EU Matters

Cross-Border Pre-Nuptial Agreements

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More couples are living an international lifestyle; many have multiple homes in more than one jurisdiction and engage in regular travel abroad for work. Some may have not decided at the time of their wedding where they will settle and make their permanent family home. For those seeking assurance as to how assets will be divided on divorce, a pre-nup is a must.

Unfortunately, an international pre-nup that will be recognised in multiple jurisdictions does not yet exist. For clients with connections to a civil law jurisdiction (most of continental Europe and Latin America) and a common law jurisdiction (such as England and Wales) the differing laws in each country can create difficulties. These difficulties can be overcome, and an experienced practitioner will be able to assist with finding a solution that works.

The disconnect

Most couples marrying in England and Wales will do so without signing a pre-nup or marriage contract. Where there is no pre-nup, the starting point is that all assets made and acquired during the marriage ("marital assets") are divided 50/50 upon divorce; this is known as the sharing principle. Once the marital assets have been divided, the court asks if both parties can meet their reasonable capital and income needs from their share. If the answer is yes, this is the end of the story. If the answer is no, the court will look to non-marital assets (assets acquired prior to the marriage or received by gift or inheritance during the marriage) and income received post separation to meet needs. In big money cases, often half of the marital assets is more than enough to meet both parties' needs. Consequently, it may be in the financially stronger party's interests for their case not to be decided based on sharing but rather on needs only.

If parties that *may* divorce in England wish to determine the division of their assets upon divorce when they get married, they must enter into a pre-nup that complies with requirements set out in the leading case of *Radmacher*.[1] The emphasis on *may* is important; the English courts have jurisdiction for divorce if the parties meet one of a list of requirements based on either party's habitual residence and/or domicile

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[1] *Granatino v Radmacher* [2010] UKSC 42; [2011] 1 A.C. 534.

at the time of divorce. Therefore, international clients who may move to England during their marriage should seek English legal advice prior to their wedding regardless of whether they are habitually resident/domiciled there at the time of the wedding. To be "*Radmacher* fair" the English agreement must meet the procedural fairness test and its terms must not be unfair in the judge's eyes at the time of divorce. To satisfy the second limb, provision should be made in the pre-nup for the financially weaker party's reasonable capital/housing and income needs, the latter typically in the form of capitalised spouse maintenance.

In contrast, in civil law jurisdictions how assets are held during the marriage, as well as divided on divorce is determined prior to the marriage. Parties to a marriage elect one of a number of preset matrimonial property regimes and if they fail to do so the default regime for that jurisdiction will apply. The chosen regime is recorded in a standard, short marriage contract which is usually only two or three pages long. The terms of the contract are rarely subject to substantive (if any) negotiation, and the agreement can be entered into at any time before the wedding (even on the same day).

Those with significant assets will typically elect a Separate Property regime which will provide that each parties' assets (and income acquired and made during the marriage) is to remain theirs upon divorce. The effect is that a divorcing spouse cannot bring a claim against the Separate Property of their husband or wife.

For parties separating in Continental Europe, there are three separate elements that must be dealt with: (i) the divorce itself; (ii) liquidation of the matrimonial property regime (asset division); (iii) spouse maintenance. Due to the operation of various EU regulations (more on which below), the appropriate jurisdiction and the applicable law for each of these elements may differ.

When it comes to liquidating the matrimonial property regime, spouses that have opted for Separate Property have nothing to liquidate; each spouse retains their own property. If the spouses elected a regime that involved sharing marital assets, such as Community of Property, liquidation of the regime will involve identifying the assets to be shared, valuing and distributing them or their value.

Civil law marriage contracts only determine the matrimonial property regime; in most jurisdictions they do not and cannot provide for spouse maintenance on divorce. In Italy, for example, it is against public order/policy to have an agreement that predetermines the level of spouse maintenance on divorce. However, orders for spouse maintenance in Italy (and other civil law courts) are typically much less generous than those made in the English courts, with the financially stronger party being ordered to pay a lower amount for a shorter period.

Clearly there is a fundamental disconnect between the substantive content of the two types of agreement. Most civil law courts will not recognise an agreement which includes provision for spouse maintenance. On the other hand, the English court will need to see provision for the financially weaker party's reasonable housing and income to conclude that the terms of the pre-nup are not unfair at the time of divorce. Significantly, the wording of *Radmacher* is "not unfair" rather than "fair"; the practical effect of this is that the housing and income provision within the pre-nup can be less generous than the English court would have otherwise awarded where there is no pre-nup.

The solution or lack of it

How then, do you square the circle? As is so often the annoying legal answer, it depends on the facts of the case! There is not a one-size-fits-all solution. There are many variables that will differ in each case including the relevant jurisdictions and the parties' intentions about where they will settle. Some continental European jurisdictions are stricter than others and it may be necessary to have both an English agreement and an agreement in the other country. In some continental European jurisdictions, parties might be able to rely on a notarised version of the English agreement. The first option can create a problematic scenario

where the financially weaker party gets a better deal in England than they would in the other jurisdiction. The second option will be ignored by the judges of many civil law jurisdictions.

It is vital that prospective spouses seek advice from a practitioner experienced in these issues well in advance of the intended wedding date so the issues can be navigated in time.

Civil law marriage contracts "will not be torn up in this jurisdiction"

Having said the above, the English court will not completely disregard a civil law marriage contract.[2] The existence of such a contract can be evidence of the spouses' intention to contract out of an equal sharing of the assets.

The case of *Versteegh*[3] concerned a Swedish husband and wife. The day before the wedding the parties signed a standard, Swedish law marriage contract (referred to as the PMA) pursuant to which they elected Separate Property. The wife did not obtain legal advice before signing the document. The parties moved to London shortly after the wedding and lived there for 21 years.

Upon separation, the wife commenced financial remedy proceedings in England. The husband's initial position was that the financial remedy order should reflect the terms of the Swedish marriage contract. He later made a revised settlement offer which included the wife sharing 25% of what would have otherwise been his Separate Property. The wife argued that she should not be held to the terms of the marriage contract; she had not understood its implications on divorce and had not obtained English legal advice when she signed it. At the final hearing, the judge heard from a former friend of the wife who gave evidence that the wife was in fact aware of the implications of the marriage contract and knew that it was commonplace for those in Sweden with significant assets to have a marriage contract electing Separate Property. The judge declined to make an order which reflected a 50/50 sharing of the assets, placing weight on the PMA and commenting that the wife had a full appreciation of the implications of the Swedish marriage contract when she signed it.

The wife appealed the first instance decision on multiple grounds including the judge's treatment of the Swedish marriage contract. She made various arguments as to why the contract should carry no weight, including her lack of independent legal advice and the fact that she had not understood the agreement. The Court of Appeal dismissed the appeal with King LJ stating:—

> "In my judgment *an effective PMA is another example of a case where*, upon a proper consideration of all the circumstances of the case (per s.25(1) of the Matrimonial Causes Act 1973), *a court can conclude that* (notwithstanding that the husband does not seek to enforce the PMA in full, and that there is now a sharing element to the case, needs having been exceeded) *the assets should be divided unequally*. This to use the words of Lady Hale in *Radmacher* represents a 'modification of the sharing principle'."[4] (emphasis added)

The more recent case of *CMX*[5] is another example of the English courts relying on a foreign marriage contract to depart from an equal sharing of the assets. *CMX* concerned a French husband and a French/Lebanese/British wife. The parties entered a standard, French *separation de biens* marriage contract pursuant to which they elected Separate Property. The agreement was signed before the wife's family's notary whom both parties met with for an hour before signing the agreement. A notary's role is different in England than in most Continental European jurisdictions; in France (like most of Europe), the notary is responsible for explaining the document's legal implications to those signing it—this is not a requirement for an English notary.

[2] *CMX v EJX (French Marriage Contract)* [2022] EWFC 136; [2023] 2 F.L.R. 14 ("*CMX*").
[3] *Versteegh v Versteegh* [2018] EWCA Civ 1050; [2019] Fam. 518, on appeal from *W v W* [2017] EWHC 123 (Fam).
[4] *Versteegh v Versteegh* [2019] Fam. 518 at [82].
[5] *CMX* [2023] 2 F.L.R. 14.

Following the wedding, the parties moved to London where they continued to reside at the time of their separation. The wife commenced financial remedy proceedings and, like in *Versteegh*, argued that she did not understand the consequence of the marriage contract and it should not be given any weight. The wife said that she could not remember the discussions with the notary but argued that she had not received independent legal advice; the husband said that the notary had provided an explanation to them both about the document and its implications upon divorce. He further noted that separate legal advice was unusual in France.

In concluding that he could rely on the French agreement to make an award that deviated from an equal sharing of the assets, the judge, Moor J stated:—

> "Those who sign marriage contracts must understand that it is a significant step with very important consequences. These contracts will be enforced in France and will not simply be torn up in this jurisdiction."[6]

The judge did "not consider that the lack of independent legal advice or full disclosure is fatal",[7] noting that the parties did receive advice from the notary. He also commented that the parties had a full appreciation of the French agreement's implications, reminding himself "that such Marriage Contracts are very common in France".[8] With all the above in mind, the judge found "that the *Radmacher* test for upholding this Contract [was] satisfied"[9] and there was a valid contracting out of the sharing principle. Calculating his award based on the wife's needs, the judge awarded her 38.9% (or £9,466,452) of the total matrimonial assets (£24,360,070).

Versteegh and *CMX* are authority for the principle that parties entering into a marriage contract will be held to the terms of it by an English court if they: (i) entered into it in a country where such agreements are commonplace; and (ii) are familiar with the concept of marriage contracts. This will be so regardless of whether the parties obtained independent legal advice. However, the English court will retain discretion to determine how the assets should be divided to meet the parties' needs, so it is essential that there is also an English pre-nup setting out how those needs are to be met.

EU Regulations

Forum shopping on divorce can be important for clients with significant wealth; an order made by the English court is likely to be more generous to the financially weaker party than an award made elsewhere.

In EU Member States there is a series of (sometimes conflicting) Regulations that determine the appropriate jurisdiction and applicable law to be applied to: (i) divorce; (ii) liquidation of the matrimonial property regime (where relevant); and (iii) spouse maintenance.

Brussels II[10] determines the appropriate jurisdiction for divorce and Rome III determines the applicable law for divorce. Rome III allows parties to make choice of law[11] agreements ahead of their divorce. In addition, the EU Maintenance Regulation[12] allows parties to elect the law applicable[13] and the jurisdiction

[6] *CMX* [2023] 2 F.L.R. 14 at [64].
[7] *CMX* [2023] 2 F.L.R. 14 at [62].
[8] *CMX* [2023] 2 F.L.R. 14 at [62].
[9] *CMX* [2023] 2 F.L.R. 14 at [64].
[10] Council Regulation 2201/2003 ("Brussels II").
[11] Rome III art.5 provides that parties can agree that the law: (i) of their habitual residence at the time of the agreement (art.(5)(1)(a)); (ii) of their last habitual residence at the time of the agreement, provided that one of them still resides there (art.5(1)(b)); (iii) of the State of either of their nationality of either spouse at the time of the agreement (art.5(1)(c)); or (iv) of the forum, shall be applied to their divorce (art.5(1)(d)).
[12] Council Regulation 4/2009 (the "Maintenance Regulation").
[13] Maintenance Regulation art.15 provides that the law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol of 23 November 2007 ("Hague Protocol"). The Hague Protocol art.8 allows parties to elect the applicable law.

in which maintenance disputes should be heard[14] and sets out how to determine the law to be applied in the absence of an election.[15]

The Lugano Convention[16] further gives parties the option of making a choice of court agreement regarding maintenance if one of the parties is "domiciled" in a signatory state (the EU, Switzerland, Norway and Iceland), as well as dealing with recognition of "maintenance" orders. So far post Brexit, the EU has blocked the UK from being a signatory to the Lugano Convention. In accordance with the Lugano Convention the court determining whether a party is domiciled in a State bound by the convention shall apply its internal law.[17] Prior to Brexit, English internal law was that an individual was domiciled in the UK if he/she was resident there and had a substantial connection with the country.[18] For the purposes of the Convention a decision on "maintenance" is one in which: (i) provision is made which enables a spouse to provide for themselves; or (ii) the needs and resources of each of the spouses are taken into consideration in determining the amount to be awarded.[19] Therefore, an English order that provides for capital for housing and spouse maintenance constitutes maintenance for these purposes.

Prior to Brexit, it was possible to make strategic jurisdiction and choice of law elections within an English pre-nup because the above Regulations/Convention applied. Post Brexit, such elections will be ignored by an English court when overcoming the first hurdle of deciding if it has jurisdiction. If the English court has jurisdiction to determine financial issues arising from the breakdown of a marriage based on English law requirements relating to habitual residence and/or domicile, the proceedings will go ahead with the English courts applying English law.

It may still be advantageous to make choice of court and choice of law elections in relation to divorce and/or maintenance disputes in the Continental European marriage contract if the parties have connections to more than one: (i) EU Member State; or (ii) of the signatories to the Lugano Convention. For example, generally most Continental European courts are known for awarding low levels of spouse maintenance, except for Switzerland (at the time of writing). Therefore, in a case involving Switzerland and Italy it would be beneficial to elect Italian jurisdiction and law if acting for the financially stronger party, and Swiss jurisdiction and law if acting for the financially weaker party.

Although not binding on an English court, such an election within an English pre-nup may still be helpful if there is a risk of a forum dispute involving an EU Member State (or any other country) and England. The case of *Ella*[20] exemplifies how such an election can be used by the English court to find that another jurisdiction is the more appropriate forum. The parties had Israeli and British nationality and had entered into a pre-nup which elected that the law of Israel should apply to disputes about division of assets on divorce. Competing proceedings were commenced in both Israel and England. The English Court of Appeal concluded that it was right to give weight to the election in the pre-nup in reaching its decision to stay/block the English divorce and so in effect allow the Israeli divorce to proceed. However, if the forum dispute is between England and most civil law countries, if the divorce is started first in the civil law country, then the forum election clause may not be effective.

Whether such an election should be used tactically in this way will depend on the facts of the case and should be explored with an English solicitor well in advance of the wedding date.

[14] Maintenance Regulation art.4 provides that spouses can elect that such disputes shall be dealt with by: (i) the court which has the jurisdiction to settle their dispute in matrimonial matters (art.4(1)(c)(i)); or (ii) a court of the Member State which was the Member State of the spouses' last common habitual residence for a period of at least one year (art.4(1)(c)(ii). The conditions must be met at the time the choice of court agreement is concluded or at the time the court is seised, and that jurisdiction shall be exclusive (art.4(1)).

[15] Maintenance Regulation 2009 art.15. The Hague Protocol art.3 sets out the general rule on applicable law.

[16] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 21 December 2007 (the "Lugano Convention").

[17] Lugano Convention 2007 art.59(1).

[18] Civil Jurisdiction and Judgments Act 1982 s.41A.

[19] *Van den Boogaard v Laumen* (C-220/95); EU:C:1997:91; [1997] Q.B. 759 at [22].

[20] *Ella v Ella* [2007] EWCA Civ 99; [2007] Fam. Law 483.

EU Succession Regulation

A final point of which parties entering pre-nups and/or European marriage contracts should be aware is the law governing succession in each connected jurisdiction. Some European jurisdictions have strict forced heirship rules (guaranteed inheritance rights) which apply to assets located in that country. In contrast, England gives individuals testamentary freedom allowing them to leave their assets to who they choose by will.

Forced heirship rules might operate contrary to the parties' intentions as set out in the marriage contract or pre-nup upon one spouse's death. Under the EU Succession Regulation, a person may elect the law of their nationality to govern their estate on death;[21] this can be a way for British nationals living in an EU Member State with strict forced heirship to sidestep those rules.

Succession should be considered when entering a pre-nup as it may be necessary for the parties to waive their rights within the pre-nup to bring a claim against the other's estate upon death or enter into an inheritance waiver document.

[21] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 (EU Succession Regulation), art.22.