"The technical problems, and possible solutions, in drafting international marriage contracts and pre-nuptial agreements"

1. Is it possible to devise a pre-nuptial agreement which will prove effective throughout Europe? Identify positives and pitfalls

2. Whether from your national standpoint European family law may at present appear to be converging or diverging

3. What minimum requirements for an effective international pre-nuptial agreement would you stipulate? Please include examples of draft provisions you consider universally acceptable and desirable

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INTRODUCTION

Clients are often surprised and frustrated to learn that their marriage contract or prenuptial agreement would not necessarily be upheld by a foreign court. In the same vein, international clients have difficulty understanding why they cannot have one global agreement, entered into in one country, recognised worldwide. An international couple, making the most of the freedom of movement, are currently unable to move around Europe with any certainty that the agreement they reached before marriage will be effective throughout Europe.

Is it possible, now or in the future, to have a uniform approach to record and enforce an agreement reached between consenting adults throughout the 27 member states of the EU; allowing the freedom of movement without the fear of divorce races and forum shopping?

An effective Europe-wide prenuptial agreement would avoid the need to take advice in more than one EU jurisdiction (and the consequent costs), or having to enter into a "mirror" agreement abroad. The idea, if successful, would avoid conflict of laws, jurisdiction races and concern about the differences of approach through Europe.

It sounds like an inspired idea in principle but, in practice, will we ever get there?

TECHNICAL PROBLEMS

Legal and conceptual differences

Some jurisdictions still consider prenuptial agreements (as opposed to marriage contracts) to be contrary to public policy and not enforceable. By way of example, in France, comprehensive prenuptial agreements (covering property and maintenance) entered into under French law are contrary to public policy and will not be valid or enforceable by a French Court[1]. In Italy, prenuptial agreements are not enshrined in national law and a waiver of maintenance claims is not permitted[2]. In England[3], prenuptial agreements are not binding on the Courts on divorce (though increasingly are given weight).

Do the fundamental conceptual differences between common law jurisdictions on the one hand and civil law jurisdictions on the other, make an effective Europe-wide prenuptial agreement merely wishful thinking? Most continental legal systems draw a clear distinction between matrimonial property and maintenance whereas the English[4] common law system deals with both at same time. Even as between the civil law EU jurisdictions there are significant differences in approach. It is when we draft prenuptial agreements involving cross border considerations that these conceptual differences are most apparent.

It is important to note the fundamental differences between **marriage contracts** and **prenuptial agreements**. The two are entirely different things.

A marriage contract is an agreement by which spouses organise their matrimonial property regime ("**MPR**"). Marriage contracts are relevant not only in event of death or divorce but also to regulate the financial relationship of spouses during marriage. Marriage contracts are customary in civil law jurisdictions and the vast majority of European countries operate MPRs. The main purpose of the contract is to elect an MPR, failing which, the couple will fall into the default statutory MPR for that country (usually community of property). In many EU

[1] See Charlotte Butruille Cardew, International Prenuptial and Postnuptial Agreements (Salter/Grant/ Butruille Cardew).
[2] See Andrea Russo and Benedetta Rossi, Family Law jurisdictional comparisons (2011) edited by James Stewart
[3] References to England mean England and Wales
[4] References to English Law mean the Law of England and Wales

countries, the marriage contract cannot make provision for maintenance (post- divorce or during the marriage). Marriage contracts are also important from a third party perspective as they regulate the respective spouses' liability for the other's debts (unlike in the English common law system where spouses are not liable for the other's debts unless they are joint). Property relationships between the couple are determined on marriage, depending on which MPR is chosen.

A prenuptial agreement is wider in scope than a marriage contract and has a different purpose. Unlike a marriage contract, it is not a requirement of any national law. It is an agreement between prospective spouses to stipulate all or some of the financial consequences of divorce. An English prenuptial agreement usually regulates the spouses' property and maintenance rights and obligations on divorce and is intended to limit the financial obligations of one party.

European MPRs take a number of different forms[5] and, whilst some states allow a limited choice of regimes, others allow many different variations. The commonly known MPRs are community of property and separation of property, and there are different options under these main regimes. The extent to which spouses can opt out of a particular jurisdiction's statutory MPR differs across Europe.

There may be a misapprehension on the part of foreign lawyers that England operates a separation of assets during the marriage because one spouse is not liable for the other's debts (as referred to above) and marriage does not impact how spouses hold property. It has also been suggested that, on divorce, England operates (in effect) a system of deferred community of property. In fact, in England, there is no default matrimonial property regime (as such) and no clear distinction between maintenance and property division. MPRs do not exist as a concept in English statute, albeit the concept is creeping into case law. The wide discretion of English Judges gives flexibility, but often a very uncertain outcome. Compare this to the more certain division which a MPR prescribes (for property). Currently, when drafting a prenuptial agreement in England for, say, a French couple living in London, such clients would also be advised to enter into a marriage contract in France.

Enforceability

Enforcement is currently the biggest challenge to an effective Europe-wide prenuptial agreement. The harmonisation of EU law has started but is not yet complete.

The European Community's stated objective of "*maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured*" by adopting regulations "*to promote the compatibility of the rules applicable in the member states concerning the conflict of laws and of jurisdiction*"[6] means that EU harmonisation is unlikely to go so far as to deal with the fundamental differences between the national laws of member states in relation to marriage contracts and prenuptial agreements.

Within the existing European legislative framework, the enforceability of the maintenance provisions of a prenuptial agreement is different to the provisions for division of property.

(i) Maintenance

There has been some harmonisation of conflicts rules within the new maintenance regulation, **Council Regulation EC No 4/ 2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters**

[5] See summary at paragraph 4.7 of the Law Commission consultation paper on marital property agreements 11 January 2011
[6] Recitals to Council Regulation (EC) no 4/2009 of 18 December 2008

relating to maintenance obligations ("the Maintenance Regulation"). "Maintenance" is not defined in the regulation, but European and English case law[7] has interpreted maintenance widely in the international context, to include not only alimony/periodical payments but also any financial provision which is for financial support (as opposed to claims in the nature of sharing).

The Maintenance Regulation allows parties, in their prenuptial agreement, to choose the court/jurisdiction which will ultimately deal with any dispute of maintenance obligations. The Hague Protocol on Applicable Law to Maintenance Obligations[8] (applicable throughout Europe other than in the UK and Denmark) allows the parties to elect an applicable law (subject to connection) which they know will uphold their agreement about maintenance (to include spousal maintenance and financial compensation claims). Parties can also elect which applicable law should apply to particular proceedings (e.g. child maintenance proceedings) but this choice will not be binding on the UK or Danish Courts, which have not signed up to the applicable law provisions of the Maintenance Regulation.

The Maintenance Regulation also seeks to "*ensure the recognition and enforcement of… authentic instruments*" without affecting the right to challenge enforceability before the courts of the originating member state.

Authentic instruments are formal agreements concluded in front of a notary and could include marriage contracts[9]. **Article 48** of the Maintenance Regulation provides that Authentic Instruments "*which are enforceable in the member state of origin shall be recognised in another member state and be enforceable there in the same way as decisions*". Therefore, certain agreements (in relation to maintenance provisions only) will be enforceable in other member states if they are enforceable in the member state of origin.

In many civil law systems (except Germany) a marriage contract cannot regulate maintenance so, in practice, the enforcement of authentic instruments may not take us very far. Agreements originating in England are unlikely to be authentic instruments of the type envisaged by the Maintenance Regulation.

(ii) Matrimonial property

Civil law jurisdictions have the concept of property regimes enshrined in their national law but that does not mean that a MPR elected in one country is enforceable in another. The financial consequences of divorce (other than maintenance) including marriage contracts/prenuptial agreements, are not currently covered by the European Regulations meaning that there is no formal recognition of MPRs between member states. Currently, the validity and enforcement of a foreign marriage contract and choice of MPR will (in most member states) be determined by national law, which will in turn apply its (often complex) private international law and, in most jurisdictions, a determination of the applicable law.

France, Luxembourg and the Netherlands are party to the Hague Convention 1978 on Law Applicable to Matrimonial Property Regimes which allows parties, with an international element in their marriage, to choose the law applicable to their MPR (subject to connecting

[7] See ECJ case of Van den Boogaard v Laumen c-220/95 [1997] 2 FLR 399 and English Court of Appeal Judgment in Moore v Moore [2007] EWCA Civ 261

[8] The Convention on the international recovery of child support and other forms of family maintenance and the protocol on the law applicable to maintenance obligations dated 23 November 2007

[9] Article 2 of the Maintenance Regulation defines an authentic instrument as "a document in matters relating to maintenance which has been formally drawn up or registered as an authentic instrument in the member state of origin and the authenticity of which (i) relates to the signature and content of the instrument and (ii) has been established by a public authority or other authority empowered for that purpose" or "an arrangement relating to maintenance obligations concluded with administrative authorities of the member state of origin or authenticated by them"

factors). If the applicable law is a foreign law which would enforce the marriage contract, it will be enforced in the contracting state.

The issue of cross border enforcement of MPRs is on the European Agenda and a 2008 Green Paper was followed in 2011 by **Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes ("the Proposed Regulation")**. The aim of the proposal is to establish a comprehensive set of rules of private international law applicable to matrimonial property regimes in cross-border cases.

The Proposed Regulation is intended to guarantee the recognition and enforcement of authentic instruments between member states "*unless their validity is disputed in accordance with the applicable law and provided such recognition is not contrary to public policy in the member state addressed*"[10].

If the Proposed Regulation is adopted (although the UK has already opted out), spouses will be able to choose their MPR, make a choice of law applicable to it and make a choice of court to deal with any dispute. Under the Maintenance Regulation, spouses can make a choice of law and court for maintenance disputes (and go further by dealing substantively with maintenance obligations, if they are permitted to under the relevant national law). The combination of regulations will go some way to recognising the autonomy of the parties' decisions and removing uncertainty surrounding enforcement of marriage contracts in some jurisdictions.

However, without substantive changes in national legal systems, the limitations of national law will restrict the ability of parties to enter into a binding comprehensive agreement. Uncertainty will continue over Europe-wide enforcement.

POSSIBLE SOLUTIONS

Do we need something completely novel to cut through (i) the conceptual differences between common law jurisdictions and those which operate matrimonial property regimes and (ii) national approaches to the validity of a prenuptial agreement?

I believe we are going to need to go further than the current framework to devise a *comprehensive* prenuptial agreement (dealing with division of assets and payment of maintenance) which will be both effective and enforceable throughout Europe.

An ambitious idea which doesn't rely on any particular law or concept in any one member state would be to devise a completely new type of prenuptial agreement – the **European Prenuptial Agreement ("EPA")** in which the spouses opt into a "**European Marriage**". The EPA would be "stateless" and would be upheld in all member states no matter where the couple reside, have property or are nationals, without the need for considerations of applicable law.

The EPA could be the next Esperanto, albeit more successful! The parties would not sign up to any specific law, but to choices about both property and maintenance which would be enforced (subject to safeguards) in whichever country had jurisdiction to hear the divorce.

It would be a tailor made prenuptial agreement for an international couple entering into a European marriage, which would state clearly their intentions with regard to the property and maintenance consequences of any divorce.

[10] Article 32

It may be going too far but it could even be a "tick box" regime where couples opt into outcomes for specific eventualities, such as whether there are children or where one party is disabled.

For example:

MATRIMONIAL HOME	Children	Disability
Sell and divide equally		x
Sell and divide in accordance with contributions	X without children	
Retained and owned fully by party in whom legal title is vested		
Retained and owned fully by party with care of children	X with children	

The idea may seem ambitious but it satisfies the intention of the EU to increase worker mobility and seeks to resolve the current inconsistencies of different cross border family law concepts. The EPA would, however, require changes in national law and countries would have to agree to enforce it.

MINIMUM REQUIREMENTS

In my view, to ensure an effective EPA, there must be some minimum safeguards. One party cannot be left in a position where the effect of a prenuptial agreement is to ignore the marriage completely or to leave the financially weaker spouse destitute. Some control is desirable.

The EPA could take guidance from the system for cross state enforcement in the USA, where 27 States have adopted the Uniform Premarital Agreement Act. The Act sets out the circumstances in which a prenuptial agreement will not be enforceable, for example, if the agreement was not executed voluntarily or if it leaves one party in a position where they are dependent on state benefits.

The Law Commission of England and Wales has suggested that a prenuptial agreement should be enforceable unless it causes serious, or manifest, unfairness[11]. To import a concept of fairness into the assessment of a Europe-wide agreement would be far from easy, particularly in respect of maintenance given the very different approach in Europe to the cut off point for support (for example in Scotland where maintenance is limited to 3 years save in exceptional circumstances).

A simple way to ensure some degree of fairness could be to ensure that, irrespective of the contributions and wealth of each party at the time of the marriage, each party is able to house themselves (and any children) following divorce perhaps by stipulating housing at a minimum value with reference to the matrimonial home. The prenuptial agreement could explicitly state how the housing need of each party is intended to be met.

The calculation of maintenance payable by one party on divorce (if any) could be calculated with reference to a formula based on expenditure during the marriage (say the last 3 years).

Child maintenance and any financial claims on behalf of children should be excluded from the ambit of the agreement.

[11] Consultation Paper No 198 11 January 2011 (Matrimonial Property Agreements)

I suggest the following **form requirements** are necessary:

(i) The agreement should be in writing and signed.

(ii) Full and independent legal advice should be taken by each party. The parties should be fully informed of the consequences of their decisions.

(iii) There should be some financial disclosure, albeit a general declaration of wealth should be sufficient to enable the parties to be properly advised on the consequences of the agreement.

(iv) The agreement should be entered into sufficiently in advance of the marriage to avoid duress (at least 28 days).

(v) There should be translations into a language understood by each party and a statement that each party has read and understood the agreement.

EUROPEAN FAMILY LAW FROM A NATIONAL STANDPOINT

English law is still firmly committed to applying the law of the forum, regardless of nationality or choice of law in an agreement. England has not signed up to the applicable law provisions of the Maintenance Regulation (or the optional Hague protocol), nor has it opted into Council Regulation of 20 December 2010[12] which harmonises rules for determining the applicable law on the divorce of an international couple.

Because of the 'lex fori' principle, English law cannot respect and directly enforce a foreign marriage contract in an English divorce (although the existence of the contract/agreement would be an important factor).

On the other hand, there is no doubt that English law in relation to the relevance of European marriage contracts is evolving rapidly. In the 2010 Supreme Court decision of *Radmacher v Granatino*[13] a German prenuptial agreement was given decisive weight in English divorce proceedings. Lord Justice Thorpe, in the Court of Appeal Judgment said "*the judge should give due weight to the marital property regime into which the parties freely entered*." The Supreme Court held that it should give effect to a prenuptial 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*". Prenuptial agreements now hold significant weight and there is presumption of enforceability (subject to the court's power to review).

Radmacher was followed by *Z v Z*[14] in November 2011 when the English court gave weight to a '*séparation de biens'* marriage contract concluded in France and the wife's award was lower than it would have been absent the marriage contract.

A full scale review of English law in this area is under way. The Law Commission of England and Wales published a consultation paper on matrimonial property agreements in January 2011.[15] The influence of European family law is evident in the consultation paper, which

[12] Council Regulation (EC) no 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation in force 21 June 2012. The 15 participating countries are Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia, Spain and most recently Lithuania

[13] Radmacher (formerly Granatino) v Granatino [2010] UKSC 42

[14] Z v Z (No2) [2011] EWHC 2878

[15] Consultation Paper No 198 11 January 2011 (Matrimonial property agreements) now extended to supplementary consultation paper No 208 (Matrimonial property, needs and agreements) 11 September 2012

states "*we take the view that it is unrealistic for the courts not to give great weight… to overseas regimes and contracts where these are part of the circumstances of the case*"[16].

The Law Commission makes provisional proposals about the introduction of qualifying agreements which are either (i) unlimited in scope or (ii) a narrow model of agreement to protect "special property" (including pre-acquired property, inherited assets and gifts). The Law Commission has suggested that the narrow form of agreement is likely to be far less controversial than a wider, unlimited model. If that is where England is heading, it will bring us closer to the French default system of community of '*acquests'*.

Final recommendations are likely to be published in Autumn 2013 and legislation, even if recommended, is unlikely to come any time soon. In the meantime, the English Courts are likely to give more weight to foreign agreements meaning that English lawyers will need to be aware of the conceptual differences and technical problems discussed above and work closely with foreign lawyers when drafting prenuptial agreements involving foreign nationals.

[16] Para 7.103

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