



Enforceability of Pre-Nuptial Agreements in Hong Kong

Definitions

Pre-Nuptial Agreements (or Ante-Nuptial Agreements): Agreements made before marriage, to regulate a couple's financial affairs during the marriage or to determine the division of property, in the event of divorce.

Separation Agreements (or Post-Nuptial Agreements): Agreements made during or after marriage, where the parties are contemplating imminent or future separation, to regulate their financial affairs upon divorce.

Key Decisions

***SPH v SA* [2014] HKLRD 497 (HK Court of Final Appeal)**

Pre-nuptial agreements are generally binding in Hong Kong, subject to *qualified effect*. The *qualification* is that the court will only uphold such agreements, where it is fair to do so. The decision applies the principles enunciated in *Radmacher v Granatino*.

***Radmacher v Granatino* [2011] 1 AC 534 (UK Supreme Court)**

The historical rule that pre-nuptial agreements were contrary to public policy is now obsolete and no longer applicable.

The court will give weight to pre-nuptial agreements, as long as it is fair to do so. "Fair" means where the parties entered into it under his/her free will, with a full appreciation of its implications. There is no reason to distinguish between pre-nuptial and separation agreements; hence the above principles are equally applicable to both agreements.

Nevertheless, the position remains that ancillary relief is an exercise of the court's discretion; the court will only consider pre-nuptial agreements as a *factor* of its discretion, but will not allow it to form its entire opinion. This is because the parties'

private agreement cannot oust the jurisdiction of the court.

SPH v SA

Facts

1. H and W were German nationals, who married in Hong Kong in 2008.
2. H and W executed a pre-nuptial agreement in December 2007 (“**Pre-Nuptial Agreement**”) and a separation agreement in September 2010 (“**Separation Agreement**”) (collectively known as the “**Agreements**”).
 - (a) The Pre-Nuptial Agreement was governed by German law. The effect was to retain a common ownership of gains accrued during marriage, but exclude business assets derived from gifts and inheritance.
 - (b) The Separation Agreement purported to rescind the Pre-Nuptial Agreement and agree that any claims for maintenance settlement upon divorce were mutually waived.
3. W petitioned for divorce in October 2010.
4. W disputed both Agreements.
5. H applied for a stay of the Hong Kong proceedings, on the basis that the German courts were the *forums conveniens* (proper forum to hear the case).
6. At first instance, the Judge granted the stay. W appealed to the Court of Appeal, where the appeal was allowed. H appealed to the Court of Final Appeal.
7. *Held*: The Court of Final Appeal dismissed H’s appeal.

Issues

There were 2 issues in question:

1. What is the effect of pre-nuptial agreements?
2. What are the principles in respect of *forum non conveniens* in matrimonial proceedings?

Principles on Pre-Nuptial Agreements

1. As confirmed by the Hong Kong Court of Appeal in *L v C* [2007] 3 HKLRD 819, the old rule (that agreements providing for separation are contrary to public policy) is now obsolete.
2. It was also confirmed that the court would uphold pre-nuptial agreements, provided that they were freely entered upon. This means, in the absence of any unfair or unconscionable circumstances surrounding the conclusion of that agreement, and any drastic unforeseen circumstances causing manifest

prejudice to one of the parties. The court will only depart from such agreement, if it can be shown that there were good and substantial grounds for doing so.

3. The principles enunciated in ***Radmacher v Granatino* [2011] 1 AC 534** should also be regarded as the law in Hong Kong. Namely:
 - (a) If pre-nuptial or post-nuptial agreements are to carry full weight, both the husband and wife must enter into it by their own free will, without the presence of any vitiating factors (e.g. duress, fraud or misrepresentation). Any unconscionable or unworthy conduct (e.g. undue pressure, falling short of duress or exploiting a dominant position to secure an unfair advantage) will also eliminate the weight attached to such agreements.
 - (b) The court will also take into account a party's emotional state and what pressures he or she was under to agree. The circumstances of the parties at the time of the agreement will be relevant – e.g. their age, maturity, whether either or both parties have been married before or been in long-term relationship, whether the marriage would have gone ahead without an agreement or without particular terms being agreed, etc.
 - (c) Further, each party is required to have a full appreciation of its implications and there must not be any material lack of disclosure. Each party should have all the information that is material to his or her understanding of the implications of the agreement. Each party should also intend that the agreement is to govern the financial consequences of the marriage, coming to an end. This may be come in the form of receiving legal advice or knowing the detailed particulars of the other party's assets.
 - (d) In appropriate circumstances, the court would even hold the parties to the agreement, even if the result had been different to what the court would otherwise have ordered.
 - (e) However, if the terms were unfair from the start, the court will reduce its weight.

Principles on *Forums Non Conveniens*

1. In deciding whether to apply for a stay of matrimonial proceedings, the single most important question is whether there was some other available forum, a more appropriate and competent jurisdiction, for hearing the trial of the action (i.e. one more suitable for achieving the interests of justice).

2. A person applying for a stay has to establish that: (i) first, Hong Kong was not the natural or appropriate forum; and that (ii) secondly, there was another available forum, which was clearly or distinctly more appropriate than Hong Kong.
3. Should the applicant succeed, the plaintiff (in rebuttal) must show he/she would be deprived of a legitimate personal or juridical advantage, if the action was tried in a forum other than Hong Kong.
4. In considering both sides, the court must balance the advantages of the alternative forum with the disadvantages that the plaintiff may suffer.

Applied to the Facts

1. The Court of Final Appeal agreed with the Court of Appeal; H had not shown that Germany was clearly or distinctly a more appropriate forum than Hong Kong. H's appeal was therefore dismissed.
2. Particularly, the trial judge failed to give appropriate weight to the factors connecting the parties, marriage and matrimonial home with Hong Kong; but rather, gave inappropriate weight to their nationality and the two Agreements.
3. While both Agreements were indeed governed by German law, neither agreement specified the jurisdiction or gave exclusive submission to the German courts¹.

Conclusions

The Future of Ancillary Relief

1. The starting point is that the court's jurisdiction to grant ancillary relief lies in section 4 of the Matrimonial Proceedings and Property Ordinance (Cap. 192) ("MPPO").
2. When making ancillary relief orders, the court must have regard to "all circumstances of the case", including a set of non-exhaustive factors set out in section 7(1) MPPO. The overarching purpose is to achieve "fairness" between the parties, as said in *LKW v DD (2010) HKCFAR 537*.
3. While pre-nuptial agreements were traditionally seen as invalid and unenforceable², this has now been overruled by the Hong Kong Court of Appeal in *L v C [2007] 3 HKLRD 819*.
4. Post-*SPH v SA [2014] HKLRD 497*, pre-nuptial agreements have been given

greater weight and are no longer a peripheral factor of the court's discretion. As the courts in HK and UK have both held, full weight can be given to such agreements, as long as its terms were "fair" from the start.

5. But it must be noted that they only carry *qualified effect*; they are still *not* prima facie enforceable – until and after the court determines whether they are fair or not.

Factors to Consider When Drafting Pre-Nuptial Agreements

6. As such, it would seem that a well-drafted pre-nuptial agreement would be the way forward in protecting the parties' wishes, in the event of divorce.
7. To attract maximum weight, the following factors should be considered:
 - Seeking *independent legal advice* during the negotiation and drafting stages, to ensure that the parties agree to be freely bound, that they understand the implications and possibly prevent any undue pressures from the other spouse;
 - The *timing* of such agreements, to ensure the parties have had sufficient time to make an informed decision (e.g. if signed shortly before marriage, the court may see it as unconscionable);
 - Whether there has been *full and frank disclosure* of each other's financial positions; and
 - *Jurisdiction clauses* to ensure certainty regarding the choice of forum, to prevent later disputes requiring a stay of proceedings.

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¹ The validity of the Agreements were also open to challenge, according to expert evidence. Accordingly, the enforceability of both Agreements was dubious.

² They were seen as contrary to public policy, because they undermined the institution of marriage and ousted the court's jurisdiction in granting ancillary relief.

PLEASE NOTE

The law and procedure on this subject are very specialized. This article is a general explanation for your reference only and should not be relied on as legal advice for any specific case. If legal advice is needed, please contact our solicitors.

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