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Family Law 2020

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Third Edition

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International Marital Agreements – the Approach by the English Court on Divorce

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One of the biggest recent developments in family law in England and Wales[1] has been the rising demand for marital agreements.

Introduction

With increased globalisation and continued migration to the UK, and following Supreme Court decisions in the early 21st century which have introduced the principle of equality into financial divorce cases, the request for pre-nuptial agreements has risen sharply. The greatest demand for pre- and post-nuptial agreements appears to still be from those individuals whereby one or both of the couple have substantial international connections. But what about those couples who already have a marital agreement, prepared in another jurisdiction, but who are divorcing in England? How will an English judge treat the agreement?

Radmacher v Granatino [2010] UKSC 42 is the first Supreme Court case specifically dealing with the enforceability of agreements. The case has cemented the English court's already developing approach to uphold domestic and foreign agreements, and has led many more clients to seek agreements as well as encouraging the demand for statutory change (e.g. see the Law Commission's 2014 report on *Matrimonial Property Needs and Agreements* at: https://www.gov.uk/government/publications/matrimonial-property-needs-and-agreements). Since *Radmacher*, English case law in relation to the enforcement of foreign marriage agreements has developed rapidly as set out below.

For those readers who do not practise English family law, it is worth noting that none of the factors set out in Section 25 of the Matrimonial Causes Act 1973, to which the court must have regard when considering the appropriate financial orders,[2] include the requirement to consider any marital agreement. The agreement will be considered as part of the circumstances of the case (s 25 (1)) or as conduct (s 25 (2) (g)) and the extent to which any agreement will be given weight will depend on the facts of the case. The jurisdiction of the English court to order financial provision on divorce cannot be ousted by the parties' agreement. And, as a country which practises family law on the basis of forum without applying foreign law (unlike many of its European neighbours), once jurisdiction has been secured, the court will apply English law (although, as can be seen from the cases below, in the exercise of its discretion, the court may take into account the parties' connections with another country when considering the appropriate financial orders, particularly if there is a foreign marital agreement).

When considering the effects of the pre- or post-marital agreement, executed in England and Wales or elsewhere in the world, the court will not ignore the established principles set out in English case law, namely the needs of any children and the parties, and the concept of sharing equally the assets built up during the marriage. (see the Court of Appeal decision of *Brack v Brack* [2018] EWCA Civ 2862 reminding practitioners that, even where there is an effective pre-nuptial agreement, the court must consider all the Section 25 factors). The extent to which the court allows the exclusion of these principles when considering the validity of a marital agreement will vary in each case. However, a consideration of the couple's needs and, in particular, the needs of any children will always be at the forefront of a judge's mind when the agreement is considered, as will the intentions behind the agreement (particularly if it is a non-English agreement which does not seek to address all the financial provision to be made in the event of a future divorce).

Approach of the Court to Foreign Marital Agreements Prior to *Miller* and *McFarlane*

Until the House of Lords[3] cases of *White* in 2001 and *Miller* and *McFarlane* in 2006, there was a dearth of case law dealing with marital agreements and those limited reported cases tended to be *forum conveniens* (stay of proceedings) cases, where one party relied on the existence of the foreign agreement to encourage the English court to decline the English divorce petition in favour of the foreign divorce proceedings, rather than cases where the court was being asked to uphold the terms of the agreement.

So, in *S v S (Divorce: Staying proceedings) [1997] 2 FLR 100*, a case involving a New York pre-marital agreement, Wilson J concluded that the agreement, with its substantial financial provisions and provision in relation to forum, was significant. Both parties had obtained independent advice and the terms had been negotiated between their respective New York attorneys. Wilson J ordered the stay of the English proceedings.

In *C v C (Divorce: Stay of English Proceedings) [2001] 1 FLR 624*, a case involving French nationals (shortly before the implementation of the Brussels II regulation which replaced *forum conveniens* with *lis pendens* for EU nationals), the judge placed great weight on the '*separation de biens*' pre-marriage contract entered into by the French couple, when staying the wife's English divorce petition in favour of the French divorce proceedings.

Contrast the court's approach in these cases with the judgment of *F v F (Ancillary Relief: Substantial Assets) [1995] 2 FLR 45*, where jurisdiction in the English court was secured and it was being asked to consider the weight of a German pre-nuptial contract in determining the wife's financial claims.

Thorpe J refused to allow any expert evidence from Germany declaring '*in this jurisdiction they* [pre-nuptial agreements] *must be of very limited significance. The rights and responsibilities of those whose financial affairs are regulated by statute cannot be much influenced by contractual terms which were devised for the control and limitation of standards that are intended to be of universal application throughout our society*' [page 66]. Compare this approach to that of the Supreme Court in *Radmacher* 15 years later.

Miller and *McFarlane* and the Approach to Marital Agreements Prior to *Radmacher*

The House of Lords' decisions in *Miller v Miller* and *McFarlane v McFarlane [2006] UKHL 24* opened the door to marital agreements becoming more enforceable. Neither of the cases involved the existence of a pre-marital agreement; however, the House of Lords established the principles of equality and sharing and that matrimonial property and non-matrimonial property (e.g. pre-marital property and inherited property) should be treated differently (something which many seeking a pre-nuptial agreement wish to achieve). So, what *Miller* and *McFarlane* established was a loose and discretionary 'community of acquests to assets built up during the marriage (with a starting point of a 50/50 division of these assets) and with the court still bringing in non-matrimonial assets if they are required to meet the parties' and (particularly) any children's needs.

And, while there is no specific reference to pre-marital agreements in *Miller* and *McFarlane*, there was indirect support, with Nicholls LJ stating '*to this non-exhaustive list should be added, as a relevant matter, the way the parties organised their financial affairs*' [para 25] and Baroness Hale held that '*the nature and the source of the property and the way the couple have run their lives may be taken into account in deciding how it should be shared*' [para 153]. And, with reference in the judgment to personal autonomy, which should not be interfered with by the courts, the door was firmly left open to future developments in the enforceability of marital agreements.

So, in *Ella [2007] EWCA Civ 99*, the Court of Appeal confirmed the judge's decision to stay the English proceedings, in favour of the husband's Israeli proceedings, with the pre-nuptial agreement (which had provisions providing that Israeli law should apply) being the main reason for the stay.

Two cases in the Court of Appeal, *Crossley [2007] EWCA Civ 491* and *Charman [2007] EWCA Civ 503*, both referred to the recognition of marital contracts in other jurisdictions, particularly their civil European neighbours in the call for reform to enforce marital contracts. In his judgment in *Charman*, Sir Mark Potter commented at paragraph 124: '*The difficulty of harmonising our law concerning the property consequences of marriage and divorce and the law of the Civilian member states is exacerbated by the fact that our law has so far given little status to pre-nuptial contracts. If, unlike the rest of Europe, the property consequences of divorce are to be regulated by the principles of needs, compensation and sharing, should not the parties to the marriage, or the projected marriage, have at least the opportunity to order their own affairs otherwise by a nuptial contract?*'

Now, over 12 years later, as the UK approaches Brexit, further harmonisation of family law in Europe is unlikely; however, with the movement of people unlikely to be reversed and London still seen as the 'divorce capital of the world', the demand for agreements is here to stay.

Radmacher and *Granatino* [2010] UKSC 42

Radmacher is the only occasion where the Supreme Court has specifically considered whether to hold the parties to the terms of a pre-marital agreement.

The facts of *Radmacher* are unusual and worth setting out. The case involved a wealthy German wife with a French husband with two children born in England. At the wife's request, the parties had entered into a pre-marital contract in Germany, providing for a separation of assets and that no party would make claims against the other in the event of a divorce. The wife's assets were all inherited and at the first hearing her wealth was accepted to be approximately £55 million with a substantial interest in family companies producing a significant income. At the first instance, Baron J awarded the husband £5.6 million together with child maintenance plus the right to reside in a German property, and in doing so held that the pre-nuptial agreement had the effect of limiting the husband's award. The wife appealed to the Court of Appeal, where the sum was reduced to a payment to cover the husband's debts, a housing fund of £2.5 million to be retained by the husband during the children's minority only and capitalised maintenance to cover the husband's needs until the younger child's 22nd birthday. The Supreme Court upheld the decision of the Court of Appeal, agreeing that the pre-nuptial agreement should be given considerable weight and the husband's claims should be limited.

The facts surrounding the pre-marital agreement were not typical insofar as:

- the case involved an Anglo Saxon 'exclude everything' pre-nuptial agreement but from a continental country where it was prepared by a notary;
- in the agreement the husband agreed to his maintenance claims being terminated on divorce;
- the husband had received full advice from the notary, which included that he should take independent legal advice, including from English lawyers (but he declined);
- the agreement was signed four months before the marriage when the parties were already living in London; and
- the husband (rather than the wife) was the financially weaker spouse (with a wife worth multi-millions) but he was found to have known exactly what he was signing.

Radmacher has undoubtedly changed the advice English family lawyers give in relation to the enforceability of agreements. While previously it was unclear whether an agreement was likely to be enforced, the case has firmly put the burden of challenging the agreement on the party who wishes to challenge the terms. In the frequently quoted words of the main judgment, the court should give effect to a nuptial agreement that is '*freely entered into by each party with a full appreciation of its implications unless, in the circumstances prevailing, it would not be fair to hold the parties to their agreement*' [para 75].

While the Supreme Court has made it clear that whether it is fair to hold the parties to their agreement '*will necessarily depend on the facts of the case*' [para 76], in the case of *Radmacher*, they were undoubtedly influenced by the parties' intentions at the time they signed the agreement. At [para 68], Lord Phillips said: '*… if an ante-nuptial agreement, or indeed a post-nuptial agreement, is to carry full weight, both the husband and wife must enter into it of their own free will, without undue influence or pressure, and informed of its implications…*' and at [para 69]: '*What is important is that each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end.*'

So, it can be seen that a property regime marriage contract, typical in the civil jurisdictions of continental Europe, which may have been executed with the intention to protect the other spouse from third-party creditors during the marriage, rather than necessarily themselves upon divorce, does not conform easily with the type of agreement that the Supreme Court intended should be upheld. However, an Anglo-Saxon type agreement, the type entered in the English speaking common law jurisdictions, such as England or the US (where most states have legislation in relation to marital agreements), which specifically provides to set out the financial position in the event of a separation, is much more likely to be enforced, particularly if the needs of the parties and any children have been met.

Case Law Since *Radmacher* – the Importance of the Parties' Intentions

Since the Supreme Court decision of *Radmacher*, there has been a flurry of English divorce (financial remedy) cases where one party seeks to rely upon the terms of a foreign marriage contract to limit the other spouse's claims. These typically are not comprehensive pre-nuptial agreements to protect a party's assets and/or income in the event of a divorce, but typically 'off the shelf' continental

marriage contracts where spouses have elected a property regime to regulate the finances during the marriage.

It is vital to appreciate that there is a fundamental difference between these two types of agreements. They are completely different animals. The aim of a typical European marriage contract is to regulate the couple's finances during the marriage, in particular against third parties, and rarely does the agreement seek to address maintenance or need-based claims on a future divorce (although the property regime elected will affect the financial outcome on divorce). Indeed, in some countries, e.g. France, it is against public policy to do so. On the other hand, the English or US-style marital agreement's main aim is to limit the couple's claims against each other in the event of separation and so typically sets out comprehensive financial terms of settlement.

The post-*Radmacher* cases relating to foreign agreements and involving the more typical simple property marriage contract of England's continental cousins are fact specific cases, but in no case since (and including) *Radmacher*, has an applicant been kept to the strict terms of the marriage contract. Furthermore, in the majority of cases, there has been a close examination of the parties' intentions when they signed the agreement.

In the first reported case, *Z v Z (No 2) (Financial Remedies: Marriage Contract) [2011] EWHC 2878*, Moor J took into account the terms of the French agreement in limiting the wife to a claim based on her generously interpreted needs. Moor J excluded the wife's sharing claims, the wife having signed a 'separation of assets' property regime before the marriage. Moor J held that '*there is no dispute that the agreement was entered by both parties freely and with full understanding of its implications*', the wife having apparently conceded that she had understood the implications of this contract. It is also worth noting that in *Z v Z* the French parties had only lived in London for a year before the wife issued her petition (so the case had a strong French flavour) whereas in *Y v Y (Financial Remedy: Marriage Contract) [2014] EWHC 2920 (Fam)* (see below), the parties had lived in England for all of their married life, over 20 years, and Roberts J did not give the agreement any weight.

V v V (Prenuptial Agreement) [2011] EWHC 3230 (Fam), a Swedish case, involved much smaller assets (£1.3 million), which were mainly pre-acquired. On appeal, Charles J did not place as much importance on the parties' intentions as the district judge at first instance, and instead gave great weight to the principle of individual autonomy as established in *Radmacher*. Charles J took into account the Swedish settlement (like the other Scandinavian agreement in *AH v PH* (below), where the terms were wider than the simple property marriage contract) and ordered a charge back on the property in favour of the husband (plus maintenance).

In subsequent cases, a theme that has developed is the extent to which a '*full appreciation of the implications*' involves legal advice, including from other countries, in particular discretionary jurisdictions such as the UK. This was addressed in detail in *B v S (Financial Remedy: Marriage Property Regime) [2012] EWHC 265 (Fam)*, where Mostyn J was dealing with a Catalan separation of property regime plus an express agreement during the 15-year marriage when a property had been purchased. The wife sought 50% of the £6 million assets whereas the husband relied on the tacit and then express agreement of the separate property regime and resisted a lump sum payment being made.

In ordering a lump sum to the wife of £3 million, Mostyn J did not place weight on the agreement, holding that there's a big difference between a pre-nuptial agreement which specifically contemplates divorce and seeks to restrict or influence the exercise of discretion of the court, and an agreement regarding the marital property regime in civil jurisdictions. Neither party had entered into the agreement with 'a full appreciation of its implications' and no weight was therefore attached to the agreement in an assessment of what was a fair award to the wife. While Mostyn J held that the requirement of '*a full appreciation of implications*' did not carry a requirement to have specific advice on the effects of English law and the agreement, '*it must surely mean that the parties intended the agreement to have effect wherever they might be divorced and most particularly were they to be divorced in the jurisdiction that operated a system of discretionary equitable distribution*'. The judgments in *B v S* and *Z v Z* above in the meaning of 'full appreciation of implications' were considered recently by the Court of Appeal in the case of *Versteegh v Versteegh [2018] EWCA Civ 1050* (see below).

In *AH v PH (Scandinavian Marriage Settlement) [2013] EWHC 3873 (Fam)*, Moor J held that the wife did not have a full appreciation of the implications of the Swedish settlement; unlike the husband, she was not sophisticated in relation to legal concepts nor was she financially astute. In *AH v PH*, the assets were non-matrimonial and, while Moor J looked at the purpose of the Scandinavian settlement (which was focused on the wife's housing needs, albeit in Scandinavia from whence she had moved permanently to England), he felt it was fair to invade the husband's wealth to deal with the wife's increased housing needs and capitalised maintenance. In ordering the husband to pay the wife a lump sum of £7.75 million (including a £5.25 million housing fund subject to a £2 million charge and £2.25 million capitalised maintenance), Moor J made it clear that he would have reached the same conclusion in any event, given the short length of marriage (four years), the age of the parties (early 30s) and the origin of the husband's wealth.

Roberts J, in her long judgment in *Y v Y (Financial Remedy: Marriage Contract) [2014] EWHC 2920 (Fam),* provides a helpful summary of the cases at [paras 98–110] and follows the views expressed by Mostyn J in *B v S* (adopted by Moor J in *AH v PH*) rather than Charles J in *V v V*.

Y v Y involved a French couple, aged 49 and 50. It was a 20+ year marriage with some pre-marriage cohabitation and three children. The assets were £14 million, including non-matrimonial assets of around £1.5 million (held roughly equally). Two days before the wedding, the parties signed a straightforward property marriage contract (*separation de biens*) before a notary. Neither party had independent legal advice, although the husband, who had requested the contract, was from a family of lawyers. Shortly after the marriage, the couple moved to London.

The only issue in the case was whether the marital pot should be shared equally or whether, on the husband's case, the wife should be limited to her needs and sharing of the assets should be excluded, given the marriage contract. The parties had not lived an extravagant lifestyle and, on the husband's case in relation to what the wife needed, the wife would have been left with around 30% of the marital assets. The husband conceded that, save for the marriage contract, this would be a sharing case and the case centred round the intentions of the parties when signing the agreement.

Roberts J accepted that the wife believed that the agreement was only entered into to protect her from third-party creditors, that she had no idea that the agreement would have any effect on a divorce and that she was not familiar with such concepts. There was no evidence that the notary had advised the parties that the agreement would affect the outcome on divorce (even though that in fact is meant to be their duty). The judge found that, at the time the wife signed the contract, she did not have a full understanding of the legal implications which would flow from a divorce, nor the rights which she might be giving up by signing. Had the wife understood the impact of the contract on divorce, she might have thought very differently about the fairness of the separation of assets regime which she was entering into.

Following her findings, the judge went on to decide the weight (if any) she would give to the agreement, having regard to the various cases.

> '*I find it difficult to see how a full appreciation of* [an agreement's] *implications (per Radmacher) will not, in almost every case, involve both a full understanding on the part of both parties as to (i) the nature and effect of the terms and (ii) of the circumstances in which its implementation in a*

jurisdiction other than that in which it is made will, or might, affect the scope of any legal award or remedy which otherwise be available to one of the parties in the event of a divorce …'

So, in considering the weight to be attached to the agreement in *Y v Y*, the judge only gave recognition to the principle that the non-matrimonial property should be excluded from any entitlement and the wife received 50% of the matrimonial assets.

The same weight to non-matrimonial property was given by Mostyn J in the case of *SA v PA [2014] EWHC 392 (Fam)*, a Dutch marriage contract. The couple had entered into a pre-nuptial agreement which stated how capital should be divided in the event of divorce but like many European agreements (unlike *Radmacher*), there was no reference to maintenance.[4]

Mostyn J held that that the wife believed (or she should be taken to have believed) that she was agreeing that any capital which was acquired from an external source after the marriage would be kept by the recipient provided that it had been kept separate. The wife had freely entered into the agreement with sufficient advice to understand its implications. In those circumstances, subject to the critical question of maintenance, which had not been addressed, it was fair to implement the capital division specified by the agreement (despite the fact that the parties entered into it the day before the wedding and the wife was pregnant).

In *XW v XH [2017] EWFC 76*, the court considered the parties' election of an Italian separation of goods regime but concluded that it would be unfair to uphold the election as the wife did not fully understand or appreciate the implications of entering into the agreement. While the wife understood in basic terms the nature and effect of the *separazione dei beni* (separation of goods) regime, she did not have any understanding of the circumstances in which its implementation in a jurisdiction other than Italy might affect the scope of any remedy which would otherwise be available to her in the event of divorce.

In 2018, the Court of Appeal considered the weight of a foreign pre-marital agreement in the case of *Versteegh v Versteegh [2018] EWCA Civ 1050*. This involved a Swedish pre-nuptial agreement which the judge, at first instance, had taken into account in awarding the wife 23.41% of the business assets but around half of the non-business assets (£51.4 million, well in excess of her needs). The wife appealed the decision seeking a greater share of the business assets (42.5%), acknowledging there should be a small departure from equality by the introduction by the husband of non-matrimonial property. The day before the Swedish wedding in 1993, the parties had entered into a pre-marital agreement based on a separation of property regime. The husband was from a wealthy family and by the time of the marriage had already inherited shares in family companies. Immediately after the marriage the parties moved to London where they brought up their three children.

Following the parties' separation in 2014, the husband's position was that the wife's financial claims should be limited to those governed by the terms of the pre-marital agreement. This would have meant she would have received assets of £27 million (above her generously assessed needs of £22 million). However, by the time of the final hearing he had increased his proposal substantially which would mean the wife would have £38 million liquid resources and 23.41% of the business assets. This was largely accepted by the trial judge who concluded that the wife had had a full appreciation of the implications of the agreement when she signed it. This was contrary to what the wife claimed; that she thought that the agreement only covered non-marital assets, she had not had legal advice and she had not even read the agreement before the wedding and only read it for the first time, following the breakdown of the marriage. The judge did not accept her evidence and indeed found the wife's account untruthful. On appeal, the wife's main argument in terms of the effect of the pre-marital agreement was that the wife received no legal advice prior to signing, relying on Mostyn J's judgment in *B v S* (see above). How could she be said to have a full appreciation of the implications of what she was signing when she (immediately moving to England) was unaware of the approach on financial provision upon divorce? The Court of Appeal reminds us that legal advice is 'desirable' but not essential – and in this case the trial judge had concluded that the wife knew 'full well' the effect of the agreement. They concluded that it cannot be correct that couples have to take the kind of legal advice anticipated by Mostyn J, 'just in case' they move countries and 'it cannot be right to add a gloss to *Radmacher* to the effect that such a spouse will be regarded as having lacked the necessary appreciation of the consequence absent legal advice to the effect that some of the countries, in which they may choose to live during their married life, may operate a discretionary system' [para 65]. The Court of Appeal further reminds us that *Radmacher* includes a safety net through the expectation of fairness and the provision of needs.

2018 saw a second Court of Appeal case, *Brack v Brack [2018] EWCA Civ,* dealing with a Swedish couple and an international pre-nuptial (three agreements in fact, signed in 2000 in Niagara, Ohio and Gothenburg where the couple lived). An issue for the Court of Appeal was whether the maintenance prorogation clause (MPC) was valid (under Article 4 of the Maintenance Regulation (EC) No 4/2009). The judge had held that it was but that he retained jurisdiction in relation to rights in property arising out of the marriage which included any sharing claims. However, following previous decisions (*Z v Z* above and *Luckwell v Limata [2014] EWHC 502* where the courts had excluded sharing), the judge felt constrained to limit his jurisdiction to only deal with the wife's needs (which he could not do due to the MPC). In allowing the wife's appeal, the Court of Appeal disagreed with the first instance judge and held the MPC was not valid (so Sweden did not have jurisdiction for maintenance) and the judge had also erred in concluding that, if he held that the pre-nuptial agreement was valid, he was constrained to make an order limited to providing for the needs not met by an effective pre-nuptial agreement.

In line with the Supreme Court's respect for autonomy as set out in *Radmacher v Granatino,* the Court of Appeal in *Brack v Brack [2018] EWCA Civ* acknowledged that since *Radmacher* the courts have interfered with valid pre-nuptial agreements only to the extent necessary to ensure that needs which have not been provided for by the agreement are satisfied. King LJ recognised that for most cases where the parties have contracted out of the sharing principle, any claims are likely to be limited to needs, however '*Even where there is an effective prenuptial agreement, the court remains under an obligation to take into account all the factors found in s25(2) MCA 1973, together with a proper consideration of all the circumstances, the first consideration being the welfare of any children. Such an approach may, albeit unusually, lead the court in its search for a fair outcome, to make an order which, contrary to the terms of an agreement, provides a settlement for the wife in excess of her needs. It should also be recognised that, even in a case where the court considers a needs-based approach to be fair, the court will as in KA v MA [a 2018 decision of Mostyn J dealing with a non international prenuptial agreement] retain a degree of latitude when it comes to deciding on the level of generosity or frugality which should appropriately be brought to the assessment of those needs.'*

But what about the approach to wider, all-encompassing agreements more commonly seen in common law jurisdictions such as England, the US and Australia? Such cases since *Radmacher* have been more limited but, provided the *Radmacher* test has been met and the intention has been to provide for the parties' claims in the event of a divorce (without arguments in relation to duress, etc.), English case law supports the fact that those agreements will largely be upheld (particularly if they meet the needs of any children and the carer). In many US states, pre-nuptial agreements have statutory authority (27 US states have now adopted the Uniform Premarital Agreement Act (UPPA)), which is designed to provide that such agreements are valid and enforceable contracts and to address the problems of conflicting laws, judgments and uncertainty about enforcement as couples move from state to state). With countries

all around the world now recognising marital agreements, England is behind the times in terms of legislative change.

Protecting Clients in Marital Agreement Cases

Given that the answer to whether it is fair to hold the parties to the agreement '*will necessarily depend on the facts of the case*' (*Radmacher*, [para 76]), in any case where a foreign marriage agreement exists, a full proof of evidence at an early stage can only assist your client. In taking the background, full details should be taken about the client's intentions at the outset, including the circumstances in which the agreement was signed, i.e. what did they think they were signing; was it a simple property regime to protect each other against creditors during the marriage or a wider *Radmacher*-style pre-marital agreement to protect the parties in the event of a divorce? Did they discuss the agreement with anyone, either prior to or during the marriage? Evidence of others may be crucial (such as in the Court of Appeal case of *Versteegh* (see above)). When advising European clients before their marriage, who seek to protect their assets in the future, it goes without saying that they should consider entering into a full English-style negotiated pre-nuptial agreement rather than a simple continental-style contract. England does not import foreign law but can export our law,[5] so it is worth considering whether to enter into the main agreement in England (while considering appropriate clauses in that agreement or a similar agreement abroad). Even though a country may not allow a restriction of maintenance claims in its own country, it may accept a foreign agreement, e.g. from England, which does and such agreement could be enforceable under the EU Maintenance Regulation. For clients from all over the world, including common law jurisdictions, consider jurisdiction clauses carefully (in this regard see the Court of Appeal's comments at para 58 in *Brack v Brack* on the importance of clear drafting) as, currently, the stronger financial party is unlikely to wish to elect England and Wales as the future forum for divorce. For those clients who are already married when they come to England, it is worth considering the limitations of the foreign marriage contract and, where appropriate, suggest they enter into a post-nuptial agreement.

To encourage the enforceability of the agreement in the future, you will need to show that the parties have entered into the agreement of their own free will. Whether the parties obtained independent legal advice and the level of financial disclosure will also be relevant. Duress or undue pressure could reduce the weight that is given to the agreement and could even negate it completely. As can be seen from the case law above, the Court will look at the parties' circumstances at the time the agreement was entered into when considering whether the parties understood the implications of the agreement and whether they intended it to be effective.

For a summary of the best way to ensure that a marital agreement will be upheld by an English court, please see the England & Wales chapter also featured in this guide; however, any future children of the marriage remain an overriding consideration and the terms of the agreement (with particular attention on needs) should still result in a 'fair' outcome.

As to the future, with the upheaval of Brexit and huge legislative change on the horizon, it is unlikely that the Law Commission's proposals for 'qualifying nuptial agreements' will be high on the political agenda. And certainly, there will be no further 'harmonisation' of family law within Europe. To the contrary, there is currently a huge uncertainty as to the extent to which the UK will remain within the current European family legislation following a full Brexit (see chapter 3). However, with the UK's current population (for example, some 3.3 million European nationals now live in the UK), it is clear that individuals, particularly those from other countries where agreements are binding, will continue to seek marital agreements to determine the financial provision in the event of divorce and the English court will continue to develop its understanding and recognition of foreign agreements.

Endnotes

1. References in this article to the law in England and English law are shorthand for England and Wales.
2. See question 2.3 in the England and Wales chapter for a list of all the Section 25 factors.
3. The House of Lords was the predecessor to the Supreme Court.
4. When considering issues of maintenance, the English court are used to extending the meaning to the definition of maintenance as set out in the ECJ case of *Van der Boogard v Laumen [1997] 2 FLR 399* where maintenance was interpreted as a needs-based award and can be extended to capitalised periodical payments or housing.
5. See the applicable law provisions under the Hague Protocol of the EC Maintenance Regulation No 4/2009, of which the UK has opted out but most of the EU has opted in so other jurisdictions will recognise the maintenance provisions of a UK agreement.

Charlotte Bradley is head of the Family team at Kingsley Napley, where she has been a partner since 2001. Charlotte specialises in all aspects of family law, including international issues, both in relation to finance (particularly cases of Schedule 1 provision for unmarried parents) and children (particularly relocation). She is also an accredited mediator and collaborative lawyer. She writes regular articles and has co-authored a number of books on family issues. She is the Contributing Editor for *The International Comparative Legal Guide to: Family Law* and fellow of the International Academy of Family Lawyers.

In the recent published legal directories, *Chambers UK* and *The Legal 500*, she has been described as "*a complete delight*", "*fantastic – she has all the attributes you want from an international family lawyer, and has warmth in abundance*", being "*absolutely brilliant at jurisdictional elements of work*", "*universally respected*", "*an absolute star with a relaxed and authoritative style*" and "*a wonderful person with an excellent mind and exceptional client care skills*".

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