *PELJ* 3.
[55] Heaton *South African family law* 101.
[56] Heaton *South African family law* 101.
[57] Heaton *South African family law* 101.
[58] Heaton *South African family law* 101.

2.2.2 Marriage out of community of property

If spouses do not wish to be married in community of property, they can conclude an antenuptial contract, in which they exclude community of property and certain benefits they do not want included in the joint estate.[59] Where spouses fail to comply with the formalities of notarial execution and registration of an antenuptial contract, they can also approach the High Court in an effort to register a postnuptial contract after the marriage.[60] The proprietary consequences of marriage out of community of property are included in an antenuptial contract or postnuptial contract.

The antenuptial contract is a contract in terms of which spouses can depart from some of the common law or statutory rules with regard to the matrimonial property consequences of marriage and furthermore can include marriage settlements.[61] The antenuptial contract, whether executed in or outside South Africa, has to be executed by a notary and registered in the deeds registry.[62]

A postnuptial contract can be registered if the following three requirements are met: the parties must have undoubtedly agreed on the terms of the contract before entering into marriage; the parties must give good reasons for their failure to execute and register the contract prior to the marriage and lastly the application must be made within a reasonable time after it was discovered that the agreement was not properly executed and registered.[63]

In terms of the Matrimonial Property Act,[64] marriages out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss are excluded, which are entered into after 1 November 1984, are

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59 Monareng *A simple guide to South African family law* 18.
60 Heaton *South African family law* 86; in terms of section 21 of the Matrimonial Property Act 88 of 1984 (hereinafter referred to as the Matrimonial Property Act).
61 Heaton *South African family law* 85.
62 Section 37 of the Deeds Registries Act 47 of 1937.
63 Heaton *South African family law* 86.
64 Section 2 of the Matrimonial Property Act.

subject to the accrual system, except when the antenuptial contract expressly excludes the accrual system.[65]

Where spouses select to have a matrimonial property system that is out of community of property and community of profit and loss without the accrual system, this matrimonial property system is referred to as complete separation of property.[66] This system usually affects black spouses who entered into marriage before the Matrimonial Property Act[67] came into operation. In accordance with section 22(6) of the Black Administration Act,[68] such spouses were automatically married out of community of property and out of community of profit and loss. The position for civil marriages entered into by black persons has now been changed in accordance with the Matrimonial Property Act.[69]

There are advantages and disadvantages to this matrimonial property regime. The main advantages are that spouses can ensure that their respective estates remain separate.[70] Divorce proceedings are sped up, without a battle over who keeps what. The disadvantage is that spouses have no right to share in each other's estate. One of the big disadvantages is that this can prejudice a spouse who is financially in a weaker position upon the dissolution of marriage.[71]

The law has tried to guard against one spouse potentially being in a weaker financial position by the inclusion of the accrual system. Spouses are not mandated to have this included, but spouses should stipulate in an antenuptial contract if they do not want the accrual system included into their matrimonial property system.[72]

The accrual system was established on the concept that, upon the dissolution of a marriage out of community of property and community of profit and loss, both spouses must share in the growth of their estates during the subsistence of the

[65] *B v B* (case number: 700/2013) [2014] ZASCA 137 (unreported) [par 4].
[66] Heaton *South African family law* 92.
[67] Matrimonial Property Act 88 of 1984.
[68] Black Administration Act 38 of 1927.
[69] Matrimonial Property Act 88 of 1984.
[70] Heaton *South African family law* 101.
[71] Heaton *South African family law* 101.
[72] Heaton *South African family law* 92.

marriage. The accrual system was introduced by the Matrimonial Property Act[73] in terms of chapter 2.[74] The accrual system was established as a way to protect spouses who enter into an antenuptial contract, excluding community of property. The accrual system only applies to marriages that were concluded out of community of property and community of profit and loss after the commencement of the Matrimonial Property Act; therefore, marriages entered into after 1 November 1984.[75] As mentioned above, accrual will not apply if it has been expressly excluded in the antenuptial contract.[76]

The main advantage of this system is the fact that spouses share in each other's growth of the estate and whatever each spouse accumulated before the marriage is not shared.[77] Each spouse's estate is protected against claims by the other spouse's creditors, and spouses can freely contract with one another.[78] The spouses can also incur delictual liability against each other and hold each other's[79] insurance liable. This includes uncomplicated administration of estates.[80]

The main disadvantages of this system include that there has to be an antenuptial contract by the spouses and the calculation of accrual can be complicated.[81] To enter into an antenuptial contract or a postnuptial contract is an additional cost to the spouses. Lastly, where the antenuptial or postnuptial contract does not include accrual, it will be difficult to protect the spouse being in a weaker financial position.

The South African law principles relating to marital property regimes are clearly set out. However, when faced with a marriage with a foreign matrimonial domicile, several contentious issues still arise. Whenever there is a case with a foreign

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[73] Matrimonial Property Act 88 of 1984.
[74] Heaton *The law of divorce and dissolution of life partnerships in South Africa* 63.
[75] "Every marriage out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss are excluded, which is entered into after the commencement of this Act, is subject to the accrual system specified in this Chapter, except in so far as that system is expressly excluded by the antenuptial contract" (section 2 of the Matrimonial Property Act 88 of 1984 regarding marriages subject to accrual system).
[76] De Jong and Pintens 2015 *TSAR* 551.
[77] Heaton *South African family law* 101.
[78] Heaton *South African family law* 101.
[79] Heaton *South African family law* 101.
[80] Heaton *South African family law* 101.
[81] Heaton *South African family law* 101.

element, a court will choose the law applicable to the case.[82] Each country has its own private international law rules. When a dispute arises with an international element, it is important to know which law will be applicable.[83] It is therefore vital to assess the connecting factor when it comes to proprietary consequences of marriage.

2.3 The connecting factor for proprietary consequences of marriage

2.3.1 Historical overview

As mentioned above,[84] the proprietary consequences of marriage is governed by the *lex domicilii matrimonii* in terms of the principles of South African private international law. The *lex domicilii matrimonii* has been interpreted as the husband's domicile at the time of the marriage.[85] The earliest South African case for this rule may be found in *Brown v Brown.*[86]

In this case, the parties were married in England on 5 August 1899 and domiciled there. The appellant claimed that his wife's earnings belonged to him in terms of section 6 of the Natal Law 22 of 1863, which states:

> Property heretofore or hereafter acquired by the labour, skill, care or diligence and ordinarily known as earnings of the spouses, or either of them, during the continuance of the marriage, shall if such spouses come under the provisions of this law, be deemed to be the property of the husband, subject to any liability in respect of debts which would have existed if the law had not been passed.[87]

The argument is that the earnings of the respondent fell within the operation of the clause and that would be dependent on the interpretation of the expression "if such spouses come under the provisions of this law".[88]

The court had to determine whether the section applied to them. It was stated that "it is the clear rule of our law that the rights of spouses in regard to property must

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[82] Forsyth *Private international law* 6.
[83] Schulze 2006 *Annual Survey of South African Law* 836.
[84] See 2.1 above.
[85] Forsyth *Private international law* 295.
[86] *Brown v Brown* 1921 AD [478].
[87] *Brown v Brown* 1921 AD [481].
[88] *Brown v Brown* 1921 AD [482].

be regarded as regulated once and for all by the law of the domicile at marriage".[89] It was therefore held that the proprietary consequences of marriage are governed by the law of matrimonial domicile.[90]

The *Brown* case does not expressly state that the proprietary consequences of marriage will be governed by the husbands domicile at the time of the marriage. The view is that proprietary consequences of marriage are governed by law of matrimonial domicile.

Old authorities were not unanimous in respect of the rule of *lex domicilii matrimonii*. Some writers favoured the application of the husband's domicile at the time of marriage, while others considered the husband's intent on making the wife's domicile his home and where the marriage took place.[91] The difference in approach was settled in favour of the rule in *Frankel's Estate and Another v the Master*.[92]

In the case of *Frankel's Estate*, the two applicants applied on motion for a declaration that the second applicant, the wife, and her deceased husband were married in community of property according to the laws of the Union of South Africa. The husband and wife had married without an antenuptial contract in 1933 in Czechoslovakia. The husband was domiciled in Germany at the time of the marriage and the wife lived in Czechoslovakia before the marriage. At the time of the marriage they had intended, arranged and agreed to establish a permanent home in Johannesburg. In 1937, the husband got a job in Durban, and the couple then moved to Durban with the intention of settling there permanently. The husband was a British citizen. The law of Germany at the time of the marriage was that without an antenuptial contract it is out of community of property, and in South Africa a marriage without an antenuptial contract is automatically in community of property. In a quest to find which legal system would govern the proprietary consequences of the marriage, it was held that, in quoting the judgment of *Gunn v*

[89] *Brown v Brown* 1921 AD [482].
[90] *Brown v Brown* 1921 AD [485].
[91] Forsyth *Private international law* 296.
[92] *Frankel's Estate and Another v the Master* 1950 (1) SA 220 (A).

Gunn[93] "when spouses are not, at the date of the marriage, domiciled in the same country, then the law of the husband prevails".[94]

The decision in the *Frankel's* case was based on the fact that the wife automatically took the domicile of the husband upon marriage.[95]

This rule still stands to date. However, the rule is flawed in that the Domicile Act[96] abolished a wife's domicile of dependence[97] and the rule is against section 9(3) of the Constitution of the Republic of South Africa, 1996. The rule will also not be applicable with regard to same-sex relationships.

An investigation and analysis of the Domicile Act will be undertaken below, as well as the constitutionality of the rule.

2.3.2 The law of domicile in South Africa

Domicile is an important connecting factor in South African private international law. It also plays a central role in determining the law applicable to proprietary consequences of marriage and as such it is necessary to analyse the South African law of domicile. The content of a connecting factor must be determined by the *lex fori*.[98] The law of the forum will govern where a person is domiciled.[99]

The definition of domicile has always been a contentious matter. In *Gunn v Gunn,*[100] it was mentioned that "domicile only means home".[101] In *Mason v Mason*[102] it was found that "domicile means a place or country which is considered by law to be a person's permanent home".[103]

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93 *Gunn v Gunn* 1910 TPD 423.
94 *Frankel's Estate and Another v the Master* 1950 (1) SA 220 (A) [347 at 369].
95 *Frankel's Estate and Another v the Master* 1950 (1) SA 220 (A) [251].
96 Domicile Act 3 of 1992, hereinafter referred to as the Domicile Act.
97 This was changed by section 1(1) of the Domicile Act.
98 Neels and Wethmar-Lemmer 2008 *TSAR* 592.
99 Forsyth *Private international law* 11; *Jones v Jones* 1984 (4) SA 725 (W); *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) [501F].
100 *Gunn v Gunn* 1910 TPD 423.
101 *Gunn v Gunn* 1910 TPD 423 [427].
102 *Mason v Mason* 185 4 EDC 330.
103 *Mason v Mason* 185 4 EDC 330 [337].

The South African Law Reform Commission accepted that domicile "is the place where a person is *de iure* considered to reside permanently, even if he is *de facto* absent".[104] *Lex loci domicilii* is the law of the place where a person is domiciled.[105] In South Africa, a person's status is determined by the law of the place where he is domiciled.[106] Domicile must be definitively defined as a place where a person is legally deemed to be permanently present for the purpose of exercising his rights and fulfilling his obligations, even in the case of his factual absence.[107]

Forsyth provides a definition of domicile. He states that "(d)omicile is a link between a person and a place … and that the link of domicile is artificial in the sense that it is not purely a reflection of a factual state of affairs… but is a creation of the law".[108]

2.3.3 General principles of domicile

The law of domicile rests on two principles: first, that everyone must have a domicile at all times; and secondly that each person should have only one domicile at any time.[109]

The above principles are important, since domicile plays a huge part in selecting the appropriate legal system to govern a person's affairs. It is important that a person has a domicile at all times and that a person cannot be without a domicile at any time for the operation of private international law.

Before the Domicile Act came into effect, there were three kinds of domicile under the common law.[110] The common law rules that governed domicile were complex and outdated. However, the Domicile Act is not retrospective. [111]

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[104] Law Commission "Domicile report – Project 60" 5.
[105] Kruger *et al The law of persons* 67.
[106] Barnard, Cronjé and Olivier *The South African law of persons and family law* 35.
[107] Barnard, Cronjé and Olivier *The South African law of persons and family law* 35.
[108] Forsyth *Private international law* 131.
[109] Forsyth *Private international law* 132-133.
[110] Barnard, Cronjé and Olivier *The South African law of persons and family law* 36-42.
[111] Forsyth *Private international law* 130.

2.3.4 Common law principles of domicile

2.3.4.1 Domicile of origin

This is the domicile which the law assigns to a person at birth.[112] When a child is born, the child will take the domicile of the parent.[113] The domicile of the child will be determined by the marital status of the parents. If the parents are married, the domicile of the child will be determined by the domicile of the father; and if parents are not married, the child will take the domicile of the mother.[114]

2.3.4.2 Domicile of choice

This is the domicile acquired by a person who has capacity to act and is chosen by him or herself by exercise of own free will,[115] with the following requirements: "(T)he person must actually settle at the particular place and he or she must have the intention of residing permanently at that place."[116]

2.3.4.3 Domicile of dependence

This is also referred to as domicile by operation of law, which is for persons who are unable to acquire a domicile of choice independently.[117] Three categories of persons attain a domicile of dependence under common law, namely:

(1) Domicile of a child: A child acquires a domicile of origin at birth. Until the child attains the age of majority, he cannot acquire a domicile of choice individually but follows the domicile of his parents or guardian.[118]

(2) Domicile of a married woman: At marriage, a wife acquires the domicile of her husband and she thus follows the domicile of the husband throughout the subsistence of the marriage. Upon termination of the marriage a woman will

[112] Barnard, Cronjé and Olivier *The South African law of persons and family law* 36-37.
[113] Forsyth *Private international law* 137.
[114] Forsyth *Private international law* 137.
[115] Barnard, Cronjé and Olivier *The South African law of persons and family law* 37-40.
[116] Barnard, Cronjé and Olivier *The South African law of persons and family law* 37.
[117] Barnard, Cronjé and Olivier *The South African law of persons and family law* 40.
[118] Barnard, Cronjé and Olivier *The South African law of persons and family law* 40.

continue to have the husband's domicile until she acquires a new domicile of choice.[119]

(3) Domicile of an insane person. "An insane person retains the domicile he had when he became insane."[120]

The common law position with regard to domicile has changed under the Domicile Act. A married woman had to take the domicile of her husband by operation of law[121] prior to the coming into operation of the Domicile Act on 1 August 1992. The change gave effect to the Law Commission's recommendation that the "domicile of a married woman should be determined in the same way as that of any other person who is capable of establishing a domicile on his own".[122]

Section 1 of the Domicile Act provides that "every person who is of or over the age of 18 years, and every person under the age of 18 years who by law has the status of a major, excluding any person who does not have the mental capacity to make a rational choice, shall be competent to acquire a domicile of choice regardless of such a person's sex or marital status." In light of the Constitution, the need for transformation had to be effected either way.

2.3.5 Domicile Act

Under the Domicile Act, there are two types of domicile, namely domicile of choice and domicile by operation of law.

2.3.5.1 Domicile of choice

The Domicile Act states the following:

> Section 1(1): Every person who is of over the age of 18 years, and every person under the age of 18 years who by law has the status of a major, excluding any person who does not have mental capacity to make a rational choice, shall be competent to acquire a domicile of choice, regardless of such a person's sex or marital status.

[119] Barnard, Cronjé and Olivier *The South African law of persons and family law* 41.
[120] Barnard, Cronjé and Olivier *The South African law of persons and family law* 42.
[121] Forsyth *Private international law* 131.
[122] Law Commission "Domicile report – Project 60" 16.

> Section 1(2): A domicile of choice shall be acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period.

Section 1(1) sets out the requirements under which a person can acquire a domicile of choice. The section makes it clear that only people who are major or declared majors by law and who have mental capacity to act, are eligible to have a domicile of choice at their own free will.[123]

A married woman can now acquire a domicile of choice. There is no longer discrimination with regard to domicile based on sex or marital status.[124]

Section 1(2) makes provision for two requirements. The common law requirements are that a person must be lawfully present at a particular place with the intention of settling there for an indefinite period:[125]

a) *The requirement of residence*: This requirement implies that a person should be lawfully present at the said residence. There is no minimum period that is laid down for this requirement to be fulfilled.[126] For the requirement to be fulfilled, a person should be legally and physically present at a particular place.

b) *The requirement of intention*: A distinction is made between the "weak test" and the "strong test" in order to determine what will satisfy the requirement of intention to settle for an indefinite period. The "weak test" is based on simply having the intention to settle for an indefinite period, while the "strong test" is based on a person's intention to reside at a particular place forever.[127] There has been different views about which test is more favoured.[128] The courts[129] have also been dissenting on which test to apply. However, the weak test has been favoured by most.[130]

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[123] Kruger *et al The law of persons* 73.
[124] Section 1 of the Domicile Act.
[125] Domicile Act section 1(2); Forsyth *Private international law* 139 and Kruger *et al The South African law of persons* 73.
[126] Forsyth *Private international law* 139-140.
[127] Forsyth *Private international law* 141.
[128] Forsyth *Private international law* 141-142.
[129] *Johnson v Johnson* 1931 AD 391; *Ley v Ley's Executors and Others* 1951 (3) SA 186 (A).
[130] Forsyth *Private international law* 142.

A person who has capacity to act and who has fulfilled the requirement of physical presence, which is a question of fact, and has fulfilled the requirement of indefinite period, may be said to have acquired a domicile of choice.[131]

2.3.5.2 Domicile by operation of law

Domicile by operation of law includes the domicile of a minor and the domicile of other persons who cannot acquire a domicile of choice.[132]

Section 2(1) of the Domicile Act states: "A person not capable of acquiring a domicile of choice as contemplated in section 1 shall be domiciled at the place with which he is most closely connected."

The words "closely connected" are not defined in the Domicile Act; however, this is a matter of fact. The test is an objective test. The Law Commission planned that this test be objective, looking at the circumstances surrounding the facts:[133]

> 2(2) If, in normal course of events, a child has his home with his parents or with one of them, it shall be presumed, unless contrary is shown, that the parental home concerned is the child's domicile.

A minor is domiciled at the place with which he or she is most closely connected.[134] A mentally incapacitated person is also domiciled at the place with which he or she is most closely connected to.[135]

The Domicile Act shows that domicile is acquired in a "particular place" – which can apply for both the choice of law and for jurisdictional purposes.[136]

Domicile plays a significant role as a connecting factor with regard to personal and proprietary consequences of marriage.[137] As discussed above,[138] the proprietary

[131] Forsyth *Private international law* 146.
[132] Section 2 of the Domicile Act.
[133] Forsyth *Private international law* 153.
[134] Section 2(2) of the Domicile Act.
[135] Section 2(1) of the Domicile Act; Forsyth *Private international law* 166.
[136] Forsyth *Private international law* 135.

consequences of marriage are governed by the *lex domicilii matrimonii*. A critical analysis of this will follow below.

2.3.6 Critical analysis of the connecting factor for proprietary consequences of marriage

As stated above,[139] the proprietary consequences of marriage in terms of the South African principles of private international law are governed by the *lex domicilii matrimonii*, which is interpreted as the husband's domicile at the time of the marriage.[140] Should a couple decide not to have the proprietary consequences of their marriage governed by the *lex domicilii matrimonii*, they should include a clause in their antenuptial contract that indicates a different legal system to govern the proprietary consequences of their marriage; or, if they wish to change their matrimonial property regime after the marriage, conclude a postnuptial contract.[141]

Section 9 of the Constitution[142] prohibits discrimination, *inter alia*, on the grounds of sex. The current connecting factor for proprietary consequences of marriage clearly falls foul of the equality clause.[143] There is no justification for giving preference to the domicile of the husband.[144]

The current connecting factor for proprietary consequences of marriage (in the absence of an antenuptial contract) has been interpreted as the domicile of the husband at the time of the conclusion of the marriage.[145] The validity of the choice of legal system to govern the proprietary consequences of their marriage will be determined according to the rules of private international law. In light of the fact that a wife's domicile of dependence was abolished by the Domicile Act, this interpretation can no longer be justified. However, the Law Commission had

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[137] Schoeman, Roodt and Wethmar-Lemmer *Private international law in South Africa* 23.
[138] See 2.1 above.
[139] See 2.1 above.
[140] Neels 2003 *SALJ* 888.
[141] Schoeman 2001 *TSAR* 72.
[142] Constitution of the Republic of South Africa, 1996.
[143] "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth".
[144] Schoeman 2001 *TSAR* 72.
[145] Forsyth *Private international law* 295; *Frankel's Estate and Another v the Master* 1950 (1) SA 220 (A); *Bell v Bell* 1991 (4) SA 195 (WLD) [197A-B]; *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C) [494C-D]; *Lagesse v Lagesse* 1992 (1) SA 173 (D).

decided not to recommend any statutory provision but to retain the common law rule.[146]

The interpretation afforded to the *lex domicilii matrimonii* is flawed on various grounds. The current interpretation clearly falls foul of the equality clause enshrined in the Bill of Rights. Forsyth describes that, at present, the rule "breaches the principle of gender equality".[147] In the matter of *Sadiku v Sadiku,*[148] Van Rooyen AJ questioned whether the application of the *lex domicilii* of the husband is still acceptable within a gender-equal society.[149] However, this question has not yet been addressed by the Constitutional Court.

The interpretation given to the current connecting factor for proprietary consequences cannot find application under the Civil Union Act.[150] Section 13 of the Civil Union Act provides for the legal consequences of a civil union.[151]

In terms of section 6 of Civil Union Act,[152] a civil union is a union of same-sex persons. A problem arises in instances where one of the same-sex civil union partners is domiciled in a foreign country with regulation of proprietary consequences. In a same-sex civil union it is impossible to determine who the "husband" is and which legal system will regulate the proprietary consequences of a same-sex civil union. The rule can therefore not be applied to same-sex civil unions.[153]

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[146] Law Commission "Domicile report – Project 60" 88.
[147] Forsyth *Private international law* 296.
[148] *Sadiku v Sadiku* Case no 30498/06.
[149] *Sadiku v Sadiku* Case no 30498/06 [par 10].
[150] Civil Union Act 17 of 2006.
[151] Section 13 of the Civil Union Act 17 of 2006 states:
"(1) the legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context to civil union,
(2) with the exception of the Marriage Act and the Customary Marriages Act any reference to
(a) Marriage in any other law, including the common law includes with such changes as may be required by the context a civil union and
(b) Husband, wife or spouse in any other law including the common law includes a civil union partner."
[152] Section 6 of Civil Union Act 17 of 2006 states: "A marriage officer other than a marriage officer referred to in section 5 may in writing inform the Minister that he or she objects on the ground of conscience, religion and belief to solemnising a civil union between persons of the same sex, whereupon that marriage officer shall not be compelled to solemnise such civil union."
[153] De Ru 2013 (9) *Fundamina* 247.

In *AC v CS*[154] the Western Cape High Court had to deal with the recognition of a civil partnership registered in the United Kingdom under the Civil Partnership Act of 2004. The South African Civil Union Act makes provision for civil unions between couples of the same sex. The parties have the discretion to choose whether their union will be known as a marriage or a civil partnership. The court had to determine which law will govern the partnership or union. The court found that the grounds for divorce and payment of maintenance should be governed by the provisions of the Divorce Act, as guided by the Civil Union Act.

Neels suggests that the parties were probably both domiciled in South Africa at the time that the partnership was registered in the United Kingdom. The parties did not conclude an antenuptial contract; therefore, the union would, according to South African law, be in community of property. Fortunately in this matter it was not necessary for the courts to determine which law applied with regard to the proprietary consequence of the union, as the parties concluded a deed of settlement.[155]

In *Fourie v Minister of Home Affairs*[156] it was pointed out that the problem associated with the Civil Union Act was the common law rule, which makes it necessary to identify the husband in determining the law applicable to proprietary consequences of marriage. There is no husband in a civil union and therefore the current connecting factor will not be practical. It has been stated that:

> Where same-sex partners are domiciled in different countries at the time of the marriage, they would have to choose which partner is to be identified as the 'husband' for the purposes of determining the matrimonial domicile.[157]

Some of the academics have argued against the current connecting factor.[158] It has been stated that the rule is ridiculous in a same-sex marriage scenario.[159] The common law rule does not make provision for civil unions.[160]

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[154] *AC v CS* 2011 (2) SA 360 (WCC).
[155] Neels http://conflictoflaws.net/2011/recognition-and-proprietary-consequences-of-a-uk-civil-partnership-in-south-africa/ (Date of use: 01 November 2016).
[156] *Fourie v Minister of Home Affairs* 2005 1 All SA 273 (SCA).
[157] McConnachie 2010 *SALJ* 435.
[158] Schoeman 2001 *TSAR* 81; Neels and Wethmar-Lemmer 2008 *TSAR* 588; McConnachie 2010 *SALJ* 435.
[159] Mamashela and Carnelley 2006 *Obiter* 385.

Despite all the developments in South African law, the current interpretation of the connecting factor for the proprietary consequences of marriage remains unconstitutional.

2.3.7 Possible alternatives to the current connecting factor

Several alternatives have been suggested by commentators in the field. These suggestions will be discussed below.

Thomashausen[161] discussed problems associated with South African private international law. Reference is given to the connecting factor with regard to the proprietary consequences of marriage. However, there is no clear proposal made.

Stoll and Visser have proposed a five-step model and worded it as follows:

> Where there is no express or implied choice by the parties to the contrary, all the proprietary consequences of marriage shall be determined by the *lex domicilii* of both parties at marriage, or the law of habitual residence of both parties at marriage, or the of the state of which both spouse are nationals, or the state with which both spouses are mostly closely connected at marriage.[162]

Schoeman suggests in the absence of an antenuptial contract that indicates the rules that govern the choice of law, the *lex domicilii* of both parties at marriage or the country with which the parties and marriage have the most significant connection should be applied.[163] Schoeman later suggests an additional option of habitual residence.[164]

Neels and Wethmar-Lemmer support the proposal of Stoll and Visser of the five-step model based in the order.[165] In reply to the proposals by Neels and Wethmar-Lemmer, Reinhartz[166] makes suggestions for developments in South Africa with

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[160] Neels and Wethmar-Lemmer 2008 *TSAR* 588.
[161] Thomashausen 1984 *CILSA* 78-91.
[162] Stoll and Visser 1989 *De Jure* 335.
[163] Schoeman 2001 *TSAR* 80-81.
[164] Schoeman 2004 *TSAR* 133.
[165] Neels and Wethmar-Lemmer 2008 *TSAR* 588.
[166] 2009 *TSAR* 124-134.

regard to the connecting factor. The author refers to developments in European countries. The author suggests that where there is an antenuptial contract that indicates choice of law, the proprietary consequences of marriage will be governed according to the antenuptial contract. If no antenuptial contract exists, the author seems to support the idea of habitual residence as a connecting factor. The choice of habitual residence is to have a more defined connecting factor.[167]

McConnachie[168] states the possible challenges that may be faced when implementing section 13 of the Civil Union Act. Section 13 stipulates that:

> (1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union.
> (2) With the exception of the Marriage Act and the Customary Marriages Act, any reference to –
> (a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and
> (b) husband, wife or spouse in any other law, including the common law, includes a civil union partner.

The phrase "with such changes as may be required by the context" suggests reading it in gender-neutral terms where necessary.[169] McConnachie stresses that reading in gender neutral terms will just be absurd when it comes to the common law rule of proprietary consequences to marriage. In such instances, the interpretation of the *lex domicilii* is based on the husband's domicile at the time of marriage.[170] It has been emphasised that one cannot identify a husband or a wife in same-sex unions.

McConnachie is in support of the five-step model proposed by Stoll and Visser[171] This author suggests that the legislature should effect necessary developments in this regard.[172]

When looking at the possible alternatives proposed by the academics discussed, it would seem that most authors support a five-step model process. In chapters 3

[167] Reinhartz 2009 *TSAR* 133.
[168] McConnachie 2010 *SALJ* 425-442.
[169] McConnachie 2010 *SALJ* 425.
[170] McConnachie 2010 *SALJ* 434.
[171] McConnachie 2010 *SALJ* 438-439.
[172] McConnachie 2010 *SALJ* 438-439.

and 4, a comparative law analysis will be conducted to ascertain whether other viable alternatives to the current connecting factor may be proposed. The present author's final recommendations in this regard will be made after the comparative analysis has been completed.

2.4 Distribution of assets upon divorce and proprietary consequences of marriage

2.4.1 Introduction

In South Africa, the Divorce Act 70 of 1979 regulates divorce and the consequences thereof. Section 3 of the Divorce Act states that a marriage can be dissolved by a court by a decree of divorce and the only grounds on which such a decree may be granted are:

a) *irretrievable breakdown of marriage*: a court must be satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospects of the repair of a normal marriage relationship between the spouses;[173] and
b) *mental illness or continuous unconsciousness:* a court may grant a decree of divorce if a spouse meets the requirements in terms of section 5(1)-(5)(a) of the Divorce Act.

In terms of the principles of private international law, divorce matters, including the grounds for divorce, are governed by the *lex fori*.[174] The uncomfortable part of divorce proceedings will usually be a discussion on the division of assets.

2.4.2 Division of assets upon divorce

2.4.2.1 General

Section 7 of the Divorce Act makes provision for the division of spouses' assets. In terms of section 7(1) of the Divorce Act,[175] a court may make an order with regard

[173] Section 4(1) of the Divorce Act 70 of 1979.
[174] Forsyth *Private international law* 307.

to the division of assets of the parties and payment of maintenance according to the written settlement agreement of the spouses.[176] A settlement agreement is a common approach in South Africa for regulating the consequences of divorce.[177] In a settlement agreement, spouses may settle on matters such as the division of their assets, payment of maintenance, the allocation and exercising of parental responsibilities and rights, and liability of costs for the proceedings.[178] The rules pertaining to the matrimonial property system play a role in the negotiations.[179] Any provision can be included in such agreement if it is not illegal, *contra bonos mores* or impossible in the settlement agreement.[180] There is no duty on the court to make an order according to the settlement agreement.[181] A settlement agreement or term in a settlement agreement which has been made an order by the court can, by mutual agreement between the parties, be amended, rescinded or suspended.[182]

Another important private international law matter in respect of proprietary consequences concerns the question of whether a party to a marriage with a foreign matrimonial domicile may apply for redistribution of assets in terms of section 7(3) of the Divorce Act. The legislator did not take into consideration a scenario where the proprietary consequences of marriage are not governed by South African law.[183]

2.4.2.2 Termination of community of property

In terms of the Marriage Act[184] or the Civil Union Act,[185] where parties are married in community of property, the balance of their joint estate, after all liabilities have

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[175] "A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of assets of the parties or the payment of maintenance by the one party to the other."
[176] Heaton *South African family law* 123.
[177] Heaton *South African family law* 123.
[178] Heaton *South African family law* 123.
[179] Heaton *The law of divorce and dissolution of life partnerships in South Africa* 57.
[180] Bakker 2013 *PELJ* 132.
[181] Heaton *South African family law* 124.
[182] Heaton *South African family law* 124.
[183] Heaton *The law of divorce and dissolution of life partnerships in South Africa* 654.
[184] Marriage Act 25 of 1961.
[185] Civil Union Act 17 of 2006.

been paid, must be divided equally between them upon divorce.[186] An exception being that of a forfeiture order granted against one of the parties or an adjustment needs effected towards one of them.[187]

2.4.2.3 Division of assets of marriages out of community of property

It is important to distinguish between marriages concluded before the coming into operation of the Matrimonial Property Act[188] and marriages concluded after 1 November 1984. Before the Act came into operation, when instituting a divorce action, a party to the proceedings could apply for a redistribution order in terms of section 7(3) of the Divorce Act. When the court granted the application, the spouse with the smaller estate could have assets or part of assets transferred to him or her upon meeting all the requirements and having contributed directly or indirectly to the maintenance or increase of the spouse's estate during the subsistence of the marriage.[189] Where parties married out of community of property after 1 November 1984, the parties would have no recourse to section 7(3). The effect of complete separation of property is that each spouse retains the estate that he or she had before the marriage and everything that he or she acquired during the marriage.[190] If spouses contracted out of community of property with retention of profit and loss, on termination of property by divorce, the spouses would share in all gains and losses accrued during the subsistence of marriage. [191]

2.4.2.4 Division of assets under the accrual system

In terms of section 3(1) of the Matrimonial Property Act,[192] "at the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the

[186] De Jong 2012 *Stell LR* 226.
[187] De Jong 2012 *Stell LR* 226.
[188] Matrimonial Property Act 88 of 1984.
[189] Section 7(3) to 7(6) of the Divorce Act 70 of 1979.
[190] Heaton *South African family law* 92.
[191] Heaton *South African family law* 92.
[192] Matrimonial Property Act 88 of 1984.

difference between the accrual of the respective estates of the spouses". As complete separation is detrimental to a spouse who is not a breadwinner, the accrual system can ensure a form of equality to the spouses. With the accrual system, in the dissolution of marriage both spouses must share in the growth their estates have shown. [193]

2.4.3 Classification

Classification is putting a legal rule in the correct legal category in order to apply a multilateral conflict rule.[194] This entails being able to identify the relevant connecting factor to solve a private international law matter. The process of characterisation, or classification, is the most fundamental yet also most difficult problem in private international law.[195]

The method of classification is used to access reasonableness and fairness in private international law.[196] The majority of jurisdictions adhere to exclusive *lex fori* classification by using the categories of *lex fori* to characterise all potentially applicable legal rules,[197] and in other jurisdictions[198] there is reference to the classification *lege causae*.[199] In South Africa there are two methods of classification, namely *lex fori* and *lex causae*-classification.[200] However, *lex fori* or *lex causae* classification may not always provide a satisfactory approach.

The approach most favoured in common law countries, and which has now explicitly been adopted in South Africa (in the *Laconian* and *Laurens* cases), is the so-called "via media" theory or a further development of the enlightened *lex fori* approach.[201]

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[193] Heaton *South African family law* 93.
[194] Forsyth *Private international law* 11.
[195] Schulze 2006 *Annual Survey of South African Law* 836.
[196] Neels 2003 *SALJ* (4) 883.
[197] Neels 2003 *SALJ* (4) 884.
[198] Civil Code of Québec and the Private International Law Code of Hungary.
[199] Neels 2003 *SALJ* (4) 884.
[200] Neels 2003 *SALJ* (4) 884.
[201] Eiselen 2006 *SALJ* 156. This approach was confirmed by the Supreme Court of Appeal in the case of *Society of Lloyds v Price, Society of Lloyds v Lee* 2006 (5) SA 393 (SCA).

2.4.4 Divorce matters distinguished from proprietary consequences of marriage

As mentioned above,[202] the principles of the Divorce Act in respect of the division of assets upon divorce can be applied in pure domestic marriages with relative ease. However, when a divorce action is brought before a South African court in respect of a marriage with a foreign matrimonial domicile, the application of the Divorce Act becomes far more complicated.

As mentioned above,[203] the rules of private international law dictate that divorce matters are governed by the *lex fori*. Divorce involves a change of status, which is governed by the *lex domicilii*. It has been indicated by Forsyth[204] that divorce is tied up with the public policy of the forum. Divorce matters primarily include grounds for divorce and maintenance.[205] Therefore, in respect of such matters, the Divorce Act will be applied, even in respect to marriages celebrated outside the Republic while the parties were domiciled abroad.

On the other hand, proprietary consequences of marriage are governed by the *lex domicilii matrimonii*. Proprietary consequences of marriage typically include the matrimonial property system, whether matrimonial property is in or out of community of property, questions with regard to the validity of antenuptial and postnuptial contracts, and the effective division of the estate upon death or divorce.[206]

Before a court may entertain a divorce matter, it must first establish whether it has the necessary jurisdiction to do so. To establish whether a certain court has jurisdiction to hear a divorce matter, section 2(1) of the Divorce Act states the requirements with that regard. Section 2(1) of the Divorce Act states the following:

> A court shall have jurisdiction if the parties or either of them:
> (a) is domiciled in the courts area of jurisdiction on the date on which the action is instituted; or

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[202] See 1.2.2 above.
[203] See 2.1 above.
[204] Forsyth *Private international law* 307; *Holland v Holland* 1973 (1) SA 897 (T).
[205] *Forsyth Private international law* 307.
[206] Forsyth *Private international law* 291; Schoeman 2004 *TSAR* 116.

(b) is ordinarily resident in the court's area of jurisdiction on that date and has been ordinarily resident in South Africa for at least one year immediately prior to that date.

The courts also deal with issues of relief *pendente lite.* This is a relief to be granted while a matrimonial action is pending. The relief may include interim maintenance for one of the spouses or for the minor children, a contribution to the costs of the pending matrimonial action, interim care of a child or interim interaction with a child.[207]

A matter that has been problematic is whether redistribution orders form part of divorce matters or patrimonial matters. It is a contentious matter whether a party to a foreign matrimonial domicile may apply for redistribution of assets upon divorce in terms of section 7(3) of the Divorce Act.[208]

2.5 Redistribution of assets upon divorce: sections 7(3) and 7(9) of the Divorce Act

2.5.1 Introduction

Section 7(3) of the Divorce Act introduced a redistribution order, which was meant to be a remedial and reformative measure. Section 7(3) of the Divorce Act gives the court power, if the court deems it just and fit, in limited circumstances, to transfer assets or part of assets of one spouse to the other spouse. This section is meant to assist spouses who had been married under a regime of complete separation of property prior to the commencement of the Matrimonial Property Act.[209] This section seems to only be beneficial to marriages concluded in terms of South African law and meeting the requirements as set out in of section 7(3) of the Divorce Act.[210]

Prior to the Matrimonial Property Act coming into operation, a spouse who was married out of community of property was subject to complete separation of

[207] Heaton *South African family law* 188.
[208] Schoeman, Roodt and Wethmar-Lemmer *Private international law in South Africa* 87.
[209] Matrimonial Property Act 88 of 1984; Heaton *South African family law* 133.
[210] Heaton *South African family law* 133.

property. The accrual system was therefore introduced by the Matrimonial Property Act to ensure fairness in respect of the division of assets upon divorce. However, since the accrual system was not imposed retroactively, the legislator inserted section 7(3) to (6) into the Divorce Act.[211]

2.5.2 The Divorce Act

Section 7(3) states as follows:

> A court granting a decree of divorce in respect of a marriage out of community of property
> (a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; or
> (b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22 (6) of the Black Administration Act, 1927 (Act 38 of 1927), as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act;
> may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party.

Section 7(4) of the Divorce Act states that "(a)n order under subsection (3) shall not be granted unless the court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would have otherwise have been incurred, or in any other manner".

Section 7(4) provides for requirements to be met. The party should have contributed directly or indirectly and it will be at the discretion of the court whether the redistribution will be just and equitable. The interpretation of the two

[211] Heaton *South African family law* 132.

requirements has led to uncertainty, conflicting judgments and academic debates.[212]

Section 7(5) states that:

> In the determination of the assets or part of the assets to be transferred as contemplated in subsection (3), the court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party as contemplated in subsection (4), also take into account –
> (a) the existing means and obligations of the parties, including any obligation that a husband to a marriage as contemplated in subsection (3)(b) of this section may have in terms of section 22(7) of the Black Administration Act, 1927 (Act 38 of 1927);
> (b) any donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable in terms of the antenuptial contract concerned;
> (c) any order which the court grants under section 9 of this Act or under any other law which affects the patrimonial position of the parties; and
> (d) any other factor which should in the opinion of the court is taken into account.

Section 7(6) states that "(a) court granting an order under subsection (3) may, on application by the party against whom the order is granted, order that satisfaction of the order be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court may deem just".

It is evident that a redistribution order is only available to a select group of persons. Such persons include persons who were married out of community of property in terms of an antenuptial contract pre-1984 and persons who were married in terms of the Black Administration Act 38 of 1927. It has been questioned why relief is offered to such a small group of spouses. Dillion[213] states that "legislators have recognised a social evil that existed before 1 November 1984, and have acted to eradicate that evil. Why have they not done the same for those spouses married after 1984?"[214]

[212] Skelton *et al Family law in South Africa* 161.
[213] Dillion 1986 *CILSA* 276.
[214] Dillion 1986 *CILSA* 276.

In the case of *EA v EC,*[215] the plaintiff and the defendant were married on 30 March 1991 in the Northern Cape, out of community of property and with the exclusion of the accrual system. The plaintiff sought, among others, a decree of divorce together with an order in respect of parental responsibilities and rights regarding the minor child. The defendant counterclaimed, amongst others, a declaratory order that the partnership came into being between the plaintiff and the defendant and had been dissolved as at the date of divorce. The defendant raised a special plea that the plaintiff's claims did not disclose a cause of action as the claims, and the evidence required to be tendered in support of them, would contradict the terms of the antenuptial contract concluded between the parties. The antenuptial contract expressly provided that the parties were married out of community of property with the exclusion of the accrual system. The court held that evidence proving the existence of a universal partnership was inadmissible. In an affidavit the defendant went on to state: "I loved the respondent and believed and trusted him without question, in his assurances in this regard. Accordingly, I was prepared to and did sign the antenuptial contract which excluded the accrual system."[216] This case illustrates that the need for redistribution orders still exist even after the creation of the accrual system and that the time limit placed upon redistribution orders in terms of section 7(3) exclude spouses from applying for such unfairly. There are therefore some problems associated with section 7(3) of the Divorce Act in terms of domestic law.

The other main question faced in terms of redistribution orders under South African law is whether a party to a marriage, the proprietary consequences of which are governed by a foreign matrimonial domicile, can rely on it if the requirements set out in terms of section 7(3) are met. The answer to this question depends upon the classification of the redistribution order.

2.5.3 Foreign lex domicilii matrimonii and section 7(3)

[215] *EA v EC* (09/25924) [2012] ZAGPJHC 2019 (unreported).
[216] *EA v EC* (09/25924) [2012] ZAGPJHC 2019 (unreported) [par 9].

As stated above,[217] section 7(3) of the Divorce Act is problematic on several grounds. When the legislator sought to provide relief for spouses married before the accrual system coming into existence, it did not originally consider the question of redistribution orders in respect of foreign marriages. The question arose whether a marriage that is dissolved in South Africa and which is out of community of property by virtue of the rules of the particular foreign legal system, can rely on section 7(3) of the Divorce Act? Case law and scholarly opinion are divided on this question.

2.5.4 Case law

2.5.4.1 *Milbourn v Milbourn* 1987 (3) SA 62 (W)

In *Milbourn v Milbourn*[218] the parties were married in June 1943 and domiciled in England. They did not enter into any form of antenuptial contract before the marriage. The marriage, in terms of the English law, was automatically out of community of property and without accrual sharing. An action for divorce and a redistribution order, for the transfer of fifty per cent of the defendant's assets to the plaintiff, was filed in terms of section 7(3) of the Divorce Act.[219] It was held that in the absence of a contract containing the provisions described in section 7(3) of the Divorce Act 70 of 1979, the proprietary results of a marriage are irrelevant and a plaintiff claiming an order for the redistribution of the parties' assets cannot rely on section 7(3) for redistribution of their assets. Parties domiciled and married in England without having entered into any form of antenuptial cannot rely on section 7(3) for a redistribution of their assets.[220]

2.5.4.2 *Lagesse v Lagesse* 1992 (1) SA 173 (D)

[217] See 2.1 above.
[218] *Milbourn v Milbourn* 1987 (3) SA 62 (W).
[219] *Milbourn v Milbourn* 1987 (3) SA 62 (W) [H-63B].
[220] *Milbourn v Milbourn* 1987 (3) SA 62 (W) [F-62G].

In *Lagesse v Lagesse*[221] the facts are as follows: the parties were married in Mauritius while the defendant was domiciled there and the proprietary consequences of their marriage would therefore be governed by the law of Mauritius. The parties' marriage certificate had a marginal note to the effect that they wished their marriage be governed by the provisions of the Status of Married Women Ordinance 1949 of Mauritius. The parties had not concluded a valid antenuptial contract.[222] The court had to determine whether the parties were married in or out of community of property and whether the plaintiff had a claim against the defendant in terms of section 7(3) if the parties had been married out of community of property.[223] The court held that the parties had been married out of community of property.[224] The next issue which the court had to settle was whether the marginal note can be interpreted to be suitable in terms of section 7(3) of the Divorce Act. The proprietary consequences of their marriage would be governed by the law of Mauritius. Judge Kriek found that in terms of section 2(1) of Ordinance 50 the parties' antenuptial contract was valid according to the law of Mauritius and consequently had to be regarded as valid in terms of South African law.[225] It was held that the plaintiff had a claim in law against the defendant under the provisions of section 7(3) of the Divorce Act. In this matter the redistribution order was therefore classified as a divorce matter.

2.5.4.3 *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C)

In *Esterhuizen v Esterhuizen*[226] the parties had married in terms of Namibian law. The parties entered into an antenuptial contract in Namibia excluding community of property, community of profit and loss and accrual sharing. Upon their divorce in South Africa, the wife sought a redistribution order in terms of section 7(3) of the Divorce Act and a claim for maintenance. The matter questioned whether section 7(3) was applicable to foreign marriages.

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[221] *Lagesse v Lagesse* 1992 (1) SA 173 (D).
[222] *Lagesse v Lagesse* 1992 (1) SA 173 (D).
[223] *Lagesse v Lagesse* 1992 (1) SA 173 (D).
[224] *Lagesse v Lagesse* 1992 (1) SA 173 (D).
[225] *Lagesse v Lagesse* 1992 (1) SA 173 (D).
[226] *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C).

The court considered several cases. The court first referred to *Milbourn v Milbourn.*[227] Josman J stated that judge Coetzee had not considered whether English law had an equivalent relief.[228] The second case considered was *Bell v Bell*[229] Josman J disagreed to a quote by Kuper that "in the absence of an antenuptial contract the proprietary consequences of a foreign marriage must be determined in accordance with the law of the matrimonial domicile".[230] The judge applied the decision of *Frankel's Estate and Another v the Master*[231] that in the absence of an antenuptial contract, the matrimonial property regime of spouses not domiciled in the same country at the time of marriage would be governed by the domicile of the husband at the time of entering into the marriage.[232] The rule in *Frankel's Estate and Another v the Master*[233] has been considered in greatly in cases as it has a bearing on the matter to be decided.[234] The judge also referred to the judgment of *Lagesse v Lagesse*[235] where he disagreed with the finding that the plaintiff had a claim against the defendant under the provisions of section 7(3) of the Divorce Act.[236]

The judge also referred to an article of Neels.[237] Neels argued that section 7(3) may be utilised to effect redistribution of assets based on past contributions. This is a proprietary matter and therefore this use of section 7(3) is only available to marriages with South Africa as the matrimonial domicile, but it may also be used to provide for future maintenance to effect a clean break. The latter is a divorce matter and governed by the *lex fori*.[238] The court further describes the "clean-break" principle as expressed by Neels.[239] In order a clean break, by differentiation, can be achieved by distribution of assets of past contributions to increase and maintain a spouse's estate from an order, and to provide for the future maintenance requirements of the spouse by distributing assets rather than

[227] *Milbourn v Milbourn* 1987 (3) SA 62 (W).
[228] *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C).
[229] *Bell v Bell* 1991 (4) SA 195 (W).
[230] *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C).
[231] *Frankel's Estate and Another v the Master* 1950 (1) SA 220 (A) [347].
[232] *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C).
[233] *Frankel's Estate and Another v the Master* 1950 (1) SA 220 (A) [347].
[234][234] *Esterhuizen v Esterhuizen* 1999 (1) SA at 949D.
[235] *Lagesse v Lagesse* 1992 (1) SA 173 (D).
[236] *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C).
[237] Neels 1992 *TSAR* 336.
[238] *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C).
[239] Neels 1992 *TSAR* 336.

ordering the payment of periodical maintenance.[240] It was further held that a court should not only make a maintenance order in terms of section 7(2) but also use the redistributive powers in terms of section 7(3) of the Divorce Act in order to provide for future maintenance.

The conclusion that the court came to was that the plaintiff was not entitled to invoke section 7(3) of the Divorce Act to effect redistribution of assets based on past contributions. The court was, however, able to make an order in terms of section 7(2) of the Divorce Act for the maintenance.[241]

Such spouse can only rely on section 7(3) only for future maintenance, which is a divorce matter governed by *lex fori.* Redistribution of assets based on past contributions is indeed therefore classified by the court as a proprietary consequence of marriage.

Heaton and Schoeman[242] do not support the decision in *Esterhuizen.*[243] The authors' argument is that the section 7(3) of the Divorce Act cannot be applicable to foreign marriages. The decision of *Esterhuizen*[244] – that one can claim for a redistribution order in the guise of a maintenance order – is flawed.[245]

There has been other criticism on the decision in *Esterhuizen*.[246] It has been submitted that the decision was wrong based on two points.[247] The authors state that a lump sum amount can be given to a limited category but the interpretation of section 7(2) excludes lump-sum maintenance. The second point is that the redistribution order amounts to two separate orders rolled into one.[248]

[240] *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C).
[241] *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C).
[242] Heaton and Schoeman 2000 *THRHR* 141-149.
[243] *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C).
[244] *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C).
[245] Heaton and Schoeman 2000 *THRHR* 149.
[246] *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C).
[247] Heaton *South African family law* 142.
[248] Heaton *South African family law* 142.

2.5.4.4 *Hassan v Hassan* 1998 (2) SA 388 (D)

In *Hassan v Hassan*[249] the parties were married in Scotland. They were domiciled in Scotland at the time of the marriage and later emigrated to South Africa and established a domicile here. The court was satisfied that the marriage had reached an irretrievable breakdown. The issues which came to into play were that of division of estate and payment of maintenance to the plaintiff. The law applied for the proprietary consequences of marriage was the law of Scotland. It was argued whether the law of Scotland should be applied for maintenance. It was argued by the defendant that the Scottish law should be applied; however, the plaintiff stated that the law of Scotland should not be applied as maintenance concerns personal consequences of marriage. It was held that redistribution orders formed part of proprietary consequences of marriage and that matrimonial domicile should govern patrimonial and maintenance aspects of divorce regulated by Scottish laws.[250]

2.5.4.5 *Lenferna v Lenferna* (120/13) [2013] ZASCA 204 (unreported)

In a recent unreported case, the Supreme Court of Appeal handed down judgment in an appeal from the South Gauteng High Court. The facts are as follows: Mr and Mrs Lenferna were married in Mauritius in 1983. A month later they moved to South Africa and continued to live here until their divorce in November 2011. In July 2006, Mrs Lenferna sued for divorce in the South Gauteng High Court stating that their marriage had reached an irretrievable breakdown. She further contended that at the time of the marriage Mr Lenferna was domiciled in Mauritius and that the proprietary consequences of Mauritian laws or alternatively the proprietary consequences of marriage would be governed by South African law.[251]

Mrs Lenferna alleged on either basis, whether in terms of South African laws or Mauritian law, that during the subsistence of the marriage she had contributed to the maintenance and increase of the estate by rendering services and saving

[249] *Hassan v Hassan* 1998 (2) SA 388 (D).
[250] Schoeman, Roodt and Wethmar-Lemmer *Private international law in South Africa* 88.
[251] *Lenferna v Lenferna* (120/13) [2013] ZASCA 204 (unreported) [par 3].

expenses. She listed contributions in cash and in kind. Mrs Lenferna also stated that it was just and equitable that she receives an equitable portion of the parties' combined net asset values, or that he pays her the monetary equivalent. She further alleged that the parties were married in community of property in terms of the South African law. However, Mrs Lenferna later moderated her claim and sought only a fifty per cent share of two properties registered in Mr Lenferna's name.[252]

In a plea, Mr Lenferna stated that at the time of the marriage he and Mrs Lenferna had agreed on the matrimonial regime governed by the Mauritian law – *regime legal de separation de biens* ("separation of goods") – which was recorded by a marriage officer. Mr Lenferna denied that Mrs Lenferna was entitled to any part of the assets.[253]

A trial ensued before Judge Victor; the parties testified, as well as experts on Mauritian law. It was agreed by the parties that a divorce order should first be granted and this was done.[254] The judge had to consider two issues: the matrimonial property in terms of the Mauritian law and the domicile of choice. The judge concluded that the parties at the time of marriage had the intention that any property acquired after the marriage would be common property. [255]

When the judge considered "domicile of choice" she accepted Mrs Lenferna's evidence that Mr Lenferna had the intention to move to South Africa permanently before the marriage and rejected the evidence that he considered Mauritius to be his permanent residence. The judge stated that at the time of marriage, the domicile of Mr Lenferna was thus South Africa and that in terms of South African law "in the absence of an antenuptial contract they would be married in community of property".[256] The judge concluded that Mrs Lenferna was entitled to 50 per cent of the value of each of the properties stated above, in terms of Mauritian law, which allows that a party can claim ownership of assets in proportion to which he

[252] *Lenferna v Lenferna* (120/13) [2013] ZASCA 204 (unreported) [par 3-5].
[253] *Lenferna v Lenferna* (120/13) [2013] ZASCA 204 (unreported) [par 4].
[254] *Lenferna v Lenferna* (120/13) [2013] ZASCA 204 (unreported) [par 5].
[255] *Lenferna v Lenferna* (120/13) [2013] ZASCA 204 (unreported) [par 6].
[256] *Lenferna v Lenferna* (120/13) [2013] ZASCA 204 (unreported) [par 6].

or she made a contribution. Ms Lenferna was entitled to such a division on the basis of community of property. Mr Lenferna was ordered to pay Mrs Lenferna's cost of the trial.[257]

The Supreme Court of Appeal assessed the evidence and determined that Mr Lenferna already had a job offer with the SABC prior to coming to South Africa, which was subject to him obtaining a permanent residence permit. It was stated that the fact that he had applied for and obtained a permit would not constitute sufficient basis for finding that he intended to remain in South Africa indefinitely. It was also held that in order for South Africa to become the domicile of choice, Mr Lenferna would have had to move to South Africa before the conclusion of the marriage.[258] The counsel on behalf of Mrs Lenferna accepted that at the conclusion of the marriage the parties were both domiciled in Mauritius and that the claim for a redistribution order in terms of section 7(3) of the Divorce Act[259] had been abandoned.[260]

It was stated that at common law, the proprietary consequences of marriage, without an express antenuptial contract, are governed by the law of the husband's domicile at the time of the marriage.[261] It was also questioned if "whether this statement can still be regarded as acceptable in our constitutional democracy". Regardless of the fact, it was held that the domicile of both parties at the time of the marriage was Mauritius.[262]

The court considered the law of separation of goods regime in terms of Mauritian law. It was accepted on behalf of Mrs Lenferna that the regime meant that each party to a marriage retained its separate estate during the marriage and that on dissolution of the marriage no party had a claim against the estate of the other. The only remedy was that a party could claim for assets on condition of having funded their acquisition.[263]

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[257] *Lenferna v Lenferna* (120/13) [2013] ZASCA 204 (unreported) [par 7].
[258] *Lenferna v Lenferna* (120/13) [2013] ZASCA 204 (unreported) [par 8].
[259] Divorce Act 70 of 1979.
[260] *Lenferna v Lenferna* (120/13) [2013] ZASCA 204 (unreported) [par 9].
[261] *Lex domicilii matrimonii.*
[262] *Lenferna v Lenferna* (120/13) [2013] ZASCA 204 (unreported) [par 10].
[263] *Lenferna v Lenferna* (120/13) [2013] ZASCA 204 (unreported) [par 11].

It was held that the court *a quo* erred in declaring that Mrs Lenferna was entitled to half of the properties.[264] The appeal was successful; the court ordered that the plaintiff's claim for 50 per cent of the value of the properties would be dismissed and that the plaintiff should pay the defendant's costs.[265]

Neels and Fredericks[266] state that whether the parties in the *Lenferna* case could be able to apply for redistribution would depend on whether redistribution is qualified as a proprietary issue or as a divorce issue or a hybrid proprietary/divorce issue.[267] A hybrid proprietary/divorce issue is governed partially by the proper law of the proprietary consequences of marriage and by the *lex fori*.[268] When considering reasonableness and fairness for classification of section 7(3), in some instances it would indicate proprietary classification and in other instances a divorce issue.[269] Where the minimum requirements of section 7(3) of the Divorce Act are met, a claim in terms of section 7(3) should have been considered as an alternative to a claim in terms of section 7(9). The authors are of the opinion that this type of claim would have succeeded if the courts had either classified redistribution as a divorce matter or as a mixed divorce/proprietary issue or developed the law to provide the plaintiff with a choice between sections 7(3) or 7(9).[270] The authors also submit that the plaintiff should have relied or continued to rely on section 16 of the Mauritian Divorce and Judicial Separation Act as the applicable remedy for redistribution and divorce by virtue of section 7(9) of the South African Divorce Act.[271]

2.5.5 Section 7(9) of the Divorce Act 70 of 1979

Section 7(9) of the Divorce Act was introduced in an attempt to address the matter of redistribution orders in respect of marriages with a foreign matrimonial

[264] *Lenferna v Lenferna* (120/13) [2013] ZASCA 204 (unreported) [par 13].
[265] *Lenferna v Lenferna* (120/13) [2013] ZASCA 204 (unreported) [par 15].
[266] Neels and Fredericks 2015 *TSAR* 918-929.
[267] Neels and Fredericks 2015 *TSAR* 926.
[268] Neels and Fredericks 2015 *TSAR* 926.
[269] Neels and Fredericks 2015 *TSAR* 927.
[270] Neels and Fredericks 2015 *TSAR* 927.
[271] Neels and Fredericks 2015 *TSAR* 929.

domicile.[272] Section 7(9) states that "when a court grants a decree of divorce in respect of a marriage, the patrimonial consequences of which are according to the rules of the South African private international law governed by the law of a foreign state concerned, would have had at that time to order that assets be transferred from one spouse to the other spouse". In terms of the section, what it means is that a court can only allow for a redistribution order if the law of a foreign jurisdiction allows for such an order. If the *lex loci domicillii* of the husband at the time of the marriage does not afford a spouse in a foreign marriage the right to redistribution, the spouse has no right to claim for the redistribution order.[273]

The legislature had good intentions with regard to the insertion of section 7(9) of the Divorce Act. However, the section does not always offer suitable solutions to the problems faced in respect of redistribution. Section 7(9) does not answer the question of whether section 7(3) can be invoked in redistribution matters relating to foreign marriages.[274] The other problem is that the section can cause inequalities. It will still only afford parties of foreign marriage the opportunity of a possible distribution order. Forsyth[275] states that a "when a marriage in community of property (but governed by a foreign law) ends in divorce before the South African courts, it will be open to a South African court to make such order as to the division of the property as would be available under the foreign law. However, when a marriage in community of property governed by South African law ends in divorce before a South African court, no order as to the division of property may be made".

2.6 Conclusion

The current connecting factor for proprietary consequences of marriage is unconstitutional. The rule applies to heterosexual partners and not to same-sex partners. The rule is discriminatory as it is against the right to equality.

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[272] Neels and Fredericks 2015 *TSAR* 927. This section was amended by the Divorce Amendment Act 44 of 1992.
[273] Heaton *South African family law* 135.
[274] Heaton *South African family law* 135; Schoeman, Roodt and Wethmar-Lemmer *Private international law in South Africa* 90.
[275] Forsyth *Private international law* 330-331.

It is proposed that a suitable alternative connecting factor be found through conducting relevant comparative research in this field. Looking at the different legal systems, we could come up with a better alternative to the current rule. Authors have criticised the rule on various grounds.

Post-democracy one may find that the current rule for *lex domicilii matrimonii* is unsuitable. This needs to be ratified. In addition, a question was also raised in *Lenferna v Lenferna*[276] by Judge Zondi whether the common law rule can still be regarded as acceptable in our constitutional democracy.[277]

The Civil Union Act[278] came into operation in 2006, long after the insertion of section 7(3) of the Divorce Act in 1984.[279] If redistribution under section 7(3) is therefore regarded as a proprietary consequence of marriage, civil unions will never have the opportunity to take advantage of the use. The legal consequences of a civil union or partnership are governed just as any other marriage in terms of the Marriage Act[280] (as stated in section 13 of the Civil Union Act).[281] Whether a spouse is same sex or heterosexual, all spouses need protection against unequal treatment.

This, however, gives reason for a change to the Divorce Act to give effect to problems associated with section 7(3) of the Act. The redistribution order must be available to all marriages. Therefore, in terms of domestic law, the section should not only be applicable to spouses married before the Matrimonial Property Act 88 of 1984 and spouses married under the Black Administration Act 38 of 1927. It should be a process in which any spouse who has contributed directly or indirectly to the maintenance or increase of the estate of the other party and where it is just and equitable, should be able to rely on.

The classification of redistribution orders remains a contentious matter as can be seen after an examination of the different case law, legislation and authors.

[276] *Lenferna v Lenferna* (120/13) [2013] ZASCA 204 (unreported).
[277] Also in *Sadiku v Sadiku* Case no 30498/06 (unreported).
[278] Civil Union Act 17 of 2006.
[279] Section 36 of the Matrimonial Property Act 88 of 1984.
[280] Marriage Act 25 of 1961.
[281] Section 13 of the Civil Union Act 17 of 2006.

Redistribution orders based on the South African Divorce Act may only be relied on by parties whose marriage is governed by a foreign law if such redistribution orders are classified as divorce matters. If redistribution orders are classified as proprietary consequence of marriage, the *lex domicilii matrimonii* will govern redistribution, if redistribution is applicable in that foreign matrimonial domicile. Section 7(9) of the Divorce Act, gives the courts the redistribution power to act in the same manner as a forum in the foreign matrimonial domicile. While the classification of redistribution is contentious, one will have to investigate this by way of a comparative study to see how different countries have classified redistribution orders.

CHAPTER3: MATRIMONIAL PROPERTY AND PROPRIETARY CONSEQUENCES OF MARRIAGE IN ENGLAND

3.1 Introduction

England is a country that forms part of the United Kingdom.[282] The United Kingdom[283] consists of England, Wales, Scotland (which collectively make up Great Britain) and Northern Ireland.[284] The United Kingdom is a member state to the European Union.[285] The European Union[286] is a unique economic and political union between twenty eight European countries.[287]

After months of public debate, on 24 June 2016, it was confirmed that UK citizens had voted by 51, 9% to leave the EU.[288] The decision to leave the EU has been termed "Brexit", a portmanteau word that has been used by merging the words "Britain" and "exit" to get "Brexit".[289] For the UK to leave the EU, they had to follow the procedures provided in terms of article 50 of the Lisbon Treaty.[290] Article 50 states the following:

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the

[282] Probert *Family law in England and Wales* 19.
[283] Hereinafter referred to as the UK.
[284] European Union https://europa.eu/european-union/about-eu/countries/member-countries/unitedkingdom_en#brexit (Date of use: 21 June 2017).
[285] European Union https://europa.eu/european-union/about-eu/countries/member-countries/unitedkingdom_en#brexit (Date of use: 21 June 2017).
[286] Hereinafter referred to as the EU.
[287] European Union https://europa.eu/european-union/about-eu/eu-in-brief_en (Date of use: 21 June 2017).
[288] Dickson 2016 *JPIL* 195.
[289] Hunt and Wheeler http://www.bbc.com/news/uk-politics-32810887 (Date of use: 21 June 2017).
[290] European Union http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ%3AC%3A2007%3A306%3ATOC (Date of use: 21 June 2017).

notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3) (b) of the Treaty on the Functioning of the European Union.
5. If a State which has withdrawn from the Union asks to re-join, its request shall be subject to the procedure referred to in Article 49".

The decision to leave the EU is most likely to have an impact on the UK's civil justice system and the rules of private international law.[291] The UK is still in negotiations with the EU in terms of article 50; therefore, for purposes of this chapter, the UK will be deemed as a member of the EU.

People travel and migrate to the UK to seek employment and a better life. There are, however, legal consequences that come with travelling or migrating to a new country.[292] The high incidence of migration to the UK leads to an increase in legal matters with a foreign legal element. Families moving between countries can easily raise questions with regard to international recognition of different forms of relationships and separation or divorce in countries outside where the relationships were formed.[293] Separated family members could be moving across borders as well, and this could have an impact on post-separation property division and maintenance payments of ex-spouses.[294]

When meeting certain complications associated with parties who travel across the world, one can wonder whether the English courts will have jurisdiction to decide on such cases and if so, would the English courts apply the English law or any other law. Private international law in Europe has been described as "a jungle that can confuse even Europeans and that an outsider without guidance may easily become lost in".[295]

[291] Dickson 2016 *JPIL* 195.
[292] Baarsma *The Europeanisation of international family law* 1.
[293] George *Ideas and debates in family law* 39; Baarsma *The Europeanisation of international family law* 1.
[294] George *Ideas and debates in family law* 39.
[295] Baarsma *The Europeanisation of international family law* 2.

Marriage has been described in terms of English law by Lord Nicholls in *Bellinger v Bellinger*[296] as "an institution, or a relationship, deeply embedded in the religious and social culture of this country".[297] While marriage can have religious, social and cultural connotations, there are however certain legal consequences. It can be argued that when parties get married they implicitly agree to make themselves subject to the powers of the courts in the event of divorce.[298]

In most marriages, partners never worry about which asset belongs to which spouse; however, in terms of English law it is expected that each spouse keeps record of their belongings due to the nature of their matrimonial property system.[299] This will be discussed below.[300]

England has a legitimate interest in divorces granted within the country because financial and custody arrangements can have an impact on British society.[301] Antenuptial contracts and postnuptial contracts have been contentious under English law.[302] At times, parties from other jurisdictions expect the English family courts to follow their antenuptial contracts. Where parties have a choice of law clause, which provides for the effects of their marriage in their antenuptial contracts, the courts on occasions interpret, recognise and enforce such contracts, when meeting specific requirements.[303]

This chapter will focus on similar aspects of chapter two above. In addition to a description of the English matrimonial property system, this chapter will reflect on the current connecting factor for proprietary consequences of marriage in English law. The law of domicile and the classification of redistribution of assets upon divorce will also be addressed.

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[296] *Bellinger v Bellinger* 2003 UKHL 2 [21]. (Also see *Hyde v Hyde* (1866) LR 1 P&D 130 (HL). Lord Penzance states "Marriage, as understood in Christendom, may … be defined as the voluntary union for life of one man and one woman of the exclusion of others".)
[297] Gilmore and Glennon *Family law* 11.
[298] George *Ideas and debates in family law* 84.
[299] Probert *Family law in England and Wales* 91.
[300] See 3.2 above.
[301] Clarkson and Hill *The conflict of laws* 18.
[302] *Granatino v Radmacher* [2010] UKSC 42.
[303] Probert *Family law in England and Wales* 189; *Granatino v Radmacher* [2010] UKSC 42.

3.2 English matrimonial property law

3.2.1 Introduction

In England, the principal source of matrimonial property law can be found in specific legislation or case law.[304] The legislation includes the Married Women's Property Act,[305] the Matrimonial Causes Act[306] and the Family Law Act.[307] To a varying degree, case law also plays an important role in situations in which legislation provides no solution.[308]

England has neither a statutory community property system nor are there any other systems of matrimonial property law.[309] Since the enactment of the Married Women's Property Act,[310] marriage has no effect on the proprietary rights of the parties.[311] It is for this reason that this chapter will only discuss the effects of marriage out of community of property and the applicability of marital agreements.

3.2.2 Marriage out of community of property

The Married Women's Property Act[312] introduced the separation of property of husband and wife, which entailed that marriage brought about no changes in relation to property situations of the spouses.[313] As a result, the spouses' assets remain separate at common law.[314] In principle, each spouse may independently manage and administer the assets that form part of that spouse's own private capital.[315]

[304] Boele-Woelki *Matrimonial property law* 2-3.
[305] Married Women's Property Act of 1882.
[306] Matrimonial Causes Act of 1973.
[307] Family Law Act of 1996.
[308] Boele-Woelki *Matrimonial property law* 3.
[309] Boele-Woelki *Matrimonial property law* 4.
[310] Married Women's Property Act of 1882.
[311] Boele-Woelki *Matrimonial property law* 4.
[312] Married Women's Property Act of 1882.
[313] Boele-Woelki *Matrimonial property law* 13.
[314] De Jong and Pintens 2015 (2) *TSAR* 366.
[315] Boele-Woelki *Matrimonial property law* 17.

All assets held individually or jointly by spouses qualify as personal property.[316] All liabilities are private, except those entered into by spouses jointly.[317] There is a rebuttable presumption that a husband is liable for household liabilities incurred by his wife.[318]

In principle, there is no distinction made between the property rights position of spouses and of unmarried persons.[319] The rule is that the matrimonial property rights are not affected by the marriage. Spouses may therefore be considered as married under a regime of total exclusion of any community of property.[320] The property relations would equate to the relations of that of strangers.[321]

Spouses are deemed joint owners of the unspent portion of the household allowance.[322] English law gives a spouse who is the non-legal owner of the matrimonial home protection by providing a matrimonial home right, which may be raised against third parties. A spouse with a matrimonial home right may not be evicted from the home without a court order.[323]

Each spouse will only be liable for debts which he or she contracted and his or her creditors will only have recourse against his or her property.[324] Unless where liabilities are entered into by both spouses jointly, all liabilities are, in principle, private and creditors only have recourse against the liable party.[325]

A spouse can be afforded a matrimonial home right; this right protects the spouse who is a "non-legal owner".[326] The right must be respected by the owner and third

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316 Boele-Woelki *et al Principles of European family law regarding property relations between spouses* 152, Welstead and Edwards *Family law* 160; Fawcett and Carruthers *Private international law* 1299.
317 Boele-Woelki *Matrimonial property law* 25.
318 Boele-Woelki *Matrimonial property law* 26.
319 Boele-Woelki *Matrimonial property law* 4.
320 Boele-Woelki *Matrimonial property law* 5.
321 Antokolskaia *Harmonisation of family law in Europe* 467and Boele-Woelki *Matrimonial property law* 5.
322 Boele-Woelki *Matrimonial property law* 14.
323 Boele-Woelki *Matrimonial property law* 4.
324 Boele-Woelki *Matrimonial property law* 22.
325 Boele-Woelki *Matrimonial property law* 22.
326 Antokolskaia *Harmonisation of family law in Europe* 470.

parties.[327] Where a spouse has acquired assets that are held in the name of his or her spouse or by both spouses, such spouse will acquire a beneficial interest in such asset.[328] Rules of equity apply in terms of English law.[329]

A spouse can become a joint owner if he or she has directly or indirectly contributed to the purchase price of an asset that belongs to the capital of the other spouse.[330] English law gives the courts wide discretionary powers when deciding on the adjustments of the matrimonial property rights when the marriage has ended.[331]

Today, the default matrimonial property system in England may be described as "separation of property with distribution by the competent authority".[332] In the event of divorce, the court has the power to redistribute property.[333]

3.2.3 Marital agreements

Traditionally, the position in England used to be that prenuptial and postnuptial contracts were not binding.[334] It was stated that prenuptial agreements were contrary to public policy as they envisaged divorce prior to the marriage.[335] In principle, matrimonial contracts are subject to general contract law.[336] There has, however, been an objection to this thought on prenuptial and postnuptial agreements based on the fact that divorce is ordinary and that judicial hostility to prenuptial and postnuptial agreements has been decreased.[337]

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[327] Boele-Woelki *Matrimonial property law* 22.
[328] Boele-Woelki *Matrimonial property law* 15.
[329] Boele-Woelki *Matrimonial property law* 15.
[330] Boele-Woelki *Matrimonial property law* 21-22.
[331] Boele-Woelki *Matrimonial property law* 3.
[332] Rešetar 2008 *EJCL* 3; Boele-Woelki *et al Principles of European family law regarding property relations between spouses* 13.
[333] De Jong and Pintens 2015 (2) *TSAR* 366.
[334] Boele-Woelki *et al Principles of European family law regarding property relations between spouses* 11; Probert *Family law in England and Wales* 189.
[335] Probert R *Family law in England and Wales* 189.
[336] Boele-Woelki *Matrimonial property law* 6.
[337] Probert *Family law in England and Wales* 189.

In *Granatino v Radmacher*[338] it was stated that a court is not obliged to give effect to marital agreements when considering the grant of ancillary relief, whether they are prenuptial or postnuptial.[339] The courts may give effect to these kinds of agreements if they are fair.[340] The weight that is attached to the agreements varies. The court will take into account two factors: those that relate to the making of the agreement, and those that relate to the subsequent relationship of the parties.[341]

An agreement will carry more weight if both parties, prior to entering into a marriage, seek out legal advice; spouses disclose all assets; and debts and the process is free of duress.[342]

Postnuptial contracts, which are agreements made after marriage or civil partnership and providing for the financial consequences of the future termination of the relationship at a time when it is intended to continue,[343] need a court order to be binding; a full disclosure of assets is a requirement.[344]

Prenuptial agreements should be legally binding in divorce settlements, but only after the needs of the separating couple and any children have been taken into account, the Law Commission has recommended.[345]

In a number of nineteenth century cases, prenuptial agreements were held to be formally void on the grounds that they might discourage couples from enforcing the duty to cohabit. When the court exercises its discretion under section 25 of the Matrimonial Causes Act,[346] marital agreements have been taken into account as part of "all the circumstances of the case" and have determined the outcome of the

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[338] *Granatino v Radmacher* [2010] UKSC 42.
[339] *Granatino v Radmacher* [2010] UKSC 42 [par 1]; Probert *Family law in England and Wales* 189.
[340] Boele-Woelki *et al Principles of European family law regarding property relations between spouses* 11; Probert *Family law in England and Wales* 189.
[341] Probert *Family law in England and Wales* 189.
[342] Boele-Woelki *et al Principles of European family law regarding property relations between spouses* 124.
[343] Law Commission "Marital property agreements – a consultation paper" 10.
[344] Boele-Woelki *et al Principles of European family law regarding property relations between spouses* 124.
[345] Bowcott https://www.theguardian.com/money/2014/feb/27/pre-numpial-agreements-legally-binding-divorce-law-commission (Date of use: 13 June 2017).
[346] Matrimonial Causes Act 1973.

litigation in some cases, despite their lack of contractual validity.[347] Postnuptial agreements were held in a decision of the Privy Council[348] to no longer be contrary to public policy but able to be set aside by the courts. [349]

In the situation where a married couple, who are not English nationals, settle in England for an indefinite period and later divorce in England, the question can be asked as to which legal system the English courts will apply to determine their matrimonial property regime. This needs to be answered with reference to the domicile of the parties.

Domicile is an important connecting factor in English private international law.[350] Every person should always have one domicile; a person can never have two; no person can have many and a domicile cannot be lost without acquiring a new domicile. If a domicile is lost, a person can revert to the domicile of origin.[351] One can easily confuse domicile, residence, and nationality.

3.3 The law of domicile in England

3.3.1 Introduction

Domicile is an important concept worldwide.[352] Domicile is what is needed in order to determine which legal system is most closely connected to a particular person.[353] In England, questions affecting status, family relations and family property are determined by the law of domicile of the *propositus.*[354] The definition of domicile can differ from county to county and therefore is not easy to define.[355] In terms of common law, domicile is described as a person's permanent home, while a civil lawyer will describe it as a person's habitual residence.[356] The

[347] Law Commission "Marital property agreements – a consultation paper" 10.
[348] *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298.
[349] Law Commission (2011) 10; Collins *et al Dicey, Morris & Collins* 1463.
[350] Probert *Family law in England and Wales* 65; Hodson *A practical guide to international family law* 101.
[351] Hodson *A practical guide to international family law* 101; Probert *Family law in England and Wales* 65.
[352] Fawcett and Carruthers *Private international law* 154.
[353] Probert *Family law in England and Wales* 65.
[354] Fawcett and Carruthers *Private international law* 154.
[355] Hodson *A practical guide to international family law* 101; Fawcett and Carruthers *Private international law* 154.
[356] Fawcett and Carruthers *Private international law* 154; Rogerson *Collier's conflict of laws* 12.

description of domicile stated above has however been criticised in that "such a definition gives a misleading air of simplicity to the English concept of domicile".[357] Domicile is also described as the country a person has the strongest connection with, that it is a person's permanent home and that the laws of that country apply to that person.[358] Domicile is based on a person's particular connection to a legal system.[359] Domicile is determined by three ways: origin, dependence or choice.[360]

Under common law, upon marriage, the wife took the husband's domicile.[361] The domicile of the wife automatically followed that of her husband throughout the marriage, even if she did not in fact live with him.[362] It was not until the rule was abolished as from 1 January 1974. This rule was also described by Lord Denning in *Gray v Formosa*[363] as "the last barbarous relic of a wife's servitude".

3.3.2 Domicile by origin

A new-born acquires a domicile of origin by law.[364] The domicile a child will take depends on the marital status of the parents. If the parents are married, the child will take the domicile of the father. If the father is not alive or the parents were never married, the child will take the domicile of the mother.[365] If the parents at a later stage get married and the child is now legitimised, she or he will have the domicile of the father communicated to him or her.[366] The same applies to an adopted child. It will be deemed that a child adopted by a married couple will attain the domicile of the father as if child was born of wedlock.[367] A foundling will have the domicile of where he or she was found.[368] The domicile of origin remains constant throughout life, except perhaps in cases of adoption.[369]

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[357] Fawcett and Carruthers *Private international law* 154.
[358] Probert *Family law in England and Wales* 65.
[359] Probert *Family law in England and Wales* 65.
[360] Probert *Family law in England and Wales* 65; Hodson *A practical guide to international family law* 102.
[361] Collins *et al Dicey, Morris & Collins* 1465.
[362] Collins *et al Dicey, Morris & Collins* 1465.
[363] *Gray v Formosa* (1963) [259].
[364] Fawcett and Carruthers *Private international law* 175; Probert *Family law in England and Wales* 65; Hodson *A practical guide to international family law* 102.
[365] Probert *Family law in England and Wales* 65; *Udny v Udny (1869)* L.R 1 Sc and Div 441.
[366] Fawcett and Carruthers *Private international law* 174.
[367] Probert *Family law in England and Wales* 65.
[368] Fawcett and Carruthers *Private international law* 155.
[369] Fawcett and Carruthers *Private international law* 175; Rogerson *Collier's conflict of laws* 14.

A change in a parent's domicile can have an effect on the child's domicile. This change in domicile can be effected by either the mother or the father.[370] Where parents of the child are alive but living apart, the domicile of the child is that of the mother if the child has a home with the mother and not with the father.[371]

3.3.3 Domicile of dependence

A child will acquire domicile of dependence if a parent from whom the domicile was derived acquires a new domicile.[372] Same as stated above, the child will take the domicile of the father if the parents are married or the domicile of the mother in cases where the child regards that place as his or her permanent home.[373]

3.3.4 Domicile of choice

When a child reaches the age of 16, he or she can attain a domicile of choice.[374] A domicile of choice can only be attained for the country where a person in residing in or for a country where the intention is to reside there for an indefinite time.[375] No minimum period of residence is required.[376]

Prior to the Domicile and Matrimonial Proceedings Act[377] coming into operation, the domicile of a married woman was that of the husband.[378] Since 1 January 1974, women who got married retained the domicile or acquire domicile of choice.[379] However, the section does not apply retrospectively; therefore women married before 1974 retained the domicile of the husband as domicile of choice.[380]

While the concept of domicile is troubled by rules, the outcome can lead to uncertainty. A question has been asked as to whether the same test for domicile

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[370] Fawcett and Carruthers *Private international law* 175.
[371] Fawcett and Carruthers *Private international law* 175; Rogerson *Collier's conflict of laws* 14.
[372] Probert *Family law in England and Wales* 66; Trakman 2015 *JPIL* 321.
[373] Probert *Family law in England and Wales* 66; Trakman 2015 *JPIL* 321.
[374] Probert *Family law in England and Wales* 66.
[375] Probert *Family law in England and Wales* 66.
[376] Probert *Family law in England and Wales* 66.
[377] Domicile and Matrimonial Proceedings Act of 1973.
[378] Probert *Family law in England and Wales* 66; Trakman 2015 *JPIL* 321.
[379] Probert *Family law in England and Wales* 66.
[380] Probert F*amily law in England and Wales* 66.

applies with regard to the context in which the matter is raised.[381] Fawcett and Carruthers[382] refer to WW Cook's single-theory concept, which states that "a test which determines the place of a person's domicile must remain constant no matter what the nature of the issue may be before the court".[383] It has also been stated that this was untrue in practice – that domicile varies in meaning in different situations where it is applicable.[384] The USA has been leaning towards adopting this approach; while the approach has been rejected in England.[385]

The concept of domicile is governed or determined by rules:

a) nobody shall be without a domicile;
b) nobody can have more than one domicile;
c) the domicile indicates a connection with a legal system of a particular state, but does not necessarily imply that it will prescribe identical rules for all classes of people;
d) there is a rebuttable presumption in favour of the continuance of an existing domicile; and
e) the domicile of a person will be determined according to the English law and not the foreign concept of domicile, unless there are certain statutory exceptions (i.e. section 46(5) of the Family Law Act 1986).[386]

The objective of jurisdictional rules is to determine an appropriate forum, and choice of law rules are designed to lead to the application of the most appropriate law, the law that the parties generally might reasonable expect to apply.[387] Trakman states that the test for domicile is more of a subjective test, looking at the intention of a person instead of *prima facie* evidence of a person's habitual residence.[388]

[381] Fawcett and Carruthers *Private international law* 154.
[382] Fawcett and Carruthers *Private international law* 155.
[383] Fawcett and Carruthers *Private international law* 155.
[384] Fawcett and Carruthers *Private international law* 155.
[385] Fawcett and Carruthers *Private international law* 155.
[386] Fawcett and Carruthers *Private international law* 155.
[387] Clarkson and Hill *The conflict of laws* 19.
[388] Trakman 2015 *JPIL* 398-342

As stated in chapter 2 above, [389] domicile plays a significant role as a connecting factor with regard to personal and proprietary consequences of marriage.[390] At times it is difficult to establish a person's domicile. Domicile of choice has been criticised with regards to the domicile test.[391]

3.3.5 Jurisdiction on divorce or judicial separation

Section 5(2) of the Domicile and Matrimonial Proceedings Act[392] provides the regulations for jurisdiction on divorce and judicial separation. The English court has jurisdiction to entertain proceedings for divorce or judicial separation if (and only if):

a) the court has jurisdiction according to the regulations under paragraph 5;
b) no court has, or is recognised as having, jurisdiction according to the regulations under paragraph 5 and either of the married same-sex couple is domiciled in England and Wales on the date when the proceedings are begun; or
c) the following conditions are met:
    i) the two people concerned married each other under the law of England and Wales;
    ii) it appears to the court to be in the interests of justice to assume jurisdiction in the case.

In a recent case of *J v U; U v J,*[393] the issue of domicile and jurisdiction had to be decided upon: the application by the respondent was to strike out petition for want of jurisdiction on the basis that the petitioner was not domiciled in England.

The wife was seeking her marriage from the husband to be dissolved; she asserted that the marriage had irretrievably broken down. She wanted the English court to grant her the dissolution of marriage and any other relief ancillary to the divorce.[394] The wife further contended that she and the husband were habitually

[389] Par 2.3.2.3.
[390] Schoeman, Roodt and Wethmar-Lemmer *Private international law in South Africa* 23.
[391] Trakman 20015 *JPIL* 398.
[392] Domicile and Matrimonial Proceedings Act 1973.
[393] *J v U*; *U v J* [2017] EWHC 449 (Fam).
[394] J v U; U v J [2017] EWHC 449 (Fam) [par 1].

resident in England and Wales, and that England would be the *forum conveniens*[395] for the determination of the divorce and ancillary matters in terms of section 5(2) of the Domicile and Matrimonial Proceedings Act.[396]

The facts are that the wife was born in England to Irish parents, and the husband was born in India but moved to the United Kingdom when he was fifteen. The parties married in Italy in 2005 and had two children together. Both parties were in the diplomatic service and spent much of their married life outside of England. At the time of the proceedings, the wife was living in Serbia and the husband and the children in Bosnia.

The parties all last lived in Sarajevo together, and the respondent and children were still there. The children have never lived in England, and it had been some time since the parties lived there together.[397]

The court had to decide on whether England would be the *forum conveniens* for the determination of the divorce and ancillary matters. However, various factors pointed away from Sarajevo as the appropriate forum: [398]

a) The wife no longer resided in Sarajevo.
b) The respondent's immigration status in Bosnia had been "very precarious" since the wife left.
c) The main assets of the marriage were either in England or elsewhere in mainland Europe (the Italian farmhouse, the Brussels property, the respondent's pension); there were no assets in Bosnia.
d) The Bosnian court has limited jurisdiction to make orders in relation to matrimonial property outside its jurisdiction, and even then only with the consent of the parties.

[395] *Forum conveniens* in English law means the court or forum which is suitable to hear the matter. https://uk.practicallaw.thomsonreuters.com/1-527-2368?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 (Date of use 29 May 2018).
[396] J v U; U v J [2017] EWHC 449 (Fam) [par 1].
[397] *J v U; U v J* [2017] EWHC 449 (Fam) [par 72].
[398] *J v U; U v J* [2017] EWHC 449 (Fam) [par 73].

e) The parties were familiar with the English court process. They have litigated in England, and had relationships with distinguished legal teams. The respondent had been divorced in the English courts before.
f) Both parties speak fluent English; neither speaks Bosnian well.
g) London has been their common and constant reference point during the marriage. [399]

Justice Cobb held the respondent had failed to demonstrate that the case may be tried more suitably for the interests of all the parties and the ends of justice in Sarajevo. Justice Cobb made the judgement that the petition and ancillary financial remedy proceedings would therefore proceed in the English court. [400]

In a situation where parties file for divorce in England, the English courts need to have jurisdiction. Where the English courts have jurisdiction, the courts can make an order for divorce and ancillary relief. The effects of divorce on marital property will be discussed below.

3.4 Divorce and proprietary consequences

3.4.1 Historical background on grounds for divorce

Marriage and divorce law were governed exclusively by the Canon law or the Roman Catholic and Eastern Orthodox churches from the eleventh century to the sixteenth century.[401] Protestant teachings on divorce also came into play in the sixteenth century.[402] Marriage was seen as a social and religious duty.[403] The perception of divorce was first challenged by the Enlightenment philosophers.[404] The French philosophers saw marriage as a union based on the sentiment of love and not as a conventional social and economic relationship. [405] They believed that one of the avenues open to man in his pursuit of happiness was the right to

[399] *J v U; U v J* [2017] EWHC 449 (Fam) [par 73].
[400] *J v U; U v J* [2017] EWHC 449 (Fam) [par 79].
[401] Antokolskaia *Dissolution of marriage in westernised countries* 74.
[402] Antokolskaia *Dissolution of marriage in westernised countries* 74.
[403] Divorce was also impossible in Catholic countries or punished as a matrimonial offence in Orthodox or Protestant jurisdictions; Antokolskaia *Dissolution of marriage in westernised countries* 74.
[404] Antokolskaia *Dissolution of marriage in westernised countries* 74.
[405] *Antokolskaia Dissolution of marriage in westernised countries* 74.

dissolve an unhappy marriage. [406] From this perspective, the state had no right to prevent citizens from happiness or to make the natural right to divorce impossible. Divorce was no longer seen as an offence but rather a remedy to marital breakdown.[407]

By the end of the nineteenth century, the vast majority of European jurisdictions only permitted fault-based divorce, and Nordic countries allowed no-fault grounds and fault grounds for the dissolution of marriage.[408]

In England and Wales, the sole ground for divorce was that the marriage has irretrievably broken down. This irretrievable breakdown could only be proved by one of five facts:

a) adultery;
b) intolerable behaviour;
c) desertion;
d) two years' separation with consent; or
e) five years' separation without consent.[409]

A petition for divorce could not be presented within the first year of marriage. It was only after the specified periods for the desertion and separation facts that a petition for divorce could be presented.[410]

In May 1988, the Law Commission published a paper[411] that concluded that the present law was defective and considered a number of options for reform.[412] In a subsequent report,[413] the commission reported that there was majority support for its approach to reform.[414]

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[406] Antokolskaia *Dissolution of marriage in westernised countries* 74
[407] Antokolskaia *Dissolution of marriage in westernised countries* 75.
[408] Antokolskaia *Dissolution of marriage in westernised countries* 75.
[409] Jeffs "Divorce law reform research paper" 7.
[410] Jeffs "Divorce law reform research paper" 7.
[411] Law Commission "Facing the future - A discussion paper on the ground for divorce".
[412] Jeffs "Divorce law reform research paper" 8.
[413] Law Commission "Family law – The grounds for divorce".
[414] Jeffs "Divorce law reform research paper" 9.

The commission made the following criticisms of the law and practice regarding grounds for divorce:

a) it is confusing and misleading;
b) it is discriminatory and unjust;
c) it distorts the parties' bargaining positions;
d) it provokes unnecessary hostility and bitterness;
e) it does nothing to save the marriage; and
f) it can make things worse for the children.[415]

The commission made recommendations that if a marriage has broken down irretrievably this would be proved by the passage of a twelve-month period in the marriage. Currently, this is still the case in England.[416]

The grounds for divorce are only one leg of divorce proceedings. The second leg is how the division of assets will be done by the courts.

3.4.2 Division of assets upon divorce

In England, ancillary relief divorce proceedings are decided separate from the divorce itself. There are three separate legal issues which may be involved in the divorce process:[417] The first is the divorce itself, where the marriage is dissolved. The second part is the process that affects the children of the marriage, if any. Thirdly it is the ancillary relief proceedings, [418] which resolves any financial issues between the parties to the marriage.[419] This includes division of property according to the rules of the applicable matrimonial property regime, sharing of retirement pension funds or income, regular maintenance, compensatory capital adjustment and the allocation of the use of the former matrimonial home.[420]

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[415] Jeffs "Divorce law reform research paper" 9-11.
[416] https://www.gov.uk/divorce (Date of use: 11 June 2017).
[417] Many countries in Europe use what is called the "pillar system" (see Miles and Scherpe *The legal consequences of dissolution: property and financial support between spouses*.
[418] Miles and Scherpe *The legal consequences of dissolution: property and financial support between spouses* 141.
[419] Terry & Co Solicitors http://www.terry.co.uk/div_ar01.html (Date of use: 16 June 2017).
[420] Miles and Scherpe *The legal consequences of dissolution: property and financial support between spouses* 141.

The consequences of divorce, excluding maintenance, across Europe are determined by the marital property regime applicable to the spouses or chosen by the spouses.[421] As stated above, in England when spouses get married, the marital property remains personal property whether property is joint or separate.[422] The court has a wide discretion regarding distribution of assets.[423] According to Lord Nicholls in *White v White*[424] the court should enable fair financial arrangements upon divorce.[425]

When a court grants a divorce decree it also has the power to grant an order of ancillary relief. The ancillary relief governs the financial arrangements between the spouses on the breakdown of marriage. At times the spouses have already made an agreement governing ancillary relief. The agreement can be in the form of antenuptial contract or a postnuptial contract.[426]

3.5 The connecting factor for proprietary consequences of marriage

3.5.1 History of the connecting factor

When it comes to English matrimonial property law, a distinction is made between movable property and immovable property.[427] When it comes to movables, the law is that of the matrimonial domicile.[428] However, the meaning of the concept of "matrimonial domicile" was unclear. The questions that emanated were whose domicile – the husband's or the wife's? The second question relates to time – is it the domicile at the time of the marriage or that which the parties intended to acquire afterwards?[429] This lead to further questions: whether the law of matrimonial domicile applies by virtue of a fixed and independent rule of conflict of

[421] Probert *Family law in England and Wales* 182.
[422] See par 3.2 above.
[423] Boele-Woelki *et al Principles of European family law regarding property relations between spouses* 152; Probert *Family law in England and Wales* 90 and 182.
[424] *White v White* (2002) 2 FLR [981].
[425] *White v White* (2002) 2 FLR [989].
[426] *Granatino v Radmacher* [2010] UKSC 42 [par 1].
[427] Collins *et al Dicey, Morris & Collins* 1465.
[428] Collins *et al Dicey, Morris & Collins* 1465.
[429] Collins *et al Dicey, Morris & Collins* 1465.

laws, or is no more than a presumption, which may be rebutted if it is shown that the parties intended the law of the country to apply?[430]

The first question was settled by stating that the husband's domicile alone was relevant due to the historical background under the common law: on marriage a wife took the husband's domicile.[431] It was, therefore, inevitable that the wife's domicile should have been displaced by the husband's for the purpose of determining matrimonial property rights.[432] The common law rule was, however, abolished in 1974. The abolition made it indefensible to approach the law of matrimonial property on the basis that the husband's domicile displaced that of the wife for the purpose of determining matrimonial property rights.[433] This is despite authorities in favour of the traditional rule which is no longer acceptable as this discriminates on the grounds of sex. [434]

At times, parties were not domiciled in England at the time of the dissolution of their marriage. This gave rise to a foreign element in the divorce proceedings similar to the South African private international law.

Where a matter contains a foreign element, the English courts will examine various matters in sequence. The first would be to determine whether the English court has jurisdiction over the parties and cause of action. Secondly, the courts will determine the juridical nature of the question that requires decision. The courts must then determine the legal system that governs the matter, looking at the connecting factor.[435]

3.5.2 The application of a foreign law in the English courts

[430] Collins *et al Dicey, Morris & Collins* 1465.
[431] Collins *et al Dicey, Morris & Collins* 1465; also see 3.3.1 above.
[432] Collins *et al Dicey, Morris & Collins* 1465.
[433] Collins *et al Dicey, Morris & Collins* 1465.
[434] Collins *et al Dicey, Morris & Collins* 1465.
[435] Fawcett and Carruthers *Private international law* 41-42.

In England, when the court exercises its jurisdiction to make an order for financial relief under the Matrimonial Causes Act 1973, they may apply English law, irrespective of the domicile of the parties or any foreign connection.[436]

In terms of English private international rules, a differentiation is made between movable and immovable property. Collins *et al* have made proposals on how to deal with the choice of law if the proceedings have a foreign element. This looks at how the courts can find the governing law with regards to movable property.

The parties may choose a governing law expressly or impliedly.[437] The parties may regulate their matrimonial property by contract, and such a contract is governed by proper law.[438] This is the law chosen by the parties, whether expressly or impliedly.[439] If the parties make no choice, the law of the country with which the contract is mostly connected will be applicable.[440] This is the law of matrimonial domicile in the absence of reason to the contrary.[441]

The parties' intentions regarding their future home will be an indication of an implied choice of law.[442] This rule looks at the future home, the country in which the marriage will be centered and which may have the greatest connection with marriage and matrimonial property.[443]

Where the parties make no choice of law, the governing law is that of matrimonial domicile, defined as the law that the parties and the marriage have the closest connections with.[444] Where a husband and wife are domiciled in the same country, there is no problem.[445] Where the parties are of the same domicile at the time of

[436] George *Ideas and debates in family law* 46; *Granatino v Radmacher* [2010] UKSC 42 [par 103].
[437] Collins *et al Dicey, Morris & Collins* 1467; Fawcett and Carruthers *Private international law* 1294.
[438] Collins *et al Dicey, Morris & Collins* 1467.
[439] Collins *et al Dicey, Morris & Collins* 1467.
[440] Collins *et al Dicey, Morris & Collins* 1467.
[441] Collins *et al Dicey, Morris & Collins* 1467.
[442] Collins *et al Dicey, Morris & Collins* 1467-1468.
[443] Collins *et al Dicey, Morris & Collins* 1466.
[444] Collins *et al Dicey, Morris & Collins* 1465; Fawcett and Carruthers *Private international law* 1295.
[445] Collins *et al Dicey, Morris & Collins* 1465; Fawcett and Carruthers *Private international law* 1295.

marriage, the law of the common domicile should apply; therefore the rules of that county will apply in the absence of special circumstances.[446]

Where the parties are not of the same domicile at the time of marriage, the applicable law should be that of the parties and the marriage have the closest connections with, with equal weight being given to connections of each party.[447] The solution of closest connection has been accepted as being fair on both sexes and ensures that the governing law is appropriate.[448]

The relevant time for determining the applicable law is that of the marriage.[449] The events subsequent to the marriage may be evidence of the parties' intention at the time of the marriage.[450]

The case in respect of immovable property is unclear and debatable.[451] It has been held that in terms of immovable property the law of where the property is situated will govern such property.[452] Where parties have a valid antenuptial contract that states which law governs their proprietary consequences, the antenuptial contract will guide the courts.[453] However, Collins *et al* are of the opinion that movables are governed by the law of matrimonial domicile.[454] In *Slutsker v Haron Investments,*[455] Underhill J applied the law of matrimonial domicile and not *lex situs* on the spouses' movable property.[456] It was stated that it would be preferable if the law of matrimonial domicile was a general application and that *lex situs* might still play a role where third parties have a claim.[457]

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[446] Collins *et al Dicey, Morris & Collins* 1465; Fawcett and Carruthers *Private international law* 1295.
[447] Collins *et al Dicey, Morris & Collins* 1465; Fawcett and Carruthers *Private international law* 1295.
[448] Collins *et al Dicey, Morris & Collins* 1465-1466.
[449] Collins et al *Dicey, Morris & Collins* 1468.
[450] Collins et al *Dicey, Morris & Collins* 1468.
[451] *Slutsker v Haron Investments* (2012) EWHC 2539 (Ch) [97].
[452] Fawcett and Carruthers *Private international law* 1301; Collins *et al Dicey, Morris & Collins* 1469.
[453] Fawcett and Carruthers *Private international law* 1020.
[454] Collins *et al Dicey, Morris & Collins* 1484.
[455] *Slutsker v Haron Investments* (2012) EWHC 2539 (Ch).
[456] Hill and Shúilleabháin *Clarkson & Hill's Conflict of laws* 491.
[457] Hill and Shúilleabháin *Clarkson & Hill's Conflict of laws* 491.

The private international law rule in terms of English law on the proprietary consequences of marriage is guided by whether the property is a movable or an immovable property. A question is then asked on whether the redistribution of property will follow the rules of proprietary consequences of marriage.

As stated above,[458] classification is explained as putting a legal rule in the correct legal category in order to apply a multilateral conflict rule.[459] Where there is a foreign element in the English courts it is important to classify the rule to which the foreign element belongs.

3.6 Classification

3.6.1 Introduction

Upon dissolution of marriage a question asked is how the property of the parties should be divided and whether one of them should continue to support the other. One would believe that the outcome of this question should be reached by applying a generally accepted standard of fairness. Different countries have adopted different solutions that have their own advantages and disadvantages. One approach is for the legislature to prescribe in detail how property must be divided, with room for the exercise of judicial discretion. A second approach is for the legislature to leave it for judicial discretion, which will be unrestricted by statutory provisions. That is the route followed in England in terms of the Matrimonial Causes Act.[460]

As stated above,[461] the common law does not include matrimonial property law and therefore does not have a default matrimonial property regime. Assets of spouses remain separate, but upon divorce the judicial discretion to redistribute the spouses' assets may lead to a deferred community of property.[462]

The courts have wide discretionary powers at the winding up of the "marital capital" that will permit it to order measures for protecting the spouse in a weaker

[458] See 2.4 above.
[459] Forsyth *Private international law* 11.
[460] *White v White* 2001 (1) AC 596 par 1.
[461] See 3.2.1 above
[462] De Jong and Pintens 2015 (2) *TSAR* 365.

economic position.[463] The Matrimonial Causes Act[464] gave English judges wide powers to distribute assets of spouses by means of property adjustment orders in divorce matters.[465] Sections 23 and 24 of the Matrimonial Causes Act[466] empower the court, on granting a decree of divorce and in certain other circumstances, to make financial provision orders and property adjustment orders.[467] A spouse who made a contribution will acquire an interest or, as the case may be, a larger interest in the asset concerned.[468] One of the factors under section 25 of the Matrimonial Causes Act,[469] which the court must have regard for when redistributing the assets upon divorce, is the age of the parties and the duration of the marriage.[470]

It has been noted that there is no discrepancy between division of assets and maintenance.[471] In terms of the clean-break principle, the allocation of assets and payment of maintenance are combined as one.[472] Section 25 of the Matrimonial Causes Act[473] gives the judges an obligation to "accommodate the interests of any children in their proprietary reallocation, to aim for a clean break and to consider all the relevant elements of the case, especially actual and potential income, financial need, duties and responsibilities of the spouses, as well as their past and future contributions to the well-being of the family".[474]

It is quite difficult to keep apart the division of marital capital and the granting of maintenance, as they both form part of the courts' duty to grant ancillary relief.[475]

3.6.2 The "clean-break" principle

[463] Boele-Woelki *Matrimonial property law* 42.
[464] Matrimonial Causes Act of 1973.
[465] De Jong and Pintens 2015 (2) *TSAR* 370 and *White v White* 2001 (1) AC 596.
[466] Matrimonial Causes Act 1973.
[467] Fawcett and Carruthers *Private international law* 1050; *White v White* 2001 (1) AC 596.
[468] Boele-Woelki *Matrimonial property law* 15.
[469] Matrimonial Causes Act of 1973.
[470] Beatson and Hewitt https://www.newlawjournal.co.uk/content/short-not-sweet (Date of use: 13 June 2017).
[471] De Jong and Pintens 2015 (2) *TSAR* 370-371.
[472] De Jong and Pintens 2015 (2) *TSAR* 370-371.
[473] Matrimonial Causes Act of 1973.
[474] De Jong and Pintens 2015 (2) *TSAR* 371.
[475] Boele-Woelki *Matrimonial property law* 47.

A “clean break” was defined by Lord Scarman in *Minton v Minton*[476] that it is such as “to begin a new life which is not overshadowed by the relationship which has broken down”.[477] A clean break would not be fully achievable upon divorce where there are children who are still minors. The equitable redistribution jurisdiction’s emphasis on discretion and explicit pursuit of overall fairness can give rise to the perception.[478]

3.6.3 Case law

Section 25 of the Matrimonial Causes Act[479] gives the judge discretion on how redistribution of assets should be done. Section 25 of the Matrimonial Causes Act[480] has not been applied the same throughout the years. We will now examine the different cases to establish how this section has been applied.

3.6.3.1 *Dart v Dart* 1996 (2) FLR 286

Mr and Mrs Dart were married in 1980 and were residents of Okemos, Michigan. The parties had two children, William Charles Dart, born 23 January 1983, and Arianna Constance Dart, born 12 November 1985. Mr Dart is the son of the founder of Dart Container Corporation, one of the largest family-controlled businesses in the United States.

In 1993 they moved to England.[481] The parties jointly purchased a house near London and enrolled the children in school there. Unfortunately, the marriage became unpleasant. On 3 February 1995, Mr Dart filed for divorce in England and four days later, Mrs Dart also filed for divorce in Michigan in the Ingham Circuit Court. The parties remained in England until a consent order was entered in the English court on 9 June in 1995, allowing Mrs Dart to return with the two children to Michigan.

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476 *Minton v Minton* 1979 AC 593.
477 *Minton v Minton* 1979 AC 593 [608].
478 Miles and Scherpe *The legal consequences of dissolution: property and financial support between spouses* 141.
479 Matrimonial Causes Act of 1973.
480 Matrimonial Causes Act of 1973.
481 The move to England was made possible in September 1993 with the transfer of several hundred million dollars to Mr Dart from a family trusts. The transfer could only take place if Mr Dart renounced his United States citizenship.

On 21 March 1995, Mr Dart brought a jurisdictional challenge in terms of sections 2.116(C) (4) and (6) of the Michigan Court Rules[482] in the Ingham Circuit Court. Following a hearing on the matter, the circuit court determined that jurisdiction was proper in Michigan and assumed jurisdiction over the two children and the divorce proceedings. The court reserved the issue of jurisdiction over the parties' property.

Mrs Dart also brought a jurisdictional challenge in the English court. On 13 June 1995, the English court determined that jurisdiction was proper in England. Following entry of this order, Mr Dart applied in the Ingham Circuit Court to defer jurisdiction on the basis of the court not having jurisdiction. After a hearing on 8 August 1995, the circuit court denied the motion and assumed jurisdiction over the parties' property. Both proceedings proceeded.

On 27 October 1995, a "decree absolute" of divorce was entered in the English court. This was followed by a seven-day trial in March 1996 in which Mrs Dart filed an answer claiming the "full range of financial ancillary relief available to a wife under the Matrimonial Causes Act of 1973". On 21 March 1996, the English court issued a lengthy opinion in which it determined the defendant's total net worth to be "about £400 million". The court awarded the plaintiff approximately $14.3 million and the house in Okemos and its contents, which the parties agreed were worth approximately $1.5 million. The plaintiff was also awarded four paintings and her jewellery. The court also awarded child support in the amount of $95,400 a year for both children. The defendant was awarded four automobiles and the balance of the marital estate.

[482] "A motion should be brought under MCR 2.116(C)(4) where it appears that the court does not have the power to hear and determine a particular class of causes of action. The subject-matter jurisdiction of trial courts is defined and circumscribed by the state constitution, and, in general, the circuit court has general jurisdiction to hear civil claims. The legislature has provided that certain specialized courts or tribunals have exclusive jurisdiction over particular areas of law (such as worker's compensation actions), and certain claims are pre-empted by federal statutes, thus depriving the state courts of subject-matter jurisdiction. Where it appears that the party asserting the claim does not have legal capacity to sue, a motion should be brought under MCR 2.116(C)(5). Examples include cases of legal disability such as infancy or mental incompetency. MCR 2.116(C)(6) provides for summary disposition when another action has been initiated between the same parties involving the same claim. Not all parties and all issues in the two lawsuits need be identical for summary disposition to be appropriate, as long as the two suits are based on the same cause or substantially the same cause."

The defendant applied for leave to appeal at the circuit court. The application was granted by the court on 10 April 1996. The English system of law was objectionable to the public policy of Michigan and because the decision violated the plaintiff's "right to have a fair and equitable distribution of property".

Bolch is of the opinion that *Dart v Dart* was a watershed case for wealthy husbands, and had it been heard several years later, the result undoubtedly would have been different.[483]

3.6.3.2 *White v White* 2001 (1) AC 596

In the year 2000 the family law matter of *White v White*[484] brought the greatest implications for family law in England.[485] The concept of equal sharing became the accepted starting point for financial settlements between a wealthy divorcing couple, irrespective of one party's role as the breadwinner and the other party's role as the homemaker. The case brought about a change in the entitlement of the breadwinner (usually the husband) to retain the largest part of the family wealth. [486]

The case revolves around how the property of the husband and wife should be divided and whether one of them should continue to support the other.

The facts of the case are as follows: Martin and Pamela White were married in September 1961. They had three children. Tragically, their eldest child, Katherine, was killed in the Kathmandu air crash in 1992. The marriage broke down in 1994. A divorce decree *nisi* was granted in December 1995, and this was made absolute in May 1997. Mr and Mrs White both filed applications for ancillary financial relief. At the first instance Mrs White was awarded just over one-fifth of the total assets. She appealed against the award and the Court of Appeal allowed her appeal, and

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[483] Bolch http://www.marilynstowe.co.uk/2014/07/31/important-family-law-cases-white-v-white-by-john-bolch/ (Date of use: 12 June 2017).
[484] *White v White* 2001 (1) AC 596.
[485] Bolch http://www.marilynstowe.co.uk/2014/07/31/important-family-law-cases-white-v-white-by-john-bolch/ (Date of use: 12 June 2017).
[486] Stowe http://www.marilynstowe.co.uk/2009/12/29/white-v-white/ (Date of use: 12 June 2017).

increased her share of the total assets to two-fifths. Mr White appealed against the order and Mrs White cross-appealed, seeking an equal share in all the assets.[487]

Mr and Mrs White carried on a dairy farming business in partnership throughout their marriage. They both came from farming families and therefore farming was in their blood. The business was successful. At the outset each of them contributed, in cash or in kind, a more or less equal amount of capital, of about £2,000. A year after their marriage they bought a farm of their own, set in beautiful countryside.

Mr and Mrs White had also made pension provision for themselves. A significant mortgage was outstanding on both farms. After deduction of estimated liabilities for capital gains tax and costs of sale, the overall net worth of Mr and Mrs White's assets was £4.6 million. This comprised, on the figures found and used by the judge, the following: Mrs White's sole property – £193,300, mostly on pension provision; her share of property owned jointly, either directly or through the partnership – £1,334,000; Mr White's share of jointly-owned property – £1,334,000; and Mr White's sole property – £1,783,500.

The House of Lords had to consider how the discretion conferred on the courts by the Matrimonial Causes Act of 1973 should be exercised. The House of Lord dismissed the appeal of both Mr and Mrs White. This in turn meant that Mrs White was still entitled to the two-fifths as provided for by the court before.

Wives of wealthy men would use the Duxbury tables to calculate their "reasonable needs" for life, until *White v White*.[488] The Duxbury tables give the wife a capital sum based on an income need determined by the court if the parties fail to agree. The lump sum is arrived at on the basis that every year the wife will spend some of the capital and some of the interest earned, so that when she reaches the actuarial age at which it is assumed she would die, there will be no capital left.[489]

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[487] Bolch http://www.marilynstowe.co.uk/2014/07/31/important-family-law-cases-white-v-white-by-john-bolch/(Date of use: 12 June 2017).
[488] Stowe http://www.marilynstowe.co.uk/2009/12/29/white-v-white/(Date of use: 12 June 2017).
[489] Stowe http://www.marilynstowe.co.uk/2009/12/29/white-v-white/ (Date of use: 12 June 2017).

"When *White v White* came to court in 2000, it was welcomed by family lawyers who had been waiting for it on behalf of their female clients."[490]

Bolch states that there is a need to "temper justice with mercy", so that the outcome reflects a practical, common-sense approach to the case such that the ordinary man or woman in the street would think it fair. Many cases do deserve a 50-50 split, but many simply do not.[491]

3.6.4 The classification of redistribution of assets

Classification of a given factual situation is one of the necessary steps in the decision of a case having a foreign element. The problem of classification is one of the most complicated problems of private international law. [492]

The choice of law rule may sometimes be clear and established; however, it may be uncertain whether the matter disputed in a particular case falls within the category to which the rule applies.[493]

The English courts have powers to make orders for financial provisions on or after granting a decree of divorce whenever they have jurisdiction.[494] The reason for this is because in England there is no community of property regime; therefore to achieve a fair distribution upon divorce the courts need to make maintenance orders part and parcel of property redistribution.[495]

When the courts give property adjustment orders in terms of sections 24 and 25 of the Matrimonial Causes Act[496] one could question whether this forms part of the proprietary consequences of marriage or divorce matters. The property adjustment

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[490] Bolch http://www.marilynstowe.co.uk/2014/07/31/important-family-law-cases-white-v-white-by-john-bolch/ (Date of use: 12 June 2017).
[491] Bolch http://www.marilynstowe.co.uk/2014/07/31/important-family-law-cases-white-v-white-by-john-bolch/ (Date of use: 12 June 2017).
[492] Agarwal 2015 *VOR* 45.
[493] Oppong *Private international law in Commonwealth Africa* 3.
[494] Collins *et al Dicey, Morris & Collins* 1062; Fawcett and Carruthers *Private international law* 1050; Hill and Shúilleabháin *Clarkson & Hill's Conflict of laws* 495.
[495] Boele-Woelki, Braat and Sumner *European family law in action* 58.
[496] Matrimonial Causes Act of 1973.

orders may sometimes be in the form of property and at times in the form of a lump sum, the clean-break principle or in the form of periodical maintenance.

Financial provisions in English family law include periodical payments, lump-sum provisions and, inter *alia*, property adjustment orders.[497] The term "maintenance obligation" is used in the Maintenance Regulation,[498] which states that "the scope of this regulation should cover all maintenance obligations arising from a family relationship, parentage, marriage or affinity, in order to guarantee equal treatment of all maintenance creditors". For the purposes of this regulation, "maintenance obligation" should be interpreted autonomously.

Article 5(2) of the Brussels I Regulation[499] states that "(a) person domiciled in a Member State may in another Member State, be sued … in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties".[500] In the regulation, the concept "matters relating to maintenance" is not defined.[501] In order to determine whether an application falls within the scope of maintenance will depend on its purpose, whether it is intended to enable one spouse to provide for him or herself to ensure predetermined income.[502] Financial orders, whether periodical or lump sum, rank as maintenance orders if it is intended for the support of the spouse and therefore are governed by the Maintenance Regulation.[503]

Property adjustment orders do not fall within the scope of the Maintenance Regulation[504] if made in consequence of the dissolution of marriage.[505] However,

[497] Collins *et al Dicey, Morris & Collins* 1065.
[498] Maintenance Regulation (EC) No 4/2009.
[499] Brussels I Regulation: Council Regulation (EC) No 44/2001.
[500] Brussels I Regulation: Council Regulation (EC) No 44/2001.
[501] Fawcett and Carruthers *Private international law* 1056.
[502] Fawcett and Carruthers *Private international law* 1056.
[503] Fawcett and Carruthers *Private international law* 1057.
[504] Maintenance Regulation (EC) No 4/2009.
[505] Collins *et al Dicey, Morris & Collins* 1066; Fawcett and Carruthers *Private International law* 1057.

periodical payments between the former spouses are within the scope of maintenance and lump-sum payments will be treated similarly if they are in the place of periodical payments.[506] Further to this, one needs to take into account the needs or resources of the parties and not solely the money value of the divided property.[507]

3.7 Conclusion

The South African conflicts rules for the proprietary consequences of marriage and the classification of redistribution orders have been problematic over the years.[508] With South Africa having historical ties with English law, English private international law provides valuable comparative perspectives.

Unlike South Africa, England does not have a matrimonial property system.[509] It has been state above that the default matrimonial property system in England is described as a "separation of property with distribution by a competent authority".[510]

The law of domicile has the same historical basis as that of the South African law of domicile and at the present the same principles are similar in England and in South Africa.

Dissolution of marriage through the process of divorce in South Africa and England is similar. The grounds for divorce are the irretrievable breakdown of the marriage.[511] Both the South African courts and the English courts, where they have jurisdiction, are competent to dissolve a marriage and to further make provision for the division of assets upon divorce.

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[506] Collins *et al Dicey, Morris & Collins* 1066; Fawcett and Carruthers *Private international law* 1057.
[507] Collins *et al Dicey, Morris & Collins* 1066.
[508] *Lenferna v Lenferna* (120/13) [2013] ZASCA 204 (unreported); *Sadiku v Sadiku* Case no 30498/06 (unreported).
[509] Boele-Woelki *Matrimonial property law* 4.
[510] Rešetar 2008 *EJCL* 3; Boele-Woelki *et al Principles of European family law regarding property relations between spouses* 13.
[511] Jeffs "Divorce law reform research paper" 7.

The conflicting rule with regard to the proprietary consequences of marriage has been problematic for the South African courts, and if not reformed it will continue to be problematic. The English private international law had also been in the same position as the South African conflict of laws rules. As a result, the courts started to apply different rules when dealing with conflict of laws in marital property. The following has been suggested to the courts when deal with marital property that has a foreign element:

a) The parties may choose a governing law expressly or impliedly.[512]
b) Where the parties make no choice of law, the governing law is that of matrimonial domicile, where the parties are of the same domicile at the time of marriage.[513]
c) Where the parties are not of the same domicile at the time of marriage, the applicable law should be that of the domicile to which the parties and the marriage have the closest connections with, with equal weight being given to connections of each party.[514]

The solution has been accepted as being fair on both sexes and ensures that the governing law is appropriate.[515]

A second problem faced by South African private international law has been the classification of redistribution orders. Redistribution orders are uncertain as to which category the rule applies for.[516] South African courts have not been clear whether a redistribution order falls under maintenance or is a proprietary consequence of marriage.

In England it has been established that in order to determine whether an application falls within the scope of maintenance will depend on its purpose, whether it is intended to enable one spouse to provide for him or herself to ensure

[512] Collins *et al Dicey, Morris & Collins* 1467; Fawcett and Carruthers *Private international law* 1294.
[513] Collins *et al Dicey, Morris & Collins* 1465; Fawcett and Carruthers *Private International law* 1295.
[514] Collins *et al Dicey, Morris & Collins* 1465; Fawcett and Carruthers *Private international law* 1295.
[515] Collins *et al Dicey, Morris & Collins* 1465-1466.
[516] Oppong *Private international law in Commonwealth Africa* 3.

predetermined income.[517] Financial orders, whether periodical or lump sum, rank as maintenance orders if it is intended for the support of the spouse.[518]

[517] Fawcett and Carruthers *Private international law* 1056.
[518] Fawcett and Carruthers *Private international law* 1057.

CHAPTER 4: PRIVATE INTERNATIONAL LAW IN THE NETHERLANDS

4.1 Introduction

South Africa has a hybrid legal system which is characterised by constitutional supremacy and reinforced by uncodified common law, set in its history of diverse influences.[519] The South African private law was historically based on Roman-Dutch principles introduced by the first European settlers as mentioned in 1.1 above.[520] While Roman-Dutch law has influenced South African private law greatly, the Netherlands also provides a good case study for this dissertation.

The Netherlands is a founding member of the European Union.[521] As mentioned in 3.1 above, the EU is a unique economic and political union between twenty eight European countries.[522] The European Union is a member state of the Hague Conference on Private International Law (HCCH).[523] The EU is bound to the Hague Conference on Private International Law on the following conventions:[524] Convention on Choice of Court Agreements,[525] Convention on the International Recovery of Child Support and Other Forms of Family Maintenance[526] and Protocol on the Law Applicable to Maintenance Obligations.[527]

The Netherlands[528] is also a founding member of the Hague Conference on Private International Law.[529] The HCCH is a world organisation constituting of 83

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519 Cotton *The dispute resolution review* 578.
520 Cotton *The dispute resolution review* 578.
521 European Union https://europa.eu/european-union/about-eu/history/1945-1959_en (Date of use: 21 June 2017).
522 European Union https://europa.eu/european-union/about-eu/eu-in-brief_en (Date of use: 21 June 2017).
523 Hague Conference on Private International Law (hereinafter referred to as the HCCH); https://www.hcch.net/en/states/hcch-members/details1/?sid=220 (Date of use: 25 September 2017).
524 https://www.hcch.net/en/states/hcch-members/details1/?sid=220 (Date of use: 25 September 2017).
525 HCCH "Convention on Choice of Court Agreements".
526 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.
527 2007 Protocol on the Law Applicable to Maintenance Obligations.
528 https://www.hcch.net/en/states/hcch-members/details1/?sid=3 (Date of use: 25 September 2017).
529 Vlas 2010 *NILR* 169.

members representing all continents.[530] The HCCH is described as the world organisation for cross-border cooperation in civil and commercial matters.[531]

The HCCH can also be described as "the melting pot of different legal traditions; it develops and services multilateral legal instruments, which respond to global needs".[532] The HCCH was formed in 1893 with the objective to "work for the progressive unification of the rules of private international law"[533]. The role of the HCCH is to harmonise conflict of laws across its members by the implementation of multilateral conventions within private international law.[534]

The conference has developed 40 international conventions.[535] A number of them are in force, such as the law applicable to maintenance obligations[536] and the convention on the law applicable to matrimonial property regimes.[537] These will be expanded below.

Social trends and cross-border mobility have led to different parties moving from place to place.[538] As a result, there is a growth in the internalisation of family law.[539] Belgium and the Netherlands have been international leaders in the legal accommodation of new family forms, including same-sex partnering relationships.[540]

Family law has many legal consequences for parties. South African family law principles or English family law principles may not be the same as the Dutch family law. As a result, the legal consequences in relation to matrimonial property law are applied different from country to country. Similarly, the approach to conflict of laws is different from country to country.

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[530] https://www.hcch.net/en/about (Date of use: 25 September 2017).
[531] https://www.hcch.net/en/home (Date of use: 25 September 2017).
[532] https://www.hcch.net/en/about (Date of use: 25 September 2017).
[533] Article 1 of the Statute of the Hague Conference on Private International Law 1955.
[534] https://www.hcch.net/en/about (Date of use: 25 September 2017).
[535] https://www.hcch.net/en/instruments/conventions (Date of use: 25 September 2017).
[536] 2007 Protocol on the Law Applicable to Maintenance Obligations.
[537] https://www.hcch.net/en/instruments/conventions (Date of use: 25 September 2017).
[538] Boele-Woelke and Jänterä-Jareborg *Initial results of the work of the CEFL in the field of property relations between spouses* 51.
[539] Gaertner 2006 *JPIL* 99.
[540] Swennen *The changing concept of 'family' and challenges for family law in the Benelux countries* 5.

This chapter will focus on similar aspects of chapters two and three above. In the same way, this chapter will give a description of the Dutch matrimonial property system, reflect on the current connecting factor for proprietary consequences of marriage in Dutch law, the law of domicile, and the classification of redistribution of assets upon divorce will be addressed.

4.2 Dutch matrimonial property

4.2.1 Introduction

In the past, Dutch family law was indirectly based on a model in which the man's duty was to provide for the family and a woman's duty was to take care of the children and household.[541] The concept of marriage brought roles or women and men.[542] During the last three decades, the legal position has improved, with changes in the Dutch Civil Code, and as a result Dutch family law is now gender-neutral.[543]

Like many jurisdictions, when couples get married they have the liberty to choose which matrimonial property regime will govern their marriage. The parties will be governed by a set of legal rules resulting from their marriage towards each other and their creditors.[544]

Since the beginning of the 21st century, Dutch family law has been considered to be both developing and straying behind at the same time.[545] It can been said that Dutch family law is unique in two ways;[546] on the one hand, the Netherlands became the first country in the world where two persons of the same sex can enter into a marriage.[547] On the other hand, the Netherlands is the only country in

[541] Schrama *Marriage and alternative status relationships* 15.
[542] Schrama *Marriage and alternative status relationships* 15.
[543] Schrama *Marriage and alternative status relationships* 15.
[544] EU *Green paper* 2.
[545] Antokolskaia and Boele-Woelki 2002 *EJCL* 64.
[546] Antokolskaia and Boele-Woelki 2002 *EJCL* 64.
[547] Antokolskaia and Boele-Woelki 2002 *EJCL* 64; Schrama *Marriage and alternative status relationships in the Netherlands* 14.

Europe where the universal community of property is the applicable legal matrimonial property regime.[548]

In recent years, calls by critics for a change in the law with regard to the universal community of property provoked a great deal of political debate.[549] Following the calls, a new bill has been tabled in Parliament under which a limited community of property will become the new standard and thus replacing the current universal community of property. [550]

On 28 March 2017, the Upper House of the Dutch Parliament adopted a proposal first submitted in 2014, providing for a change in the law on matrimonial property.[551] The new regime is set to take effect in 2018.[552]

The new law will entail that matrimonial community of property will consist exclusively of goods acquired by or on behalf of both spouses during the course of the marriage.[553] Gifts, inheritances or any pre-existing debts will be regarded as being personal and will therefore not form part of the community.[554]

Currently, under Dutch law, one may marry either in community of property or under the terms of a marital contract.[555] There is a rebuttable assumption that marriage is governed by marriage in community of property, that total property is shared by the spouses.[556]

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[548] Antokolskaia and Boele-Woelki 2002 *EJCL* 64; Miles and Scherpe *The legal consequences of dissolution: property and financial support between spouses* 143.
[549] Maric https://rwv.nl/en/news/2017/02/new-dutch-matrimonial-property-regime-a-limited-community-of-property (Date of use: 25 September 2017).
[550] Maric https://rwv.nl/en/news/2017/02/new-dutch-matrimonial-property-regime-a-limited-community-of-property (Date of use: 25 September 2017).
[551] Blomjous https://rwv.nl/en/news/2017/03/new-dutch-law-on-matrimonial-property-puts-an-end-to-the-community-of-property (Date of use: 25 September 2017).
[552] Blomjous https://rwv.nl/en/news/2017/03/new-dutch-law-on-matrimonial-property-puts-an-end-to-the-community-of-property (Date of use: 25 September 2017).
[553] Maric https://rwv.nl/en/news/2017/02/new-dutch-matrimonial-property-regime-a-limited-community-of-property (Date of use: 25 September 2017).
[554] Maric https://rwv.nl/en/news/2017/02/new-dutch-matrimonial-property-regime-a-limited-community-of-property (Date of use: 25 September 2017).
[555] https://advocare.home.xs4all.nl/folder57.htm (Date of use: 01 August 2017).
[556] https://advocare.home.xs4all.nl/folder57.htm (Date of use: 01 August 2017).

4.2.2 Universal community of property

As soon as spouses are married, by operation of law,[557] the default matrimonial property system in Netherlands is universal community of property.[558] This means that assets belong to both spouses in equal shares.[559] While a new bill has been tabled in Parliament under which a limited community of property will become the new standard.[560] For purposes of the research, before the new legislation comes into effect, the matrimonial property system in the Netherlands will be regarded as the universal community of property.

Both spouses are required to contribute to household costs. These costs include the physical and mental wellbeing of the parties and their children.[561] Both spouses are liable for obligations entered into by the other for the benefit of running the household.[562]

In some instances,[563] a spouse requires the written consent of the other spouse with regard to the following transactions that have an impact on the household:

a) contracts for disposal, mortgage or usufruct, and
b) the discontinuation of the usufruct.[564]

4.2.3 Assets and liabilities of matrimonial property

In the Netherlands, there are three different categories of assets: [565]

a) the community property containing both assets and debts;
b) personal property and personal debts of spouse A; and

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[557] Boele-Woelki and Braat *The Netherlands* 233.
[558] Boele-Woelki *et al Principles of European family law regarding property relations between spouses* 16; De Jong and Pintens 2015 (2) *TSAR* 366; https://www.government.nl/topics/family-law/marriage-registered-partnership-and-cohabitation-agreements (Date of use: 20 September 2017).
[559] Boele-Woelki *et al Principles of European family law regarding property relations between spouses* 162; Art 1:131 para 1 of the Dutch Civil Code.
[560] Marichttps://rwv.nl/en/news/2017/02/new-dutch-matrimonial-property-regime-a-limited-community-of-property (Date of use: 25 September 2017); see also 4.1 above.
[561] Boele-Woelki and Braat *The Netherlands* 231.
[562] Boele-Woelki and Braat *The Netherlands* 231.
[563] Except in terms of the Dutch Civil Code article 1:88 paragraph 2, which states that where a legal transaction must be performed on the grounds of the rule of law or preceding legal transactions, consent is not needed.
[564] Boele-Woelki and Braat *The Netherlands* 232.
[565] Boele-Woelki and Braat *The Netherlands* 233.

c) Personal property and personal debts of spouse.

Community of property comprises all assets and debts that the spouses both had before and after entering into the marriage part of the marital property.[566] It is presumed that all assets belong to joint property of the spouses. If a spouse claims that an asset is personal property, this has to be proven by him or her.[567] How a spouse proves whether the asset is community property or personal property depends on the type of asset.[568]

Article 1:94 of the Dutch Civil Code provides a list of assets that may be personal assets, which include the following: [569]

a) gifts or inheritance and a testator or donor has provided that these assets will not fall within the community of property by means of an exclusion clause;
b) assets which have a close affinity with one of the spouses;
c) the right of usufruct; and
d) pension rights covered by the Pension Rights Equalisation (Separation) Act.[570]

4.2.4 Marriage in terms of marital contract

Similar to South African law, spouses who do not wish to be married in community of property need to enter into a marital contract.[571] Spouses may choose a statutory matrimonial property regime through a prenuptial or postnuptial contract.[572]

A marital contract is a way for one party to not be liable for another party's debts. The antenuptial or postnuptial contract is binding if it complies with necessary requirements and cannot violate obligatory rules, in particular public policy.[573]

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[566] https://advocare.home.xs4all.nl/folder57.html (Date of use: 01 August 2017).
[567] Boele-Woelki and Braat *The Netherlands* 233.
[568] Boele-Woelki and Braat *The Netherlands* 233.
[569] Boele-Woelki and Braat *The Netherlands* 234.
[570] Pension Rights Equalisation (Separation) Act 1994.
[571] https://advocare.home.xs4all.nl/folder57.htm (Date of use: 01 August 2017).
[572] Boele-Woelki *et al Principles of European family law regarding property relations between spouses* 93; Article 1:114 of the Dutch Civil Code.
[573] Boele-Woelki *et al Principles of European family law regarding property relations between spouses* 10; Article 93 of the Dutch Civil Code.

4.2.5 Requirements of marital contracts

The requirements for antenuptial contract are that it must be in writing and must be drawn up by a notary.[574] For postnuptial contracts it is assumed that spouses are under the duty to disclose all assets and debts.[575] In principle, if the spouses wish to change their matrimonial property regime during their marriage, they need to get permission from the court.[576] The courts will investigate whether the creditors of the spouses will not be placed in a prejudicial position with regard to their claims. Only when the court is satisfied, the permission will be granted.[577]

The Dutch matrimonial property system has some similarities to the South African matrimonial system in that the default matrimonial property system is in community of property. The Dutch matrimonial system has been criticised that it is regressive as compared to other European countries. The current Dutch matrimonial property provides a set of rules and the legal effects with regard to the marital property of spouses.

4.3 The law of domicile in the Netherlands

The law of domicile is not a concept unique to South African law. It is a concept that is widely used throughout the world. It is therefore important to study the principles of domicile in terms of Netherlands' principles. Book 1 of the Dutch Civil Code makes provision for the law of persons and family. Articles[578] 1:10 to 1:15 make provision for the legal aspects with regard to domicile. These legal provisions are addressed below.

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[574] Boele-Woelki *et al Principles of European family law regarding property relations between spouses* 120; Article 1:115 par 1 of the Dutch Civil Code.
[575] Boele-Woelki *et al Principles of European family law regarding property relations between spouses* 124.
[576] Boele-Woelki, Cherednychenko and Coenraad *Grounds for divorce and maintenance between former spouses* 11; Article 1:119 of the Dutch Civil Code.
[577] Boele-Woelki, Cherednychenko and Coenraad *Grounds for divorce and maintenance between former spouses* 11.
[578] Dutch Civil Code.

4.3.1 Domicile of a natural person

In terms of Article 1:10[579] the domicile of a natural person is situated at his habitual residence or in the absence of a habitual residence, the domicile will be at the place where he actually stays.

4.3.2 Loss and change of domicile

Article 1:11[580] makes provision for the loss and change of domicile. The article states as follows:

1) "A natural person loses his habitual residence by actions showing his intention to abandon it.
2) A natural person is presumed to have moved his habitual residence when he has notified the appropriate municipal authorities … that he has moved to another address."

4.3.3 Dependent domicile of persons without full legal capacity

Article 1:12[581] makes provision for dependent domicile of persons without full legal capacity. The article state as follows:

1) The person who exercises authority over a minor will have the same address and domicile of the minor.
2) Where both parents exercise authority over a minor child jointly and yet without the same domicile, the child's domicile will be located at the address of the domicile of the parent with whom it actually stays or where it stayed most recently.
3) The domicile of an adult placed under curatorship is located at the same place as the domicile of the person who has been appointed by the court as the adult's legal curator.
4) The domicile of the legal administrator will be, for all matters related to this fiduciary administration, the domicile of the property of a person put under fiduciary administration.
5) Where a domicile pf a person has been assigned by law as the domicile of another person, when this person dies or loses his authority or capacity, then the domicile of this other person will continue to be located at his domicile until the other person has obtained a new domicile.

[579] Article 1:10 of the Dutch Civil Code.
[580] Article 1:11 of the Dutch Civil Code.
[581] Article 1:12 of the Dutch Civil Code.

4.3.4 Elected domicile

Article 1:15[582] makes provision for elected domicile. Article 1:15 states as follows:

> "A person may only elect a domicile different than his real domicile when the law forces him to do so or when his choice for such an elected domicile is made by written agreement or by an agreement concluded by electronic means and it relates only to one or more specific juridical acts or legal relationships and there is a reasonable interest in having an elected domicile."

Van Rooij reiterates the words of Lagarde that domicile is one of the most elusive and indefinable notions of our legal system and questions whether these words are applicable to the notion of domicile as a connecting factor.[583] He then explains that domicile is flexible with regard to private international law matters in the Netherlands. [584]

A natural person's place of domicile is the place where he or she is officially registered according to the municipal personal data records.[585] The official address registered with the municipality does not have to be the address where the registered person actually lives or resides.[586]

A natural person's habitual residence is the place where he or she has his or her home. This is the place where the person usually lives and sleeps there, where he or she returns to it in general after work or other places.[587] As a rule, a person habitually resides at the same address that he or she is officially registered to. Therefore, the official domicile is also the habitual residence based and established on actual facts.[588]

The words "domicile" and "habitual residence" may therefore be regarded as synonyms, at least within the Dutch legal order, in order to determine which court has territorial jurisdiction. [589]

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[582] Article 1:15 of the Dutch Civil Code.
[583] Van Rooij 1975 *NILR* 165.
[584] Van Rooij 1975 *NILR* 182.
[585] http://www.dutchcivillaw.com/jurisdiction/legalsystem033.htm (Date of use: 16 June 2017).
[586] http://www.dutchcivillaw.com/jurisdiction/legalsystem033.htm (Date of use: 16 June 2017).
[587] http://www.dutchcivillaw.com/jurisdiction/legalsystem033.htm (Date of use: 16 June 2017).
[588] http://www.dutchcivillaw.com/jurisdiction/legalsystem033.htm (Date of use: 16 June 2017).
[589] http://www.dutchcivillaw.com/jurisdiction/legalsystem033.htm (Date of use: 16 June 2017).

When treaties or European regulations are applicable, the meaning of the term "habitual residence", as used in that international regulation, is significant.[590]

A question is then asked whether the words "habitual residence" or "domicile" will play a pivotal role in in determining the connecting factor with regards to proprietary consequences of marriage. As state above,[591] a connecting factor can be described as facts that connect an occurrence or transaction with a particular law or jurisdiction. An examination on the connecting factor with regard to matrimonial property will be examined below.

4.4 Divorce and proprietary consequences

4.4.1 Introduction

The dissolution of marriage can occur in the following manner: [592]

a) death of a spouse;
b) divorce;
c) legal separation;
d) termination of a registered partnership by mutual consent;
e) dissolution of a registered partnership;
f) uncertainty of a spouses existence;
g) a court order terminating the community; or
h) as a result of a subsequent marital agreement.

For the purposes of this chapter, I will only discuss the legal effects of divorce on marital property. Since 1 October 1971, divorce in the Netherlands can only be granted on the ground of the irretrievable breakdown of the marriage.[593] Article 1:151 states that "(a) divorce at the request of one of the spouses shall be decreed if the marriage has been irretrievably broken down". [594]

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[590] http://www.dutchcivillaw.com/jurisdiction/legalsystem033.htm (Date of use: 16 June 2017).
[591] See 1.3 above.
[592] Boele-Woelki and Braat *The Netherlands* 234.
[593] Boele-Woelki, Cherednychenko and Coenraad *Grounds for divorce and maintenance between former spouses* 1.
[594] Boele-Woelki, Braat and Sumner *European family law in action* 94.

4.4.2 Division of assets upon divorce

Special clauses exist in notarial practice which excludes situations where a spouse would have to leave a marriage empty-handed due to a marital property agreement, excluding the applicable community regime.[595]

Before or after divorce proceedings, parties may enter into separation agreements, so-called “divorce covenants”.[596]

4.4.3 Community of property

Upon divorce, each spouse is entitled to half of the marital property, except when it has been determined otherwise in terms of a marital contract or settlement agreement. [597]

A maintenance agreement between the spouses may be entered into either before the divorce decree is given or afterwards.[598] The agreement must be regulated and state the amount one of them will be obliged to pay towards the other for maintenance after the divorce.[599]

In the Netherlands there is no special legislation on the clean-break principle.[600] This is based on the possibility of claiming maintenance after the dissolution of the marriage, and maintenance payments are usually fulfilled in the form of periodic payments.[601]

4.4.4 Dissolution in terms of a marital contracts

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[595] Boele-Woelki *et al Principles of European family law regarding property relations between spouses* 146.
[596] Boele-Woelki and Braat *The Netherlands* 250.
[597] Boele-Woelki and Braat *The Netherlands* 250.
[598] Article 1:158 of the Dutch Civil Code.
[599] Article 1:158 of the Dutch Civil Code.
[600] Boele-Woelki and Braat *The Netherlands* 242; Article 1:402 (2) of the Dutch Civil Code; Boele-Woelki, Braat and Sumner *European family law in action* 229.
[601] Boele-Woelki and Braat *The Netherlands* 242.

A marital contract may be concluded by the prospective spouses before their marriage (prenuptial agreement) or during their marriage (postnuptial agreement).[602]

As stated above[603] spouses have an equal share in the dissolved marital community of property.[604] The only time where spouses will not be bound by the universal community of property is if the spouses have agreed differently by means of a nuptial agreement or by means of a written agreement between them, entered into in anticipation of the dissolution of their marital community of property for another reason than the death of one spouses or the termination of a nuptial agreement.[605]

4.5 The connecting factor for proprietary consequences of marriage

The growing number of international couples has brought with it an increase in the number of divorces with a foreign element.[606] In most of the cases, a question that is asked is which law should be applied regarding the various disputes regarding international marriages.[607] In order to develop a proper law on matrimonial property issues, the current connecting factor in the Netherlands must be studied.

4.5.1 The history of the connecting factor

For twenty-five years, Belgium, Luxembourg and the Netherlands had tried to reach an agreement on a uniform Benelux code of private international law. [608] The decision to go ahead with national codification of private international law was taken at the end of the 1970s.[609] In 1951, a first draft was drawn up and a final version was drafted in the form of a convention in 1969.[610] These texts, however,

[602] Article 1:114 of the Dutch Civil Code.
[603] See par 4.5.2.1above.
[604] Article 1:100(1) of the Dutch Civil Code.
[605] Article 1:100(1) of the Dutch Civil Code.
[606] Gaertner 2006 *JPIL* 99.
[607] As discussed in chapters 1, 2 and 3 above.
[608] Boele-Woelki and Van Iterson 14 (3) *EJCL* 1.
[609] Boele-Woelki and Van Iterson 14 (3) *EJCL* 2.
[610] Boele-Woelki and Van Iterson 14 (3) *EJCL* 2.

failed and this was announced in a formal letter addressed to the Dutch Parliament in 1976.[611]

The denouncement of five "old" Hague conventions of 1902 and 1905 concerning marriage, divorce, matrimonial property regimes, custody and guardianship was a step geared towards new efforts for the codification of private international law.[612]

The HCCH adopted two conventions in 1905 and 1978,[613] and determined the law which would govern the marital property between spouses.[614] These conventions based nationality as a connecting factor.[615] The connecting factor was problematic as it gave priority to the husband's national law in the event where spouses' nationalities differed.[616] Netherlands, together with other contracting parties, rejected the convention on account of article 2, which concludes that the national law of the husband will apply.[617]

In 1992, the Hague Convention on the Law Applicable to Matrimonial Property Regimes 1978 came into force, which focuses on law applicable to marital property.[618] Since 1 September 1992, the Hague Convention on the Law Applicable to Matrimonial Property Regimes has governed the conflict of laws rules on matrimonial property law in the Netherlands.[619]

Chelouche v Van Leer[620] can be stated as the case that brought about change with regard to the connecting factor for the proprietary consequences of marriage. The case, heard in the Supreme Court, can be summarised as follows: A Dutch man, who in 1949 was an American citizen, was nationalised and had residence in

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[611] Boele-Woelki and Van Iterson 14 (3) *EJCL* 2.
[612] Boele-Woelki and Van Iterson 14 (3) *EJCL* 2.
[613] Boele-Woelki *et al Principles of European family law regarding property relations between spouses* 19.
[614] Boele-Woelki *et al Principles of European family law regarding property relations between spouses* 19.
[615] Boele-Woelki and Van Iterson 14 (3) *EJCL* 2.
[616] Boele-Woelki and Van Iterson 14 (3) *EJCL* 2.
[617] Boele-Woelki *et al Principles of European Family law regarding property relations between spouses* 19; Reinhartz 2009 *TSAR* 124.
[618] Boele-Woelki *et al Principles of European family law regarding property relations between spouses* 19; Reinhartz 2009 *TSAR* 124.
[619] Reinhartz 2009 *TSAR* 124; https://advocare.home.xs4all.nl/folder57.htm (Date of use: 01 August 2017).
[620] *Chelouche v van Leer* HR 1976 NJ 275 (hereinafter referred to as the *Chelouche* case).

Chicago, Illinois. He wedded a woman of French nationality in March 1960 in London. The marriage did not affect the nationality of the woman. [621]

The marriage went by and the wife applied to the court in Amsterdam for a declaratory order, before divorce proceedings, against her husband (who was very powerful), to apply Dutch law to the proprietary consequences of their marriages. The declaratory order would announce their marriage in terms of the Dutch universal system of community of property. [622]

The court did not regard the law of the Netherlands for various reasons. The courts applied the law of the USA (Illinois), according in terms of which the law entered between the parties had not entered into a community of property, and consequently, the claim of the woman was rejected. [623]
As a result, the High Court took the opportunity to formulate a new referral rule for private international law on proprietary consequences of marriage. At first, the court proposed that future spouses should have the freedom to appoint themselves where their right to property have been revoked. [624] If the spouses have not exercised their right of choice, preference should be given to a common nationality as factor at the time of the marriage. [625]

The *Chelouche* case gave birth to the connecting factor for the proprietary consequences of marriage as follows:

a) the law the spouses have been designated;
b) the law of the state of the common nationality of spouses;
c) the law of the state in which both spouses establish their first habitual residence after the marriage;
d) the law of the state taking all circumstances into account; and
e) their matrimonial property regime is most closely connected.[626]

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[621] Strikwerda *Inleiding tot het Nederlandse internationaal privaatrecht* 127.
[622] Strikwerda *Inleiding tot het Nederlandse internationaal privaatrecht* 127.
[623] Strikwerda *Inleiding tot het Nederlandse internationaal privaatrecht* 127.
[624] Strikwerda *Inleiding tot het Nederlandse internationaal privaatrecht* 127-128.
[625] Strikwerda *Inleiding tot het Nederlandse internationaal privaatrecht* 128.
[626] Reinhartz 2009 *TSAR* 125.

After the *Chelouche* case, the rules on choice of law on proprietary consequences of marriage were formulated more precisely in section 12.3 and section 13 of the *Wet Conflictenrecht Huwelijksvermogensregime*, the law which accompanies the convention of 1978.[627]

4.5.2 Current connecting factor

Marriages with an international element do not automatically fall within the scope of the Dutch matrimonial property law.[628] As described above[629], the rules of private international law determine which law is applicable, and each country has its own rules relating to private international law. [630] In the Netherlands, the rules of Dutch private international law apply.[631]

At present the Hague Convention on the Law Applicable to Matrimonial Property Regimes [632]governs the conflict of laws with regard to marital property. Article 3 of the Convention on the Law Applicable to Marital Property Regimes states that the matrimonial property regime is governed by the internal law designated by the spouses before marriage. This means that the choice with regard to the governance of the matrimonial property will lie with the spouses before the marriage in the form of a contract.

When spouses choose which laws will govern their matrimonial property, they may only choose one of the following laws:[633]

a) the law of any state in which either spouse is a national at the time of designation;
b) the law of the state in which either spouse has his habitual residence at the time of designation; or

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627 Reinhartz 2009 *TSAR* 125.
628 https://advocare.home.xs4all.nl/folder57.htm (Date of use: 01 August 2017).
629 See 2.2 above.
630 https://advocare.home.xs4all.nl/folder57.htm (Date of use: 01 August 2017).
631 https://advocare.home.xs4all.nl/folder57.htm (Date of use: 01 August 2017).
632 The Hague Convention on Law Applicable to Matrimonial Property Regimes available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=87 (Date of use: 01 August 2017).
633 Article 3 of the Convention on the Law Applicable to Matrimonial Property Regimes; Strikwerda *Inleiding tot het Nederlandse internationaal privaatrecht* 135.

c) the law of the first state where one of the spouses establishes a new habitual residence after marriage.

The law chosen by the spouses will apply to the whole of their property. Where the spouses have not chosen a law that will apply to their property, they may elect the law of the place where these immovables are situated, with respect to all or some of the immovable. They may also elect that any immovables that may be subsequently acquired be governed by the law of the place where such immovables are located.[634]

Article 4 of the Hague Convention on the Law Applicable to Matrimonial Property Regimes makes provision for when spouses have not elected the applicable law for their marital property. Where spouses have not selected the applicable law to govern their matrimonial property regime before marriage, the following rules will apply:

The internal law of the State in which both spouses establish their first habitual residence after marriage will govern the matrimonial property regime.[635] The matrimonial property regime is governed by the internal law of the state of the common nationality of the spouses:

a) where a declaration in terms of Article 5 has been made by that state and its application to the spouses is not excluded by the provisions of the second paragraph of that article; [636]
b) where that state is not a party to the convention and according to the rules of private international law of that state its internal law is applicable, and the spouses establish their first habitual residence after marriage [637]_
    i) in a state which has made the declaration provided for in article 5, or

[634] Article 3 of the Convention on the Law Applicable to Matrimonial Property Regimes.
[635] Article 4 of the Convention on the Law Applicable to Matrimonial Property Regimes.
[636] Article 4 of the Convention on the Law Applicable to Matrimonial Property Regimes.
[637] Article 4 of the Convention on the Law Applicable to Matrimonial Property Regimes.

ii) in a state which is not a party to the convention and whose rules of private international law also provide for the application of the law of their nationality; or

c) where the spouses do not establish their first habitual residence after marriage in the same state. [638]

If the spouses do not have their habitual residence in the same state, nor have a common nationality, their matrimonial property regime will be governed by the internal law of the state with which, taking all circumstances into account, they are most closely connected.[639]

Book 10, Article 10:45 makes provision for the registration that foreign law is applicable to the marital property regime. The article states as follows:

> A spouse whose marital property regime is governed by foreign law may request for the registration of a notarial deed in the public register meant in Article 1:116, containing a statement that the marital property regime is not governed by Dutch law.

4.6 Classification

As mentioned above,[640] the international movement of parties and cross-border relationships often leads to the question of which connecting factor should be applied to determine the applicable law? In terms of private international law rules, different laws apply according to the classification of the legal principle.

A distinction is often made between divorce matters, which are usually governed by *lex fori*[641] and proprietary consequences of marriage, which are governed by different principles dependent on the country.

In the Netherlands, the law that is applicable to the matrimonial property regime does not govern all aspects that are related to all divorce issues of the parties.[642]

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[638] Article 4 of the Convention on the Law Applicable to Matrimonial Property Regimes.
[639] Article 4 of the Convention on the Law Applicable to Matrimonial Property Regimes.
[640] See 4.1 above.
[641] Miles and Scherpe *The future of family property in Europe* 431.
[642] Reinhartz 2009 *TSAR* 127.

Maintenance can be classified as a divorce matter, which is governed by the *lex fori*.[643] At times, there is confusion where the maintenance is paid as a lump sum or as periodical payment. The confusing element is whether, where maintenance is paid as a lump sum in terms of the clean-break principle, if it will still qualify as maintenance.[644]

It is therefore important to find a classification for payment of maintenance in terms of the clean-break principle and whether the applicable laws will be governed by the *lex fori* or another provision for matrimonial property.

4.6.1 Classification of redistribution of assets upon divorce

There is no express definition of maintenance in the Brussels I Regulation or the Hague Protocol on the Law Applicable to Maintenance Obligations.[645] While there is no express definition for maintenance, a unanimous consensus for a definition of maintenance has been reached.[646]

Maintenance can be defined as securing the dependent creditors' fundamental needs and cost of living from the debtor's side. Further, there is a need by the creditor to receive and the debtor is in a financial position to comply.[647]

Based on the definition of maintenance, it can be said that the following requirements should be met in order to receive a maintenance order:

a) there should be fundamental need and cost of living necessity by the creditor/requestor; and
b) that the debtor is in a financial position to comply with the creditors' needs.

4.6.2 Antonius van den Boogaard v Paula Laumen

In *Antonius van den Boogaard v Paula Laumen,*[648] an essential issue before the District Court in Amsterdam[649] was on the classification of an order for the

[643] Miles and Scherpe *The future of family property in Europe* 431.
[644] Magnuss and Mankowski *European commentaries on private international law* 169.
[645] Magnuss and Mankowski *European commentaries on private international law* 169.
[646] Magnuss and Mankowski *European commentaries on private international law* 169.
[647] Magnuss and Mankowski *European commentaries on private international law* 169.

payment of a lump sum made by the court for the purposes of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in civil and commercial Matters.[650]

The facts are as follows: The parties were married in the Netherlands in 1957 in terms of universal community of property. In 1980, they entered into a postnuptial contract, in the Netherlands, which altered their matrimonial regime into one of separation of goods. In 1982, they moved to London. The High Court dissolved the marriage and also dealt with an application made by Miss Laumen for full ancillary relief.[651]

Since the wife sought a clean break between herself and her husband, the English court awarded her a lump sum payment so that periodic payments of maintenance would be avoided. It also held that the Netherlands postnuptial contract was of no relevant for the purposes of its decision.[652]

The High Court set the total amount which Ms Laumen should be awarded in order to provide for herself at £875 000. Part of that amount, £535 000, was covered by her own funds, by the sale of moveable property and by the transfer of immovable property.[653] For the rest, the English court ordered Mr Van den Boogaard to pay Ms Laumen a lump sum of £340 000, to which was added £15 000 to meet the costs of earlier proceedings.[654] By an application lodged on 14 April 1992 at the Arrondissementsrechtbank in Amsterdam, Ms Laumen sought enforcement of the English judgment, relying on the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (hereinafter "the Hague Convention"). The President of the Arrondissementsrechtbank granted that application.[655]

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[648] *Antonius van den Boogaard v Paula Laumen* Case C-220/95.
[649] *Antonius van den Boogaard v Paula Laumen* Case C-220/95.
[650] Jacobs http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61995CC0220 (Date of use: 20 July 2017).
[651] *Antonius van den Boogaard v Paula Laumen* Case C-220/95 [I 1178].
[652] *Antonius van den Boogaard v Paula Laumen* Case C-220/95 [I 1179].
[653] *Antonius van den Boogaard v Paula Laumen* Case C-220/95 [I 1179].
[654] *Antonius van den Boogaard v Paula Laumen* Case C-220/95 [I 1179].
[655] *Antonius van den Boogaard v Paula Laumen* Case C-220/95 [I 1179].

On 19 July 1993 Mr Van den Boogaard appealed against the grant of leave to enforce. The Arrondissementsrechtbank, which had jurisdiction to hear and determine that appeal, was uncertain whether the High Court's judgment of 25 July 1990 was to be classified as a "judgment given in matters relating to maintenance", in which case leave to enforce would be properly granted, or whether it was to be classified as a "judgment given in a matter relating to rights in property arising out of a matrimonial relationship", in which case the Hague Convention could provide no basis for enforcement.[656]

The Amsterdam court considered that the High Court's judgment had such consequences for the parties' relations with regard to property rights that it could not be regarded as a "decision in respect of maintenance obligations" within the meaning of article 1 of the Hague Convention. It therefore considered that enforcement not to be granted on the basis of that convention. [657] The court then went on to consider whether the Brussels Convention could provide a basis for granting leave for enforcement.[658]

It was stated that where a provision rendered in court proceeding is designed to enable one spouse to provide for him or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the decision will be concerned with maintenance.[659] Maintenance will therefore fall within the scope of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.[660]

Where the provision awarded is only concerned with dividing property between the spouses, the decision will be concerned with rights to property arising out of a matrimonial relationship and will therefore not be enforceable under the Brussels Convention.[661]

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[656] *Antonius van den Boogaard v Paula Laumen* Case C-220/95 [I 1180].
[657] *Antonius van den Boogaard v Paula Laumen* Case C-220/95 [I 1179].
[658] *Antonius van den Boogaard v Paula Laumen* Case C-220/95 [I 1179].
[659] *Antonius van den Boogaard v Paula Laumen* Case C-220/95 [I 1184].
[660] *Antonius van den Boogaard v Paula Laumen* Case C-220/95.
[661] *Antonius van den Boogaard v Paula Laumen* Case C-220/95.

The court held that a decision which has both matrimonial property issues and maintenance issues may[662] be enforced in part, if it clearly shows the aims to which the different parts of the legal provision correspond.[663] It was also held that a decision rendered in divorce proceedings ordering payment of a lump sum and transfer of ownership in certain property by one party to his or her former spouse must be regarded as relating to maintenance and therefore as falling within the scope of the Brussels Convention if its purpose is to ensure the former spouse's maintenance.[664]

4.6.3 Rights to property arising from a matrimonial relationship

Rules for maintenance after divorce in the Netherlands are contained in articles 1:157 to 1:160 of the Dutch Civil Code.[665] When granting a divorce, the judge may decide to award maintenance to a former spouse at his or her request.[666] Maintenance can be requested where the former spouse does not have sufficient funds to maintain her or himself or cannot reasonably be expected to be able to gain such income.[667]

It is not relevant to determine whether maintenance is a lump sum payment or a periodical payment, either weekly, monthly or annually.[668] The choice of mode of payment is immaterial; this does not change the objective pursued.[669]

The rules relating to maintenance are not connected to the rules relating to matrimonial property. The judge may, however, take into consideration the rules relating to matrimonial property when making a decision on maintenance.[670]

A distinction should be made as to whether the redistribution of assets is pursued for past contributions or future maintenance of a spouse. The objective

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[662] In accordance with article 42 of the Brussels Convention.
[663] *Antonius van den Boogaard v Paula Laumen* Case C-220/95.
[664] *Antonius van den Boogaard v Paula Laumen* Case C-220/95 at par 22.
[665] Boele-Woelki, Braat and Sumner *European family law in action* 5.
[666] Article 1:157 of the Dutch Civil Code.
[667] Boele-Woelki, Braat and Sumner *European family law in action* 49.
[668] Magnuss and Mankowski *European commentaries on private international law* 169-170.
[669] Magnuss and Mankowski *European commentaries on private international law* 169.
[670] Boele-Woelki, Braat and Sumner *European family law in action* 61.

of the redistribution of assets will determine whether the lump sum will be characterised as a divorce matter or matrimonial property matter.

4.6.3.1 Lump sum as maintenance

Where the receiver has no earning power, the lump sum is awarded in the context of a clean break as a substitution of periodical payments for the receiving spouse, in the nature of maintenance.[671]

Where a lump sum is paid in a contractual nature and its dependency is for the requestor's needs, this will be classified as maintenance.[672]

4.6.3.2 Lump sum as a division of property

Where both parties are earning well, an order awarding a lump sum will frequently be intended as a division of assets rather than maintenance. It will concern "rights in property arising out of a matrimonial relationship".[673]

Where a lump-sum payment applies to redistribution of assets solely concerned with the dividing of property between spouses, this will be concerned with rights in property arising out of a matrimonial relationship. However, where the redistribution of property is aimed at supporting the needs and financial support of the requestor, it will be classified as maintenance. [674]

4.6.6.3 Combined orders

In some scenarios there will unavoidably be lump-sum orders that fall somewhere in between maintenance and property division. Such orders may show the attributes of both maintenance and property division, with a proportion intended to ensure maintenance and the remainder intended to effect a division of the matrimonial property.[675]

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[671] Jacobs http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61995CC0220 (Date of use: 20 July 2017).
[672] Magnuss and Mankowski *European commentaries on private international law* 169.
[673] Jacobs http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61995CC0220 (Date of use: 20 July 2017).
[674] Magnuss and Mankowski *European commentaries on private international law* 169.
[675] Jacobs http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61995CC0220 (Date of use: 20 July 2017).

If a court were to decide that a lump sum order related in part to rights in property and in part to maintenance, it may, by virtue of the second paragraph of article 42 of the Brussels Convention[676], order enforcement to the extent that the order related to maintenance although the order would be unenforceable to the extent that it related to rights in property.[677]

It can be held that the classification of redistribution of property will be determined according to the objective of the redistribution. If the amount is used for the purposes of future maintenance, it will be classified as a divorce matter. If the redistribution is for the purposes of transferring property, it will be classified as a proprietary consequence of matter.

4.7 Conclusion

As stated above,[678] the South African conflicts rule for the proprietary consequences of marriage and the classification of redistribution orders has been problematic over the years.[679] With South Africa having historical ties with Dutch law, Dutch private international law has also shown to provide valuable comparative outlooks.

Similar to South Africa, at present, Netherlands has a matrimonial property system.[680] It has been stated above that the default matrimonial property system in Netherlands is one of either marrying in community of property or under the terms of a marital contract.[681]

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[676] "Where a foreign judgment has been given in respect of several matters and enforcement cannot be authorized for all of them, the court shall authorize enforcement for one or more of them. An applicant may request partial enforcement of a judgment."

[677] Jacobs http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61995CC0220 (Date of use: 20 July 2017).

[678] See 3.7 above.

[679] *Lenferna v Lenferna* (120/13) [2013] ZASCA 204 (unreported); *Sadiku v Sadiku* Case no 30498/06 (unreported)

[680] Boele-Woelki K *Matrimonial property law* 4.

[681] Matrimonial Property Law and the Hague Convention https://advocare.home.xs4all.nl/folder57.htm (Date of use: 01 August 2017).

The law of domicile has the same historical basis as that of the South African law of domicile and at the present the principles are similar in Netherlands and in South Africa.

Dissolution of marriage through the process of divorce in South Africa and Netherlands is similar. The grounds for divorce are the irretrievable breakdown of the marriage.[682] Both the South African courts and the Dutch courts, where they have jurisdiction, are competent to dissolve a marriage and to further make provision for the division of assets upon divorce.

The conflicts rule with regard to the proprietary consequences of marriage has been problematic for the South African courts and, if not reformed, it will continue to be problematic. The Dutch private international law had also been in the same position as the South African conflict of laws rules. As a result, the Dutch Civil Code states that the law applicable to a matrimonial property regime will be designated by the provisions of the Convention on the Law Applicable to Matrimonial Property Regimes,[683] as follows:

a) The matrimonial property regime is governed by the internal law designated by the spouses before marriage.[684] The choice, however, is limited to the law of one of three states:[685]
    i) The law of the state in which either spouse is a national at the time of designation.
    ii) The law of the state in which either spouse had his or her habitual residence at the time of designation.
    iii) The law of the state where one of the spouses establishes a new habitual residence after marriage.
b) Where spouses have not designated the applicable law, their matrimonial property will be governed by the law of the internal state in which both

[682] Jeffs "Divorce law reform research paper" 7.
[683] Convention on the Law Applicable to Matrimonial Property Regimes, 1978.
[684] Stegman http://www.kplaw.com/pub/docs/MJ%20Stegman%20-%20Matrimonial%20Property%20Regimes%20in%20a%20Cross-Border%20Context.pdf (Date of use: 13 June 2017).
[685] Article 3 of the Convention on the Law Applicable to Matrimonial Property Regime.

spouses establish their first habitual residence or common nationality after the marriage, taking all circumstances into account.[686]

c) During marriage, the spouses may subject their matrimonial property regime to an internal law other than that previously applicable. The spouses may designate only one of the following laws:
   i) the law of any state of which either spouse is a national at the time of designation; or
   ii) the law of the state in which either spouse has his habitual residence at the time of designation. [687]

d) If the spouses have neither designated the applicable law nor concluded a marriage contract, the internal law of the state in which they both have their habitual residence will become applicable, in place of the law previously applicable:
   i) when that habitual residence is established in that state, if the nationality of that state is their common nationality, or otherwise from the moment they become nationals of that state, or
   ii) when, after the marriage, that habitual residence has endured for a period of not less than ten years; or
   iii) when that habitual residence is established, in cases when the matrimonial property regime was subject to the law of the state of the common nationality solely by virtue of sub-paragraph 3 of the second paragraph of article 4.[688]

Netherlands have used this process since 1978. This process does not look at one sex; it is based on fairness and gives the courts the discretion to take everything into consideration.

A second problem faced by South African private international law has been the classification of redistribution orders. Redistribution orders are uncertain as to which category the rule applies for.[689] South African courts have not been clear

[686] Article 4 of the Convention on the Law Applicable to Matrimonial Property Regime
[687] Article 6 of the Convention on the Law Applicable to Matrimonial Property Regime.
[688] Article 7 of the Convention on the Law Applicable to Matrimonial Property Regime.
[689] Oppong *Private international law in Commonwealth Africa* 3.

whether a redistribution order falls under maintenance or is a proprietary consequence of marriage.

In the Netherlands it has been established that in order to determine whether an application falls within the scope of maintenance will based on to the intention of the redistribution. If the amount is used for the purposes of future maintenance it will be classified as maintenance; if the redistribution is for the purposes of transferring property then it will be classified as a proprietary consequence of matter.

CHAPTER 5: LESSONS LEARNT: COMPARATIVE LEGAL ANALYSIS

5.1 Introduction

International migration has increased as part of the globalisation process; and has resulted in more complex divorce matters – also in South African courts. The field of private international law has to continue to evolve and change to suit the changing needs of individuals.

This dissertation is aimed at closing the legal gaps found within the South African private international law rules in respect of proprietary consequences of marriage. These gaps include the connecting factor with regard to the proprietary consequences of marriage and the classification of redistribution orders. The South African private international law can benefit greatly from the experiences born out of England and the Netherlands.

Having regarded all factors discussed in the chapters above, this chapter will highlight the following: the current South African principle of *lex domicilii matrimonii* and the classification of redistribution orders, the lessons learnt from England and the Netherlands and provide recommendations on the two research questions.

5.2 Matrimonial property law

It is important to highlight some of the similarities and differences between South African matrimonial property law and that of England and the Netherlands. In most countries, prospective spouses have wide ranging party autonomy and they may select the matrimonial property system that should apply to their marriage by entering into an antenuptial contract before their marriage or a postnuptial contract after the marriage.[690] Different countries have different laws on marital property, and the effects of divorce on such property differ as well.

[690] De Jong and Pintens 2015 *TSAR* 551.

5.2.1 South Africa

As stated above,[691] South Africa has three main matrimonial property systems, namely universal community of property, complete separation of property and the accrual system.[692] The South African default matrimonial property system is universal community of property, the most common matrimonial system in the world.[693] A universal community of property regime entails that all assets and liabilities of the parties are merged in a joint estate in which both spouses, irrespective of the value of their contributions, hold equal shares.[694]

When parties get married, their marriage will be presumed to be governed by universal community of property.[695] The presumption can be rebutted by proving one of the following:

a) a valid antenuptial contract; or
b) a valid postnuptial contract; or
c) *lex domicilii matrimonii* which provides that the marriage is out of community of property;[696] or
d) the spouses entered into a civil marriage which was governed by section 22(6) of the Black Administration Act 38 of 1927.[697]

When the marriage is dissolved by divorce, the property will be distributed according to the matrimonial property regime of the parties. In the event of divorce, the allocation or distribution of assets will be done according to the matrimonial property regime that the parties have chosen.

5.2.2 England

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691 See 1.7.1 and 2.2 above.
692 Heaton *South African family law* 100.
693 Heaton *The law of divorce and dissolution of life partnerships in South Africa* 59; De Jong and Pintens 2015 *TSAR* 551.
694 Robinson 2007 *PELJ* 3; Marumoagae 2015 *De Rebus* 36; De Jong and Pintens 2015 *TSAR* 551.
695 Heaton *South African family law* 65; Heaton *The law of divorce and dissolution of life partnerships in South Africa* 59.
696 Heaton *The law of divorce and dissolution of life partnerships in South Africa* 60-62.
697 Heaton *South African family law* 65-66.

The default matrimonial property system in England may be described as "separation of property with distribution by the competent authority".[698] During a marriage, each spouse retains ownership and control over his or her property, whether acquired before or during the marriage.[699] In the event of divorce, the court has the power to redistribute property.[700]

While South African law makes provision for the concept of community of property or out of community of property with provision for the accrual system, matrimonial property and the accrual system is unknown in England.[701]

Both the South African court and the English courts, where they have jurisdiction, are competent to dissolve a marriage and to further make provision for the division of assets upon divorce.

5.2.3 Netherlands

In the Netherlands, the current default matrimonial property system is universal community of property.[702] Under the Dutch law, spouses that do not conclude a marriage contract live under a system of full joint ownership of assets and liabilities.[703] However, on 28 March 2017, the Upper House of the Dutch Parliament adopted a proposal first submitted in 2014, providing for a change in the law on matrimonial property.[704] The new regime is set to take effect in 2018.[705]

The new law will entail that matrimonial community of property will consist exclusively of goods acquired by or on behalf of both spouses during the course of

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[698] Rešetar 2008 *EJCL* 3; Boele-Woelki et al *Principles of European family law regarding property relations between spouses* 13.
[699] Probert *Family law in England and Wales* 181.
[700] De Jong and Pintens 2015 (2) *TSAR* 366.
[701] Antokolskaia *Harmonisation of family law in Europe* 467; *Milbourn v Milbourn* 1987 (3) SA 62 (W).
[702] Article 94 of the Dutch Civil Code.
[703] Van Rooij and Polak *Private international law in the Netherlands* 195.
[704] Blomjous https://rwv.nl/en/news/2017/03/new-dutch-law-on-matrimonial-property-puts-an-end-to-the-community-of-property (Date of use: 25 September 2017).
[705] Blomjous https://rwv.nl/en/news/2017/03/new-dutch-law-on-matrimonial-property-puts-an-end-to-the-community-of-property (Date of use: 25 September 2017).

the marriage.[706] Gifts, inheritances or any pre-existing debts will be regarded as personal property and will therefore not form part of the community.[707]
At present, the Netherlands has a matrimonial property system that is similar to the South African system.[708]

Dissolution of marriage, through the process of divorce, in South Africa and the Netherlands is similar, the grounds for divorce is irretrievable breakdown of the marriage.[709] Both the South African courts and the Dutch courts, where they have jurisdiction, are competent to dissolve a marriage and to further make provision for the division of assets upon divorce.

5.2.4 Conclusion

It is clear that the rules of substantive law differ from country to country.[710] The civil law world has different traditions and concepts across the globe.[711] The system of community of property is found in South Africa and is similar to the position in the Netherlands. The community extends to movables and immovables.[712]

There is a prominent variation between South Africa's default matrimonial property system and that of England and the Netherlands. Community of assets are much more comprehensive in South Africa.[713]

When the South African courts have to apply the domestic substantive law concerning matrimonial property law during divorce proceedings, problems rarely arise. When the matter contains a foreign element, it becomes far more complex.

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[706] Maric https://rwv.nl/en/news/2017/02/new-dutch-matrimonial-property-regime-a-limited-community-of-property (Date of use: 25 September 2017).
[707] Maric https://rwv.nl/en/news/2017/02/new-dutch-matrimonial-property-regime-a-limited-community-of-property (Date of use: 25 September 2017).
[708] Boele-Woelki *Matrimonial property law* 4.
[709] Jeffs "Divorce law reform research paper" 7.
[710] Hodson *A practical guide to international family law* 7.
[711] Collins *et al Dicey, Morris & Collins* 1464.
[712] Collins *et al Dicey, Morris & Collins* 1464.
[713] De Jong and Pintens 2015 *TSAR* 560.

5.3 The *lex domicilii matrimonii*

A question is usually raised when the courts are faced with divorce proceedings with a foreign element. The question is with regard to which law will govern the marital property of the parties?

5.3.1 South Africa

The current rule that governs the marital property of spouses is that, where there is no antenuptial contract that determines the law applicable to matrimonial property, the proprietary consequences of marriage in terms of South African private international law are governed by the *lex domicilii matrimonii*, interpreted as the law of the husband's domicile at the time of marriage.[714] Once the *lex domicilii matrimonii* is established it remains fixed, governing the proprietary consequences of marriage once and for all in terms of the principle of immutability.[715]

As already stated, this rule is unacceptable within today's society. The conflicting rule with regard to the proprietary consequences of marriage has been problematic for South African courts and if not reformed it will continue to be problematic.

5.3.2 England

The English private international law principle of proprietary consequences of marriage was also problematic. As a result the courts started to apply different rules when dealing with conflict of laws in marital property. The following has been suggested to the courts when dealing with marital property that has a foreign element:

a) The parties may choose a governing law expressly or impliedly.[716]

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[714] See 1.2 above.
[715] Schoeman 2001 *TSAR* 74.
[716] Collins *et al Dicey, Morris & Collins* 1467; Fawcett and Carruthers *Private international law* 1294.

b) Where the parties make no choice of law, the governing law is that of matrimonial domicile, where the parties are of the same domicile at the time of marriage.[717]

c) Where the parties are not of the same domicile at the time of marriage, the applicable law should be that of the parties and the marriage have the closest connections with, with equal weight being given to connections for each party.[718]

The solution has been accepted as being fair on both sexes and ensures that the governing law is appropriate.[719] However, the rules concerning the choice of law applicable to the matrimonial property regime in England are not clear and easy to apply. These were only applicable to movable property; however, the English courts have also extended the rules to be applicable to immovable property.

5.3.3 The Netherlands

The Dutch private international law rules in respect of proprietary consequences were in the same position as the South African conflict of laws rules before. As a result, the Dutch Civil Code states that the law applicable to a matrimonial property regime will be designated by the provisions of the Hague Convention on the Law Applicable to Matrimonial Property Regimes,[720] as mentioned above. The Hague Conventions outlines the procedures to be followed when establishing the connecting factor.[721]

The Netherlands have used this process since 1 September 1992.[722] The approach followed in the convention has much to commend itself in that it does not discriminate on the basis of gender and provides sufficient legal certainty, coupled with discretionary powers for courts where necessary.

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[717] Collins *et al Dicey, Morris & Collins* 1465; Fawcett and Carruthers *Private international law* 1295.
[718] Collins *et al Dicey, Morris & Collins* 1465; Fawcett and Carruthers *Private international law* 1295.
[719] Collins *et al Dicey, Morris & Collins* 1465-1466.
[720] Convention on the Law Applicable to Matrimonial Property Regimes, 1978.
[721] See 4.7 above.
[722] Reinhartz 2009 *TSAR* 124; https://advocare.home.xs4all.nl/folder57.htm (Date of use: 01 August 2017).

Reinhartz[723] translated the convention's rules of applicable law into an easier formula:

a) the law of the state the spouses have designated either before marriage[724] or during marriage;[725]
b) the law of the state in which both spouses establish their first habitual residence after marriage;
c) the law of the state of the common nationality of the spouses;[726] or
d) the law of the state with which, taking all circumstances into account, they are most closely connected with.

5.3.4 Conclusion

The South African conflict of laws rule on proprietary consequences of marriage has been under the spotlight in a couple of decisions. It has been mentioned that it is unacceptable that this rule is still applicable in a gender-neutral society.[727] The rule is unconstitutional on the grounds of sex. The rule will be continuously challenged on the basis that it is in conflict with the constitutional principle of gender equality and is not suitable for application in same-sex relationships. This could result in conflicts, since there is no rule to fill the void.

This can be avoided by the timely recognition of the unconstitutionality of the current rule and by starting the process of reform. In this regard, the English and Dutch legal systems have provided valuable comparative perspectives, since South African private international law will have to deal with the same issues that have been faced by the English courts and Dutch legislators.

Similar to South Africa, the Dutch and English rules were first based on *lex domicilii matrimonii* – the domicile of the husband. These legal systems have since

[723] Reinhartz 2009*TSAR* 126.
[724] Article 3 of the Convention on the Law Applicable to Matrimonial Property Regimes.
[725] Article 6 of the Convention on the Law Applicable to Matrimonial Property Regimes.
[726] Article 15 of the Convention on the Law Applicable to Matrimonial Property Regimes.
[727] *Sadiku v Sadiku* Case no 30498/06 [par 10 p 4].

seen that this rule is unacceptable and contrary to the principle of gender equality.[728]

5.4 Redistribution orders

Classification is a fundamental step in all traditional systems of conflict of laws.[729] This stems from the fact that rules that have been developed to deal with choice of law problems are expressed in terms of their connecting factors.[730] The overall aim is to identify the most appropriate law to govern a particular issue.[731]

5.4.1 South Africa

The South African courts have delivered conflicting judgments in respect of the classification of redistribution orders. A question that is raised is whether parties with a foreign matrimonial domicile are able to apply for a redistribution order in terms of the South African Divorce Act? When looking at the cases discussed above,[732] the South African courts have not been consistent whenever parties to a foreign marriage apply for a redistribution order.

5.4.2 England

In England it was noted that at times there is no difference between division of assets and maintenance.[733] In terms of the clean-break principle, the allocation of assets and payment of maintenance are combined as one.[734]

It has been established that in order to determine whether an application for redistribution of property falls within the scope of maintenance will depend on its purpose – whether it is intended to enable one spouse to provide for him or herself

[728] *Sadiku v Sadiku* Case no 30498/06 [par 10 p 4].
[729] Collins *et al Dicey, Morris & Collins* 38.
[730] Collins *et al Dicey, Morris & Collins* 38.
[731] Collins *et al Dicey, Morris & Collins* 51.
[732] See 2.6.1 above.
[733] De Jong and Pintens 2015 (2) *TSAR* 370-371.
[734] De Jong and Pintens 2015 (2) *TSAR* 370-371.

to ensure predetermined income.[735] Financial orders, whether periodical or lump sum, rank as maintenance orders if it is intended for the support of the spouse.[736]

5.4.3 Netherlands

In Netherlands, in some scenarios there will unavoidably be lump-sum orders that fall in between maintenance and property redistribution orders. These orders may show attributes of both maintenance and property division, with a proportion intended to ensure maintenance and the remainder intended to effect a division of the matrimonial property.[737]

If a national court in a particular case were to decide that a lump-sum order related in part to rights in property and in part to maintenance, it may order enforcement to the extent that the order related to maintenance although the order would be unenforceable to the extent that it related to rights in property. [738]

In order to determine whether an application falls within the scope of maintenance, regard must be given to the intention of the redistribution. If the amount is used for purposes of future maintenance, it will be classified as maintenance. If the redistribution is for purposes of transferring property, then it will be classified as a proprietary consequence of marriage.

5.4.4 Conclusion

The classification of redistribution orders has been a contentious matter over the years and there still seems to be no clear-cut answer. Whether parties are able to apply for redistribution orders would depend on whether redistribution is qualified as a proprietary issue[739] or as a divorce issue or a hybrid proprietary/divorce issue.[740]

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[735] Fawcett and Carruthers *Private international law* 1056.
[736] Fawcett and Carruthers *Private international law* 1057.
[737] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61995CC0220 (Date of use: 20 July 2017).
[738] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61995CC0220 (Date of use: 20 July 2017).
[739] *Antonius van den Boogaard v Paula Laumen* Case C-220/95 [I 1180]; Fawcett and Carruthers *Private international law*.
[740] Neels and Fredericks 2015 *TSAR* 926.

It is proposed that the courts regard redistribution as a hybrid proprietary/divorce issue, which will be governed partially by the proper law of the proprietary consequences of marriage[741] and by the *lex fori*.[742]

5.5 General conclusion

The South African conflict rule for the proprietary consequences of marriage and the classification of redistribution orders have given rise to much academic debate over the years.[743] There are various valuable lessons that South Africa could learn from England and the Netherlands. I therefore agree with Reinhartz's sentiment that in order to avoid some of the problems of differing rules of private international law, harmonisation of this field should be promoted.[744]

A sensible choice of law rule needs to be incorporated in the South African matrimonial property law. There needs to be an establishment of the proper law of matrimonial property in private international law and clarity in respect of the classification of the redistribution orders. In light of the research undertaken in this dissertation, recommendations will be made to address the legal gaps in terms of the South African conflict of laws rules with regard to proprietary consequences of marriage and the classification of redistribution orders.

5.6 Recommendations

Much development is needed in respect of the South African private international relating to proprietary consequences of marriage. The current rule has a limited scope – it does not govern the matrimonial property regime of all couples in an inclusive manner. The rules should be clear and easy to apply and should be aligned with the rules that most other countries have chosen. When it comes to international matters, it would be best to have a more standard application of rules. I therefore submit the recommendations below.

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[741] With hope that the current rule would have been abolished.
[742] Neels and Fredericks 2015 *TSAR* 926.
[743] *Lenferna v Lenferna* (120/13) [2013] ZASCA 204 (unreported); *Sadiku v Sadiku* Case no 30498/06 (unreported).
[744] Reinhartz 2009 *TSAR* 131.

5.6.1 Lex domicilii matrimonii

I support and recommend the so-called "5-step rule", which is supported by academics [745] and is compatible with the Hague Convention on the Law Applicable to Matrimonial Property Regimes. The South African Law Reform Commission should amend the Matrimonial Property Act[746] to give effect to the proposed solution as follows: Conflict of laws on matrimonial property – that the proprietary consequences of marriage are determined by the following connecting factors:

a) the law of the country indicated by the express or implied intention of the spouses in an antenuptial or postnuptial contract; or
b) in the absence of (a), the law of the country of the common domicile of the spouses at the time of marriage; or
c) in the absence of (b), the law of the country of the common habitual residence of the spouses at the time of marriage; or
d) in the absence of (c), the law of the country of which both spouses are nationals at the time of marriage; or
e) In the absence of (d), the law of the country to which the spouses are jointly most closely connected at the time of marriage.

5.6.2 Classification of redistribution orders

When the courts are deciding cases that deal with the classification of redistribution orders, they need to determine the intention of the redistribution, in a clear and fully reasoned manner.

In addition to clear reasoning, it is vital that an order intended to combine maintenance and division of property be mathematically clear, to enable the court before which enforcement is sought to separate the enforceable from the unenforceable.

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[745] Neels and Wethmar-Lemmer 2008 *TSAR* 588; McConnachie 2010 *SALJ* 435; Thomashausen 1984 *CILSA* 78-91; Stoll and Visser 1989 *De Jure* 335; Schoeman 2001 *TSAR* 80-81; Schoeman 2004 *TSAR* 133.

[746] Matrimonial Property Act 88 of 1984.

The courts should start to give effect to a hybrid proprietary/divorce issue, which will be governed partially by the proper law of the proprietary consequences of marriage[747] and by the *lex fori*.[748]

[747] With hope that the current rule would have been abolished.
[748] Neels and Fredericks 2015 *TSAR* 926.

Abbreviations

CILSA	The Comparative and International Law Journal of Southern Africa
EJCL	Electronic Journal of Comparative Law
HCCH	Hague Conference on Private International Law
JPIL	Journal of Private International Law
NILR	Netherlands International Law Review
PELJ	Potchefstroom Electronic Law Journal
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
TSAR	*Tydskrif vir Suid-Afrikaanse Reg*
VOR	Voice of Research

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