

Pre-nuptial Agreement (PNA)

In the following, we would explain what a pre-nuptial agreement (“PNA”) is, its pros and cons and countries’ position on PNAs and what you can do if you are thinking about PNAs.

In light of a number of high profile divorce cases in the United Kingdom involving divisions of huge amounts of assets (see below), PNA is becoming an attractive pre-emptive measure. Countries have not taken PNAs on board whole heartedly because aside from being a legal anomaly, PNAs presuppose the breakdown of a fundamental social institution. But the trend towards enforcing PNAs is gathering force globally. It is open to couples to choosing the laws they wish to be bound by in their marriage or its breakdown. In Hong Kong, courts are not bound to enforce PNAs lock stock and barrel. Depending on circumstances, judges may put evidential weight on these instruments in the case of disputes. Hence a carefully drafted PNA should assist couples to avoid costly and bitter litigation in Hong Kong courts or otherwise.

What is a prenuptial agreement?

A PNA is a contract entered into by two people who are about to get married. This contract primarily aims to set out in advance of the marriage, the parties’ financial arrangements if the marriage should come to an end either through divorce or death. A PNA can also be used to manage the parties’ financial arrangements throughout the duration of the marriage e.g. where the parties wish to keep separate from each other and the marriage assets created during the marriage.

Pros

Other than the general merits of a PNA above mentioned, from case laws we can deduce several specific advantages to drawing up a PNA, some of which are listed below: -

- It can protect the inheritance rights of children from a previous marriage;
- It can preserve a party's business from being divided upon divorce;
- It can prevent a debt-free spouse from assuming liability or debts brought by the other party into the marriage;
- It can preserve heirlooms or family assets passed down the generations from being severed upon divorces
- It puts a ceiling on ancillary relief upon divorce;
- It helps to plan the financial arrangement of parties during and after the marriage.

Cons

However, many people are uneasy about PNAs. The following are amongst some of the reasons: -

- It may undermine trust between a couple about to get married;
- PNAs may become anachronistic;
- Parties normally cannot perceive that far into the future;
- Not all countries enforce PNAs in full; or countries are uncertain on enforceability.

Enforceability of PNAs in other countries

United Kingdom

The recent House of Lords cases of *White v White* [2000] 3WLR 1571 and *Miller v Miller and McFarlane v McFarlane* [2006] 2 WLR 1283 have alarmed people because the Lords ruled that equality is to be adopted regardless of the duration of marriage, and the way wealth is accumulated whether by sweat or by windfall. This might have spurred people to think seriously on PNAs.

The traditional position is that PNAs are unenforceable, the UK courts are now becoming more receptive to PNAs. The court will use these to construe the intention of the parties at the time of marriage – which has always been one of the considerations the court has to take into account when determining a just and equitable division.

The UK courts may enforce PNAs drafted in other jurisdictions, if the applicable law is of a jurisdiction that does enforce such agreements. In general, English law provides that the place of matrimonial domicile follows the place of domicile of the husband. So if the jurisdiction of the husband's place of domicile recognizes PNAs, then the terms of the PNA in relation to the couple's movable property (but not real estate) will be applicable and enforceable.

United States of America

Historically, prenuptial agreements were unenforceable in the US because the judges viewed them as a means to evade the laws applicable to marriage, but they are now recognized in fifty states as well as the District of Columbia. The landmark case of *Posner v Posner* 233 So2d 381 (Fla 1970) reviewed the public policy argument, and the Supreme Court of Florida concluded that prenuptial agreements were not invalid per se, and that the precedents which previously held that such agreements violated public policy were now out of touch with the changing morals and values of society.

Most US states have now enacted a version of the "Model Prenuptial Uniform Premarital Agreement Act" which sets down a number of requirements for a PNA to be valid and enforceable. These include for example, compliance with formalities; restriction on the scope of waivers of the right to spousal support; absence of any provisions regarding children; mandatory disclosure of financial circumstances; exclusion of unconscionable provisions etc.

Australia

Part VIIIA of the Family Law Act 1986 imposes a number of restrictions and permits the courts to reject PNAs on the grounds of fraud, duress, undue influence, unconscionability, and where there is a significant change to children arrangements resulting in hardship. PNAs void of the above vitiating factors are likely to be enforceable.

Canada

PNAs drafted in compliance with the laws are enforceable in all Canadian provinces. The Supreme Court in Canada has held in a landmark case in 2004 that courts should respect arrangements agreed upon by private individuals, for the division of their property upon the breakdown of a marriage, particularly where both sides are supported by independent legal advisors. The Supreme Court opined that individuals ought to be able to structure and arrange their own private affairs and the court should be slow to second-guess the arrangement on which they reasonably expect to rely on.

If you are thinking about PNAs, you should note the following:

Other than adopting the jurisdiction of a country that recognizes PNAs, courts around the world, may enforce or give weight to PNAs if it can be established that the following have been fulfilled:

- full and frank disclosure of the parties' finances so as to allow parties to make informed decisions;
- independent legal advice;
- voluntary agreement, void of duress or undue influence;
- no coercion, a PNA should be signed well in advance of the wedding day;
- absence of any unconscionable terms.

[Please be advised to consult foreign lawyers on the laws of foreign countries]

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IMPORTANT:

The law and procedure on this subject are very specialized and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.