

PRACTICAL ASPECTS OF MARITAL AGREEMENTS IN ENGLAND WITH AN INTERNATIONAL ELEMENT

*A pre-marriage agreement is a piece of paper that a solicitor prepares to protect the party of the first part from the party of the second part should they discover that the party is over
(Anon but adapted)*

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Part of these notes are taken from “A Practical Guide to International Family Law” (Jordans) by David Hodson, with acknowledgments to Jordans

ABOUT THE AUTHOR

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He was joint founder in 1995 of probably the world's first metropolitan practice to combine family lawyers, mediators and counsellors and with an emphasis on a conciliatory and holistic approach. It was subsequently copied in many practices across the world. He is past chairman of the resolution/Solicitors Family Law Association's Financial Provision Reform Committee, Training Committee and Good Practice Committee and founder member of its International Committee. He is a member of The President's International Committee. He is past vice chair of the UK College of Family Mediators, the umbrella organisation for family mediation. He is a member of the Chartered Institute of Arbitrators. He is co-author of "Divorce Reform: a Guide for Lawyers and Mediators", "The Business of Family Law" and consulting editor of "Family Law in Europe". He is an Accredited Specialist (with portfolios in Substantial Assets and International Cases), a Fellow of the International Academy of Matrimonial Lawyers, a past trustee of Marriage Resource and member of the Family Law Section of the Law Council of Australia and a member of the Lawyers Christian Fellowship. He is chair of the Family Law Reform Group of the Centre for Social Justice

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He is the author of "A Practical Guide to International Family Law", (Jordans July 2008), probably the leading textbook on international family law, of which part of this is an extract.

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The International Family Law Group is a specialist law firm providing services to the international community as well as for purely national clients. iFLG has a special contract with the Legal Services Commission for child abduction work and is regularly instructed by the UK Government (Central Authority). It acts for international families, ex pats and others in respect of financial implications of relationship breakdown including forum shopping and international enforcement of orders. It receives instructions from foreign lawyers and, as accredited specialists, acts for clients of other law firms seeking their specialist experience.

iFLG is situated in Covent Garden near the Law Courts. Its mobile telephone accessible website includes valuable information, podcasts, a government approved child abduction questionnaire and formulae as a starting point for calculating fair financial settlements. It has emergency 24 hour contact arrangements. Contact at www.iflg.uk.com.

English Marital agreements for international families after Radmacher

David Hodson

Introduction

The UK Supreme Court decision in Radmacher on 20 October 2010 was always likely to have a significant impact in the international family community. And so it has proven. The decision brings England and Wales much closer to the law and practice of many other countries. It gives much greater confidence to foreign lawyers and their clients that a foreign marital (including premarital) agreement, especially after independent advice, will be upheld on an English divorce.

England will now look more at foreign law to determine the effect the parties intended when entering into a foreign agreement. England will still only apply local law, English law, and not applicable (conflicts of) law, but this is what occurs in many other countries with which England is historically close, even if not the preference of the Euro bureaucrats. The Supreme Court decision does not of course make marital agreements binding in law - only Parliament can do so and probably will in the next four years following the Law Commission proposals expected in January 2011. In the meantime, this is as close to binding as judge made law could provide.

This decision is good for the international family lawyers community and good for international families

The decision in Radmacher was *par excellence* in an international family: a French husband, a German wife, German inheritances, German pre-marriage agreement binding under both German and French law, choice of law clause, separation of assets in classic community of property regime, awareness in the agreement that other countries may ultimately deal with the divorce, and then the divorce occurring in a country which applied only local law. Apart from the curiosity of the husband being the applicant and the very high level of assets, this was a quite frequent international occurrence.

It is a familiar situation for international family lawyers in many countries. So it was very appropriate case for England's highest court and the decision is an excellent one to help international families.

In short summary the position now in law in England of marital (including premarital) agreements is set out in paragraph 75 of the judgment namely: "*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.*"

Fairness is the objective of financial provision, capital and income, on divorce in England. Fairness is found in providing for needs and compensation and in sharing the assets. The Supreme Court said that a marital agreement had to be fair both when it was entered into and fair at the time of the subsequent divorce.

Fair at the time of being entered into

The agreement should be *freely entered into by each party with a full appreciation of its implications*. This will primarily go to the circumstances at the time that the agreement was entered into such as lack of duress, knowledge of financial disclosure and being able to negotiate freely and fairly, often through independent legal representation.

The court will often want to ensure that there has been legal representation and disclosure and an absence of duress. However where an individual is aware of their rights in law and/or the probable

level of disclosure and chooses not seek legal advice or make disclosure enquiries, they will be unable to set aside the agreement, being the very facts of Radmacher itself.

In looking at whether an agreement is fairly entered into, the Supreme Court looked back at certain recommended pre-conditions from the UK Government in a Consultation Paper in 1998, referring to the importance of independent legal advice. In Radmacher itself, the lack of independent advice was not a basis for setting aside the agreement as the husband had been aware of his general legal rights. However the outcome in Radmacher should be treated as exceptional. Most English courts will expect to see the opportunity provided and taken of independent legal advice. However separate representation of each spouse or fiancée is a distinctively “common law” professional attribute. Across much of the civil law world, it is conventional on entering into such an agreement for the parties to have joint advice from only one lawyer such as a notary. This causes concern and alarm for common law practitioners. It gives rise to doubts about the independence of the advice and the opportunity to take a meaningful part in changing the terms and being fully represented.

It may well be that English courts will treat more sceptically (i.e. less likely to be fair) agreements reached without true independent legal advice. Very probably, couples entering into a marital agreement in civil law country which may need to be enforced in a common law country should be recommended to obtain independent legal advice. This may create consternation in civil law jurisdictions. Common law and civil law regimes in family law have much to learn sympathetically and tolerably from each other. Perhaps the importance of independent legal advice to overcome duress and unfair agreements could be one aspect usefully exported from the common law world.

The same applies to disclosure. If one party has a reasonable knowledge of the financial circumstances of the other party or is aware of the implications of entering into such an agreement without having knowledge of the other’s financial circumstances, then the lack of disclosure may not be fatal. In the vast majority of cases, it will be very important for there to be general disclosure of the financial and other relevant circumstances of each

The (autonomous) intent of the parties to be bound by the agreement was crucial for the Supreme Court. They recorded that in past years, parties in England may have entered into these agreements knowing that ultimately they were not strongly influential on outcome etc. From this time of the Supreme Court decision onwards, and probably from the past few years when the English courts have given much greater weight to these agreements, it will not be possible for a party to say that they did not intend to create a binding commitment. This will be of particular importance for foreign marital agreements where, under the law of the country in which they were then entered into, they were intended to have binding impact as the English court is now likely to hold those parties to that agreement.

The Supreme Court stated that agreements entered into after the date of the marriage had the same status and position in English law as premarital agreements, overturning the decision of the Privy Council in MacLeod (2008) UKPC 64. This will give much comfort to a number of parties who had entered into premarital agreements abroad and had previously been advised by English lawyers then to enter into a marital agreement a short time after the marriage on the basis that it had greater weight. The Supreme Court has ended this practice and helped foreign lawyers to know agreements entered into a couple of months before or a couple of months after the marriage are of equal status.

Fair at the time of the divorce

Although the divorce court has a duty to produce a fair outcome, the Supreme Court said that fairness on divorce might now be found in holding the parties to the agreement freely entered into.

Certainly it will be inappropriate on divorce to give effect to an agreement when, and to the extent to which, there is inadequate provision for the children (maintenance and capital including accommodation with each parent). Otherwise spousal needs (Brussels I maintenance) at the time of the divorce may not overcome the intent of the parties in the agreement for there to be no ongoing support or other provision for needs. The Court of Appeal in Radmacher had given financial provision to one parent for the minority of the children and then to revert back to the other spouse. This was upheld by the Supreme Court and may become a preferred model of outcome in such cases.

Impact of international law

Foreign law will be considered by the English courts looking at these agreements to the extent it is necessary to ascertain what, under the relevant foreign law of the country of the agreement, was the impact and status of the agreement and the intent that the parties would be bound (see paras 74 and 96-102 of the judgment). It is likely that English lawyers will be consulting foreign lawyers for specific advice about this particular aspect.

The whole question of applicable law of marital agreements was anticipated to be dealt with by the Supreme Court, especially as eight of the nine judges were first and foremost civil litigation judges, not family court judges, and therefore familiar with the application within England of the laws of another country. Strikingly the Supreme Court, including the dissenting judgment of Baroness Hale, was clear that English divorce courts looking at the terms of a foreign marital agreement should only apply English law, local law. It referred to the UK policy decision not to participate in EU and Hague Conference attempts to apply uniform rules of private international law. The UK will not be bound by the 2007 Hague protocol on the Law Applicable to Maintenance Obligations. The Supreme Court held the issues in the case, and of any other foreign marital agreement considered in England on an English divorce, were governed exclusively by English law. The relevance of German law and the German choice of law clause was they clearly demonstrated the intention of the parties that the marital agreement should be binding on them.

Previously, in English law, jurisdiction clauses in marital agreements stating preferred forum of any future proceedings were curiously given much greater weight and strength than marital agreements generally, especially in forum disputes. With now more strength given to marital agreements following the Supreme Court decision, it is likely that the jurisdiction clauses will be treated equally strongly as the other clauses. Choice of law clauses are likely to continue to be treated by the English courts as jurisdiction clauses.

Dissent

Baroness Hale, the only family court judge amongst the nine Supreme Court justices, gave the dissenting judgment. Her Ladyship expressed real anxiety about the impact on women of making these agreements, in effect, presumptively binding. She stated that very often the woman is the weaker party in the negotiations and loses out by the agreement, in contrast to what would occur on divorce. Baroness Hale's remarks will be echoed in the experiences of almost all international family lawyers across many jurisdictions. They are a timely and salutary reminder that these agreements are efforts, invariably by men, to avoid what would otherwise be an outcome of the divorce court more favourable to the weaker party, invariably the woman. The gender impact of these agreements on women across the world cannot be ignored

Therefore many practitioners in England and worldwide welcome the considerably greater certainty and predictability the Supreme Court has now given to marital agreements, giving respect for personal autonomy and commitments. Nevertheless international family law practitioners must always regard our calling to do fairness and justice including for the weaker and more vulnerable party. Experience sadly is that at the door of the wedding chapel or (already married) in the

marital bed, many are reluctant to say no and refuse to sign. This is a reason why pre-marriage agreements should be entered into well in advance of the wedding to overcome any suggestion of unfairness through duress by being last-minute. It is a reason why there should be independent legal representation. It emphasises the importance for international family lawyers to explain clearly and carefully the impact of signing such marital documents and to do our best to protect our more vulnerable and economically weaker clients.

Conclusion

Many lawyers across the common law world rejoice in the discretionary basis which allows flexibility of fair outcomes. Nevertheless there is the constant cry for help by practitioners for more guidance and certainty. The UK Supreme Court has provided this. For the international family law community the message is now very clear. Whereas previously there was a very great risk that foreign marital agreements might well be simply ignored on any English divorce, there is now reason for considerable confidence that they will be followed if fairly entered into including without duress, and often with legal representation and disclosure and on the basis that it is the intent of the parties to be bound by them. The Supreme Court is to be congratulated on a clear, fair and certain decision.

Introduction

Marital agreements with an international element present particular practical challenges for English family lawyers, especially solicitors, both at the time of formation and then when they arise in a case on divorce.

At the time of formation, it is crucial to ensure it is fairly entered into with both parties having a full appreciation of its implications. This means, at least, taking account of what the Supreme Court said in *Radmacher* and what the Law Commission anticipates in its January 2011 paper as to pre-conditions to a qualifying agreement. With the international element, the English solicitor as to make sure it complies with the law and practice in the other countries (often more than one) in which the parties may be living and having any material connection. This may well require different criteria, different legal representation and very different concepts including choice of law and relationship to quite different property regimes.

Crucially lawyers need great care about the gender dimension of these agreements where very often it is the woman who is being pressurised to make an agreement which will mean she does less well, sometimes dramatically less well, than under the local law of divorce. In some cultures and jurisdictions, expectations are that women will (should) have less (much less) than half the marital partnership, and indeed are not perceived as equal marital partners. If it is really against her best interests to sign, what in reality can the lawyer do to help his client? This is always much more difficult in the international arena, including if clients are not in England

Because England is still new to these agreements, there is not yet any body of skills, training and sophisticated awareness of distinctivenesses in negotiating these agreements, e.g. in contrast to Australia where they have been binding for several years.

More generally, all lawyers must take great care under a regime in which these agreements are either binding in future statute law or presumptively binding. Experience from America is that on a later divorce, the unhappy party sues their lawyer who “allowed” them to enter into it originally. It is probably the most risky activity undertaken by family lawyers (and most underpaid in contrast to

risk!). Great caution is needed, with suitable precedent warning letters and double checking with colleagues, and even then with much luck. No-one knows what could happen in a medium or a long marriage especially with the likelihood of a decent level of assets and an international element

At the time of any divorce in England, the marital agreement will be scrutinised very carefully. Is it fair to hold the parties to it in the circumstances then prevailing? If it was entered into abroad, was there separate legal representation and disclosure and if not, is it still appropriate to hold the parties to it (Radmacher itself)? This is a very difficult issue and quite fraught internationally although both Radmacher and the Law Commission gave helpful comments to say the agreement should be looked at only in accordance with English law.

Consultation will almost always be needed with specialist lawyers in the country where the agreement was entered into, if different to England, to include what was the status of such agreements, the expectations of parties in that jurisdiction and to confirm local practice was followed.

However there are some shocking examples of agreements which, without the saving graces of Radmacher (originally wealthy husband who had an appreciation of these agreements in French and German law), simply fail to make half decent provision for women, especially in their child caring capacity. It really is sometimes (frequently?) the case that the wife as primary carer who has devoted time to housekeeping and child raising then finds herself with no accommodation and no real income provision. (The man can then even sometimes demand custody of the children as she has no resources to look after them!) Although a number of countries exempt "maintenance" from marital agreements, this is rarely able to overcome real inequality of capital distribution. It is yet further reason why the race to issue under Brussels II is so vital and necessary. EU Enhanced Co-operation merely perpetuates this gender victimisation by imposing the agreement on other countries' laws

Practical aspects on entering into agreements with an international element

It is good practice to take into account the following when instructed to advise on entering into a pre-marriage agreement or any other marital or relationship agreement when there is an international element.

- Discuss in which countries the parties are, or are likely to be, resident, nationals, hold or control assets or have other connections, in as far as this is ascertainable.
- Then ascertain the impact of the agreement in those jurisdictions, probably preparing an omnibus agreement to take account of the position in the various countries and working with lawyers in those jurisdictions.
- Consider if there should be one agreement compliant with each country or two or more agreements in identical terms but perhaps with local procedural requirements and terms and perhaps even local languages. Latter needs one lawyer in one country to control the process, action taken, timings and ensure no differences in the separate agreements through translations.
- Where a couple already have significant connections with other countries, it is especially important to involve family law specialists in those countries in the drafting and content of any pre-marriage agreement or other relationship agreement.
- Foreign lawyers will need a careful - and patient - exposition of English family law financial provision especially as it is contrary to so many experiences and expectations in foreign family

courts, not least the non-binding element of marital agreements.

- Include jurisdiction clauses in all purely national marital or other relationship agreements, given the reasonable possibility that the majority of purely national families might subsequently live or work abroad. (However if the parties seek certainty in entering into the agreement, why ever choose England as the jurisdiction?!)
- Advise at outset that finalising pre-marital agreements can take several weeks and sometimes a couple of months where it is necessary to liaise with and incorporate drafting and local procedural requirements from lawyers in other jurisdictions. Is there time? Will it seem unreasonable pressure and duress as the wedding date approaches?! Remember the Supreme Court has said there is no difference in status of pre-marital and marital agreements. However there may be abroad and in any event, the relationship dynamic may have changed. Timing is a vital practical aspect.
- Take particular care with agreements from particular religious and ethnic groups, to understand any cultural and religious dimensions to such agreements, aspects for inclusion, status within the marriage and on any divorce and expectations of the wider family
- Very different skills of negotiation, tactics and approach are required when negotiating a marital agreement as distinct from a relationship breakdown settlement; discuss with other colleagues and otherwise consider what different skills will be needed and how they should be used.
- Discuss carefully with the client in advance of a negotiation meeting to know the parameters for any agreement and also to know how assertively and strongly to put any negotiating position.
- Consider mediation as a way forward especially directive mediator with the involvement in the mediation of each party's lawyers and with a specialist mediator.
- Create in-house precedents for relationship agreements including jurisdiction clauses.
- Make sure each party has specialist family law advice before entering into the agreement; often the wealthier party wanting the agreement agrees to pay for the representation of the other party. Don't rely on the distinctive circumstances in Radmacher!
- Make sure each party has given full and frank disclosure of financial and other relevant circumstances, either in a schedule to the agreement or in separate other documents, before entering into the agreement. It is risky to rely on the outcome in Radmacher because of the distinctive facts. Law Commission refers to material full and frank disclosure of the other party's financial situation. This is wider than many expected and presently use which is an amplified version of Form M1 rather than a truncated version of Form E.
- Endeavour to make sure the agreement is entered into materially in advance of the wedding: some countries impose a deadline, for example 21 days or 56 days, before the marriage for such agreements whilst others are more likely to find duress if immediately before the ceremony. Law Commission suggests no time periods as pre-conditions, which may in fact tend to make them earlier in time than just before the wedding.
- Consider separating out maintenance and non-maintenance elements in accordance with Brussels I and the EU Maintenance Regulation.
- Consider clauses to make agreement void insofar as it makes insufficient provision for any children or would otherwise leave one party dependant on state benefits in circumstances

where the other party could provide – see Law Commission proposals as bare minimum for court to be able to interfere with an agreement.

- Record the terms of the agreement in writing to the client before the agreement is executed, in simple and very understandable terms, setting out methodically what will happen during the lifetime of the marriage or other relationship.
- Make sure the client has time to consider carefully the implications: don't allow the client to be rushed into signing such an important agreement.
- Include provision for children including additional capital provision for the person who is likely to be the primary carer, or alternatively provide that children will cause the agreement to be null and void and/or provide for a review.
- Make sure there are no obvious elements of duress or misrepresentation and make very good attendance notes of any features which give professional or personal anxiety: see the good example of the lawyers for the wife in *NA v MA (2007) 1 FLR 1760*.
- If it is obviously contrary to the client's best interests to sign the agreement, advise clearly in a face-to-face meeting and also in writing and record in attendance notes, preferably with a lawyer colleague in attendance at the relevant meeting to corroborate.
- In any event obtain a written letter confirming the instructions to proceed and on the basis of clear written advice to the contrary setting out the risks and disadvantages.
- If ultimately the client wishes to sign, it is her choice and her instructions.
- Consider carefully the position for the law firm if a client is abroad and never met, yet being advised not to sign. Obtain a good local agent. Face to face is much more powerful and gives better protection for the law firm.
- Do not destroy the file after 6 years etc but retain for many years, that is, the likely length of the marriage and for the children who may be provided for in the agreement.
- In view of the potential risks of claims many years later, law firms should consider as a matter of policy whether they should ever undertake pre-marriage or other agreements at the commencement of or during relationships.
- Although it may be wise to involve counsel in some cases, do not rely on instructing counsel as a protection from liability – it isn't!
- Make sure that the practice has and maintains very good professional indemnity insurance as any professional failings or shortcomings at the time of the agreement, perhaps viewed on the basis of the circumstances as they later appear and perhaps viewed in the light of subsequent changes in law and practice, may only appear very many years later and could be for a substantial claim.
- Consider obtaining separate one-off indemnity insurance cover for high risk cases or high net worth individuals: discuss with the firm's professional indemnity insurance company. However many companies then require that level is maintained annually thereafter which is prohibitively expensive.

- Perhaps maintain a separate database of clients with pre-marital agreements, for future contact and updating.
- Always undertake in conjunction with another partner to ensure all issues are considered – and share the risk!
- Charge a realistic amount, taking account of the risks and possible unhappiness of the client many years later.

Practical aspects on relationship breakdown with an international element where there are marital agreements

It is good practice to take into account the following at the time of any relationship breakdown.

- Ascertain at the outset if there are any marital or other relationship agreements of any kind, including jurisdiction clauses and including agreements in correspondence.
- Take such agreements into account in considerations of the most beneficial forum.
- Take local advice in respect of any foreign agreements to make sure that they are good in local law and would be upheld locally including whether they would be binding on an outcome in the local courts or whether they are merely persuasive.
- Understand the cultural and religious aspects to particular marital agreements, status within local law and the relevant religion, enforceability and expectations of the parties
- Consider what weight England would give to such foreign agreements, for example if no separate advice or disclosure, but take account of their understanding of implications.
- It may be better to issue in a country which will uphold a favourable agreement rather than having proceedings in a country which may give it little weight.
- Where the parties have entered into a marital or other agreement specifying a preferred choice of law or jurisdiction yet England is seized with financial proceedings, consider applying at the First Appointment for permission to introduce expert evidence as to the likely outcome had the proceedings had been in the jurisdiction specified by the parties at the commencement of or during the relationship, see *Otobo* (2003) 1 FLR 192 but now review in light of *Radmacher*.
- Separation agreements are dangerous in the international context for fear proceedings could be unexpectedly commenced abroad in a country which might ignore or give little weight to the terms of the separation agreement: it is invariably better where possible to proceed to obtain a final court order immediately.
- Never do Separation agreements in a possible EU case – always secure jurisdiction first. Of course it is not conciliatory or settlement orientated and reaching any agreement is much more difficult after a tactical first to issue divorce, but tell clients to blame the EU politicians, not English family lawyers who don't want that law anyway!
- It may even be dangerous to propose an agreement or use of ADR on separation without first establishing jurisdiction by issuing in the more beneficial jurisdiction for the client.

- Agreements have no relevance to jurisdiction or priority of proceedings within the EU in the context of divorce.
- In international children matters, the English courts will invariably give greater weight to what is now in the best interests of the children rather than what was necessarily agreed months or years before.
- Agreements may be of fundamental importance in Hague Convention abductions as they may be evidence of consent or acquiescence.

A possible practical way forward

Law and professional practice needs to develop hand-in-hand. This is especially so with cross-border cases in Europe. There is a strong argument for saying that professional practice may assist harmonisation of the law across Europe and lead to a better understanding of the variety of standard arrangements made in marital agreements.

At present almost every European country, and almost it seems every practitioner within each country, has their own preferred precedent documentation for various forms of marital agreements. Some countries positively oppose any public availability of precedent marital agreements on the web, through stationers and shops and in any other way. In contrast some other countries across Europe have precedent family law documents widely and publicly available and indeed written in a form accessible to lay parties

One significant way to advance the use and application of marital agreements by practitioners across Europe is the creation and adoption of a set of standard precedent marital agreements approved by a cross border professional organisation and covering the main forms of arrangements in marital agreements. These various precedent agreements would then be easily recognisable across Europe. A lawyer in one country would recognise the agreement as, for example, Model Agreement No 2 or No 6, which would be known as intended to have a particular outcome. Some arrangements would be used to opt in and some used to opt out of marital regimes. Some would cover capital and maintenance. Some would not cover maintenance. Some would cover marital acquest and non-matrimonial assets. Some would limit their application only to non-marital assets. The types of arrangements are not great. These documents are being prepared by family lawyers across Europe many times each day. Yet family lawyers are reinventing the proverbial wheel, at a cost to their clients and with the risk of lack of clarity to other lawyers abroad at the time of any marital breakdown.

This creation by a European cross-border gathering of family lawyers of a set of marital agreement precedents has been suggested on a couple of occasions, including to the Council of the Law Societies and Bars of Europe. Whilst each time receiving favourable and supportive responses, nothing has happened. Although England has come late to the marital agreement party, it has a highly organised and very specialist family law profession. What can be undertaken from England to create a set of marital agreement precedents and thereby assist in this cross border work for the benefit of international families?

The Gender dimension

Many family law solicitors spend their careers representing the more vulnerable party in family court proceedings; vulnerable for financial reasons and in other ways. Often, although certainly not always, the vulnerable party is the wife or cohabiting woman. It is often much harder, and

more expensive on costs, to act for the claimant. Many cases are hard-fought with bullying, non-disclosing, wealthier and otherwise difficult husbands or male partners. Across Europe, the race to issue the divorce takes place to secure the more favourable outcome with often the wealthier and law-sophisticated party having a distinct advantage.

Suddenly when dealing with marital agreements, the family law practitioner then finds himself in a situation where the whole purpose and intention is to produce an arrangement which will be significantly less beneficial to the more vulnerable party, invariably the woman. The practitioner finds himself advising the client in very unequivocal, black-and-white certainty terms that the terms of the marital agreement will be dramatically less good than the outcome on divorce, and therefore the more vulnerable client should not sign. Yet the pressure in the buildup to the marriage is immense; financial, family, emotional, sexual, perhaps as parents already and in many other ways. The opportunity in practical reality for the client to refuse to sign, to say no, is very limited. Although gender stereotypes about commitments to marriage should be avoided, often the woman is the keener and more committed to the wedding ceremony itself going ahead and therefore again less likely to cause difficulties by refusing to sign

This gender vulnerability in marital agreements is known to all family law practitioners across the world preparing and finalising these documents. It has existed for decades and longer. It causes many professional misgivings and frustrated attempts to encourage clients not to sign.

It has recently been given voice by Baroness Hale in the dissenting judgement in *Radmacher*. She said that marriage was not just about contract but about status. The law on premarital agreements should be changed by legislation, not judicially. She said the court can all too easily lose sight of the fact that the object of a premarital agreement is to deny the economically weaker spouse the provision to which she would otherwise be entitled. She said there was a *“gender discrimination to this issue which some may think ill suited to a decision by a court consisting of eight men and one woman”!*

Baroness Hale’s remarks are echoed in the experiences of almost all international family lawyers across many jurisdictions over very many years. They are a timely and salutary reminder that these agreements are efforts, invariably by men, to avoid what would otherwise be an outcome of the divorce court more favourable to the weaker party, invariably the woman. The gender impact of these agreements on women across the world cannot be ignored

Many practitioners in England and worldwide welcome the considerably greater certainty and predictability the Supreme Court has now given to marital agreements, giving respect for personal autonomy and commitments. Nevertheless international family law practitioners must always regard our calling to do fairness and justice including for the weaker and more vulnerable party. Experience sadly is that at the door of the wedding chapel or (already married) in the marital bed, many are reluctant to say no and refuse to sign. This is the reason why the practical aspects of these agreements are as important as the law and culture in which they exist. This is a reason why pre-marriage agreements should be entered into well in advance of the wedding to overcome any suggestion of unfairness through duress by being last-minute. It is a reason why there must be independent legal representation. It emphasises the importance for international family lawyers to explain clearly and carefully the impact of signing such marital documents and to do our best to protect our more vulnerable and economically weaker clients.

Conclusion

Many lawyers across the common law world rejoice in the discretionary basis which allows flexibility

of fair outcomes. Nevertheless there is the constant cry for help by practitioners for more guidance and certainty. The UK Supreme Court has provided this. The Law Commission has assisted the process with very well thought through and wise observations and recommendations.

For the international family law community the message is now very clear. Whereas previously there was a very great risk that foreign marital agreements might well be simply ignored on any English divorce, there is now reason for considerable confidence that they will be followed if fairly entered into including without duress, and (very often) with legal representation and disclosure and on the basis that it is the intent of the parties to be bound by them. The Supreme Court is to be congratulated on a clear, fair and certain decision. Lawyers now need to create a practical structure for these agreements given their much stronger status in English law, to balance the vulnerability of the weaker party with the autonomy of the wishes of the couple.

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