EVERSHEDS HARRY ELIAS

PRENUPTIAL AGREEMENTS
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KOH TIEN HUA | PARTNER

CO-HEAD, FAMILY & MATRIMONIAL
EVERSHEDS HARRY ELIAS

PRENUPTIAL AGREEMENTS

To Do or Not To Do

STARTING POINT

Governing Statute – Women's Charter (Cap 353)

Section 112 of the WC

- Power of court to order division of matrimonial assets
- 112.—(1) The court shall have power, when granting or subsequent to the grant of a judgment of divorce, judicial separation or nullity of marriage, to order the division between the parties of any matrimonial asset or the sale of any such asset and the division between the parties of the proceeds of the sale of any such asset in such proportions as the court thinks just and equitable.

PRENUPTIALS

Women's Charter

- (2) It shall be the duty of the court in deciding whether to exercise its powers under subsection (1) and, if so, in what manner, to have regard to all the circumstances of the case, including the following matters:
- (a) the extent of the contributions made by each party in money, property or work towards acquiring, improving or maintaining the matrimonial assets;
- (b) any debt owing or obligation incurred or undertaken by either party for their joint benefit or for the benefit of any child of the marriage;
- (c) the needs of the children (if any) of the marriage;

Prenuptial

Women's Charter

- (d) the extent of the contributions made by each party to the welfare of the family, including looking after the home or caring for the family or any aged or infirm relative or dependant of either party;
- (e) any agreement between the parties with respect to the ownership and division of the matrimonial assets made in contemplation of divorce;
- (f) any period of rent-free occupation or other benefit enjoyed by one party in the matrimonial home to the exclusion of the other party;

Prenuptial

Women's Charter

- (g) the giving of assistance or support by one party to the other party (whether or not of a material kind), including the giving of assistance or support which aids the other party in the carrying on of his or her occupation or business; and
- (h) the matters referred to in section 114(1) so far as they are relevant.

HOW THE LAW DIVIDES

Governing Statute – Women's Charter (Cap 353)

Matrimonial Assets – s 112(10)

- (10) In this section, "matrimonial asset" means —(*a*)
- any asset acquired before the marriage by one party or both parties to the marriage —(i) ordinarily used or enjoyed by both parties or one or more of their children while the parties are residing together for shelter or transportation or for household, education, recreational, social or aesthetic purposes; or
- (ii)which has been substantially improved during the marriage by the other party or by both parties to the marriage; and
- (*b*) any other asset of any nature acquired during the marriage by one party or both parties to the marriage,
- but does not include any asset (not being a matrimonial home) that has been acquired by one party at any time by gift or inheritance and that has not been substantially improved during the marriage by the other party or by both parties to the marriage.

HOW THE LAW DIVIDES

Governing Statute – Women's Charter (Cap 353)

Matrimonial Home

- Cradle of the family – per Andrew Phang J in Chen Siew Hwee v Low Kee Guan (Wong Yong Yee, co-respondent)[2006] 4 SLR(R) 605
- Neetu Mittal vs Kanta Mittal And Ors 30 September, 2008 CM(M)105/200630.09.2008 – per JUSTICE SHIV NARAYAN DHINGRA –
- 8…... However, phrase "Matrimonial home" refers to the place which is dwelling house used by the parties, i.e., husband and wife or a place which was being used by husband and wife as the family residence.

HOW THE LAW DIVIDES

Governing Statute – Women's Charter (Cap 353)

Matrimonial Assets

- Court's power to divide arises "when granting or subsequent to a divorce"
- This means that Court has no power to divide matrimonial assets during the subsistence of the marriage – separation of property regime.
- Effect of section 112 = Deferred community of property regime
- Marriage is a partnership or union – section 45 of Women's Charter – Husband and Wife are extolled to work together for the common good of the family and the partnership

Matrimonial assets – Prenuptial

- Prenuptial agreements –
- ***Kwong Sin Hwa v Lau Lee Yen*** [1993] 1 SLR(R) – CA per LP Thean JA –It is clear to us that not every pre-nuptial agreement regulating or even restricting the marital relations of the husband and wife is void and against public policy. Needless to say, much depends on the relevant circumstances and in particular, the nature of the agreement, the intention of the parties and the objective the agreement was designed to achieve. In our opinion, the law does not forbid the parties to the marriage to regulate their married lives and also the incidents of the marriage, so long as such agreement does not seek to enable them to negate the marriage or resile from the marriage as the ***Brodie*** ([11] supra) pre-nuptial agreement did. In particular, the law does not forbid them to agree as to how they should live and conduct themselves as husband and wife, when and where they would commence to live as husband and wife, when they would consummate their marriage, when they would have a child or children and how many children they would have.

Prenuptial Agreement

- LP Thean JA cont-
- Such agreements made between husband and wife are not illegal or immoral or against public policy. In particular, the law does not forbid parties to make a pre-nuptial agreement to the effect that after the marriage at the Registry of Marriages they would go through a religious or customary ceremony and only thereafter would they live as husband and wife and consummate the marriage. Consequently, where such a pre-nuptial agreement has been made and one of the parties after the marriage at the registry refuses to proceed with the religious or customary ceremony, he or she, as the case may be, has made it impossible for the marriage to be consummated as agreed. It is not wrong for the court to give recognition to such agreement and to hold the party in default as having in effect wilfully refused to consummate the marriage.

- ***TQ v TR*** and another appeal [2009] 2 SLR(R) 961- CA per Andrew Phang JA –
- The legal status of a prenuptial agreement in the Singapore context is the result of the interaction of both statute law (ie, the Women's Charter (Cap 353, 1997 Rev Ed) ("the Act")) on the one hand and the common law on the other. Where one or more of the provisions of the Act expressly covers a certain category of prenuptial agreement, that provision or those provisions would be the governing law. Where, however, the Act was silent, the legal status of the prenuptial agreement concerned would be governed by the common law. In this regard, it would be assumed that any prenuptial agreement which contravenes any express provision of the Act and/or the general or specific legislative policy embodied within the Act itself will not pass muster under the common law: at [50] and [102].

Matrimonial assets

- The Act is silent with respect to the legal status of prenuptial agreements relating to the maintenance of the wife and/or the children, though the Act contains express provisions relating to postnuptial agreements, in particular, **ss 116 and 119**. The common law principles would apply in the apparent absence of an applicable provision under the Act. These principles must nevertheless be consistent with, inter alia, the legislative policy underlying the Act, and the legislative policy which governs postnuptial agreements ought to apply equally to prenuptial agreements. Thus, all prenuptial agreements relating to the maintenance of the wife and/or the children would be subject to the overall scrutiny of the courts. In so far as a prenuptial agreement relates to the maintenance of the children, the courts would be especially vigilant and would be slow to enforce agreements that are apparently not in the best interests of the child or the children concerned:

Matrimonial assets

- Andrew Phang JA –

- In so far as prenuptial agreements relating to the custody (as well as the care and control) of the children are concerned, the court would operate on the basis of the common law and, possibly, **s 129** of the Act. As a matter of general logic as well as principle, the courts must always have the power (whether at common law or under statute) to scrutinise both prenuptial as well as postnuptial agreements relating to the custody (as well as the care and control) of children. There would be a presumption that such an agreement is unenforceable unless it is clearly demonstrated by the party relying upon the agreement that that agreement is in the best interests of the child or the children concerned: at [70] and [103

Matrimonial assets

- Andrew Phang JA cont

- In so far as prenuptial agreements relating to the division of matrimonial assets are concerned, the governing provision is **s 112** of the Act. The ultimate power resides in the court to order the division of matrimonial assets "in such proportions as the court thinks just and equitable", having regard to all circumstances of the case, and a prenuptial agreement cannot be construed in such a manner as to detract from this ultimate power. It follows that the prenuptial agreement cannot be enforced, in and of itself. However, this does not mean that such a prenuptial agreement cannot (where relevant) be utilised to aid the court in exercising its power pursuant to **s 112** of the Act. **What weight the prenuptial agreement would be given would depend on the precise facts and circumstances of the case**. In an appropriate situation, a prenuptial agreement might be accorded significant - even conclusive - weight. It might well be the case that a prenuptial agreement is, given the circumstances as a whole, considered to be so crucial that it would, in effect, be enforced in its entirety. However, everything will depend upon the precise circumstances before the court: at [73], [75], [77], [80], [86] and [103].

Prenuptials

- Andrew Phang JA cont
- **as a general guide, if a prenuptial agreement is entered into by foreign nationals and governed by (as well as was valid according to) a foreign law (assuming that that foreign law is not repugnant to the public policy of Singapore), there is no reason in principle why the court should not accord significant (even critical) weight to the terms of that agreement**. Such an approach would also avoid the danger of forum shopping. **However, such an approach is confined (in the main at least) to** prenuptial agreements relating to the division of matrimonial assets and it is important to emphasise that there is no blanket rule to the effect that such agreements would (even with respect to the division of matrimonial assets only) be accorded significant (let alone crucial) weight as a matter of course. Everything depends, in the final analysis, on the precise facts and circumstances of the case itself:

Prenuptials

- Andrew Phang JA cont
- **Prenuptial agreements ought generally to comply with the various legal doctrines and requirements that are an integral part of the common law of contract**, given that such agreements are, ex hypothesi, contracts to begin with. However, **this requirement would not apply to foreign prenuptial agreements which are valid by their proper law, save where it is otherwise shown that the agreement concerned is repugnant to, or otherwise contravened, the public policy of the lex fori** (here, Singapore). The court, however, retains a residuary discretion to give some weight to a prenuptial agreement which does not comply with one or more of the legal doctrines and requirements under the common law of contract, though the exercise of such residuary discretion will, by its very nature, occur only in limited circumstances. Much will depend on what particular legal aspect is involved and/or the specific facts of the case:

Matrimonial assets

- Andrew Phang JA cont-
- There would be no order as to the division of matrimonial assets in the present case. **The Agreement was wholly foreign in nature, dealt with the parties' respective matrimonial assets only and was valid by Dutch law**. In these circumstances, the Agreement should be taken into account and it ought to be given the highest significance. Persons might (particularly in jurisdictions where prenuptial agreements were commonplace) decide to get married only because of the assurance furnished by a binding prenuptial agreement. It would be neither just nor equitable for the Wife to now ask the court to allow her to evade her responsibilities under the Agreement. To hold otherwise might encourage forum shopping by those who wished to avoid the enforceability of their respective prenuptial agreements in their home countries. In any event, the Husband asserted that he had no assets and the Wife was unable to adduce any substantive proof to the contrary: at [28] and [107] to [109].

Matrimonial assets

- **Post nuptial agreements** –
- ***TQ v TR*** and another appeal [2009] 2 SLR(R) 961- CA per Andrew Phang JA
- 44 An agreement made between spouses or spouses-to-be can be called a "marital agreement". There are at least four different kinds of marital agreements, each entailing different legal considerations, and it is therefore important to draw some clear distinctions. We acknowledge that the terminology used here may differ from that used elsewhere, as certain terms are commonly used loosely to cover one or more kinds of marital agreements.
- 45 Strictly speaking, prenuptial agreements (or "antenuptial agreements" as they are sometimes called) refer to agreements reached by a husband and a wife before their marriage concerning what would happen in the event of a divorce.

Matrimonial assets

- 46 Prenuptial agreements are to be distinguished from prenuptial settlements, which regulate rights and obligations only during the marriage but not after its termination (see the English High Court decision of ***N v N*** (Jurisdiction: Pre-nuptial Agreement) [1999] 2 FLR 745 ("N v N") at 751-752). The ambit of such agreements can be very wide, covering any aspect of married life from the mundane to the highly idiosyncratic. It must be noted that an agreement can sometimes be both a prenuptial agreement as well as a prenuptial settlement if it makes provisions concerning both the subsistence as well as the end of the marriage.
- 47 A distinction must also be drawn between two kinds of **postnuptial settlements**. These are separation and pre-divorce settlements, which are agreements made after a marriage by which the parties decide on what happens upon their separation or divorce, respectively. Such agreements are often made in the context of ongoing litigation. Just like prenuptial agreements, postnuptial settlements may address any ancillary matter.

Matrimonial matters

- It is, of course, equally clear that **s 112(2)(e) would also cover postnuptial agreements**. The following observations of Michael Hwang JC in ***Wong Kam Fong Anne*** ([64]supra at [33]) are also apposite, especially if we bear in mind the fact that the learned judge was not dealing with any equivalent of **s 112(2)(e)** of the Act as such:
- Both as a matter of law as well as of policy, my view is that, if the parties to a marriage, in circumstances where a divorce is imminent or a real possibility freely enter into an agreement in respect of the division of their assets, that agreement may be considered a valid reason for the court not to exercise its powers under **s 106** [of the 1985 Act, the predecessor provision of **s 112** of the Act]. [emphasis added]

Matrimonial assets

- ***Wong Kien Keong v Khoo Hoon Eng*** [2012] SGHC 127 – per Belinda Ang J –

- It is not controversial that for a pre-nuptial or post nuptial agreement (collectively referred to hereinafter as "marital agreement") to have the effect of a valid and subsisting agreement, it should satisfy the requirements of the law of contract: see ***Chia Hock Hua v Chong Choo Je*** [1994] 3 SLR(R) 159. The Court of Appeal in ***TQ v TR*** and Another appeal [2009] 2 SLR(R) 961 ("TQ v TR"), affirmed that for a pre-nuptial agreement to subsist, it must comply with the requirements of the law of contract.

- As marital agreements are not commercial contracts, the court retains a residuary discretion even though the marital agreement does not comply with the legal doctrines of contract law to give some weight to the marital agreement where the circumstances justify it

Matrimonial assets

- Belinda Ang J cont-

- I now come to another related point, namely the presence of any of the standard vitiating factors such as duress, fraud or misrepresentation that will negate the marital agreement. Phang JA in ***TQ v TR*** identified various vitiating factors. They include (at [97]):

- At the other end of the contractual spectrum are to be found the various vitiating factors. These include standard contractual doctrines such as misrepresentation, mistake, undue influence, duress, unconscionability, as well as illegality and public policy...[including] the possibility of 'saving' that part of the prenuptial agreement that is objectionable via the doctrine of severance... There has also been mention of the safeguard relating to the availability of independent legal advice...

Matrimonial assets

- Belinda Ang J-

- I wish to point out that even though the Deed was not set aside, the Deed would have to be scrutinised in order to determine the weight to be given to it in deciding the ancillary matters. Section **112(1)** of the Charter gives the court the power to order a division of matrimonial assets "in such proportions as the court thinks just and equitable". **Matrimonial agreements do not and cannot oust the court's jurisdiction to order a just and equitable division of matrimonial assets**. An agreement between parties to a marriage relating to the division of matrimonial assets like the Deed cannot automatically be enforced in and of itself and is only one of the factors listed under section **112(2)** of the Charter to be considered by the court in determining a just and equitable division of the matrimonial assets, and the weight to be accorded to such an agreement depends on the precise facts and circumstances of the case itself: see TQ v TR at [73]-[75], [77], [80], [103]; AOO v AON [2011] 4 SLR 1169 at [19]; AFS v AFU [2011] 3 SLR 275 at [17]-[18]. As the court noted in TQ v TR (at [80], [86]), such an agreement may be given conclusive weight and effectively enforced in its entirety if the facts and circumstances warranted so.

Matrimonial assets

- Belinda Ang J cont-
- Similar sentiments have been expressed by Chao Hick Tin JA in a recent decision of the Court of Appeal in ***AQS v AQR***[2012] SGCA 3. Chao JA reiterated (at [35]):
- In any case, an agreement between the parties made in contemplation of divorce could not be decisive. It is only one of the factors listed in **s112(2)** of the Women's Charter that the court must take into account as part of its overarching duty to reach a just and equitable division in light of all the circumstances of the case. This Court affirmed in ***TQ v TR*** and another appeal [2009] 2 SLR(R) 961 at [75] that even though post-nuptial agreements could be accorded more weight than pre-nuptial agreements, how much weight was to be allocated to a postnuptial must ultimately depend on the precise circumstances of the case.

Matrimonial matters

- As for the circumstances to be taken into consideration in the determination of the weight to be given to a matrimonial agreement, the oft-cited dictum of Ormrod LJ in ***Edgar v Edgar*** [1980] 1 WLR 1410 is relevant and provides valuable guidance (see, eg, Granatino v Radmacher [2011] 1 AC 534 at [38]; MacLeod v MacLeod [2010] 1 AC 298 at [25], [42]; NA v MA [2007] 1 FLR 1760 at [13]; A v B (Financial Relief: Agreements) [2005] 2 F.L.R. 730 at [13]; X v X (Y and Z Intervening) [2002] 1 F.L.R. 508 at [84]; Benson v Benson (Deceased) [1996] 1 F.L.R. 692 at 704G-705B). Ormrod LJ said (at 1417):

Matrimonial assets

- To decide what weight should be given, in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So, the circumstances surrounding the making of the agreement are relevant. Under pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties.

Matrimonial assets

- Belinda Ang J cont
- Essentially, where the marital agreement is valid and subsisting, the court will look at the facts and circumstances that are likely to reduce or eliminate the weight to be attached to the marital agreement. I have in mind, unconscionable conduct as such undue pressure (falling short of duress). Another example is unworthy conduct such as exploitation of a dominant position to secure an unfair advantage. An important change of circumstances, unforeseen or overlooked at the time of entering into the marital agreement may be relevant. The appropriate weight to be given to the Deed is yet to be argued and determined and this will take place at the adjourned hearing of the ancillary matters

- Important too is the general proposition that formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement. There may well be other considerations which affect the justice of this case; the above list is not intended to be an exclusive catalogue.

Matrimonial assets

- ***AQS v AQR*** [2012] SGCA 3- CA per Chao Hick Tin JA –
- In any case, an agreement between the parties made in contemplation of divorce could not be decisive. It is only one of the factors listed in **s 112(2)** of the Women's Charter that the court must take into account as part of its overarching duty to reach a just and equitable division in light of all the circumstances of the case. This Court affirmed in ***TQ v TR*** and another appeal [2009] 2 SLR(R) 961 at [75] that even though post-nuptial agreements could be accorded more weight than pre-nuptial agreements, how much weight was to be allocated to a postnuptial agreement must ultimately depend on the precise circumstances of the case.

Pre Nuptial

- Lian Hwee Choo Phebe v Tan Seng Ong [2013] 3 SLR 1162 CA per Judith Prakash J –
- 16….. It bears mention that if in any particular divorce proceedings it is established that an agreement falling within s 112(2)(e) exists, that agreement is only one of the factors the court has to consider when deciding how the matrimonial assets are to be divided. Depending on the circumstances, this may not be the main factor in the division. The parties and the Judge were fully aware of this aspect and the Judge noted at [55] of his judgment that his finding on the existence of the Agreement was not the end of the inquiry and the court would have to look at all the circumstances to determine how much weight to give to the Agreement.

Prenuptial

- 17 To determine whether an agreement of the type specified in s 112(2)(e) of the Charter exists, two elements must be met: first, there must have been an agreement with respect to the ownership and division of matrimonial assets; and second, the aforesaid agreement must have been "made in contemplation of divorce".
- 18 With regard to the first element, it is uncontroversial that agreements pertaining to the ownership and division of matrimonial assets ought generally to comply with the various legal doctrines and requirements that are an integral part of the common law of contract (see TQ v TR [2009] 2 SLR(R) 961 ("TQ v TR") at [94], where this comment was made vis-à-vis prenuptial agreements within the framework of s 112 of the Women's Charter (Cap 353, 1997 Rev Ed) ("the 1997 Charter") which is in pari materia with s 112 of the edition of the Charter currently in force, and Wong Kien Keong v Khoo Hoon Eng [2012] SGHC 127 at [20] where this principle was extended to postnuptial agreements within the framework of the current edition of the Charter).

Matrimonial assets

- 19 Turning to the second element, the arrangements that the agreement makes for the ownership and division of assets must be intended to apply in the event of a dissolution of the marriage, since s 112 is wholly concerned with the distribution of assets upon divorce. The paradigm case is an agreement reached between feuding spouses who want a clean break
- Wong Kam Fong Anne v Ang Ann Liang [1992] 3 SLR(R) 902 ("Wong Kam Fong Anne")

The deed was not to be invalidated by a temporary reconciliation (save for a written statement signed by both parties cancelling the deed), and was also not to be invalidated by any judgment made by the court. Michael Hwang JC held that the deed was made at a time when the parties had already been separated, and divorce was viewed as a real possibility (though not necessarily in the immediate future). The deed was therefore intended as a comprehensive financial and property settlement between the parties.

Matrimonial assets

- what is required is that in making the agreement, the parties must have addressed their minds to the issue of how property should be divided in the eventuality of a divorce, notwithstanding the possibility that at the time of making the agreement they had hoped that this eventuality would not arise. Thus, the intention that must be found by the court is that the parties intended for the agreement to exhaustively govern the allocation of matrimonial assets upon the contingency of divorce, whenever that might actually happen.

Matrimonial assets

- 21 It follows from the foregoing that there can be two types of agreement within the meaning of s 112(2)(e) of the Charter:

- (a) If an agreement is entered into for the purpose of dividing the assets in the context of a specifically contemplated divorce, that will be an agreement within the meaning of s 112(2)(e) for the purpose of that divorce; but, if for some reason the divorce does not ensue at that time and the parties reconcile and carry on, then that agreement can have no relevance in the event of a later divorce.

- (b) On the other hand, if an agreement is a definitive one for the division of assets in the event of a divorce (whenever that might happen and even though it may not be specifically envisaged at the time of the agreement (as is the case in a prenuptial agreement)), the evidence must show that the agreement was intended to have such an effect. If such intention is proven, as it was in TQ v TR, then that agreement would be admissible under s 112(2)(e).

Matrimonial assets

- 29 It is evident from the authorities cited above that two substantial hurdles must be crossed for an agreement to be implied for the purposes of s 112(2)(e). First, the burden lies on the party alleging that the agreement exists to adduce proof that an agreement ought to be implied based on all the relevant circumstances. Clear and cogent proof inexorably pointing towards consensus ad idem and an intention to create legal relations is required because of the fundamental proposition that contracts should not be lightly implied. Second, the agreement must be to the effect contended for. In other words, the agreement must have been intended to exhaustively govern the post-divorce allocation of matrimonial assets.

Prenuptial

- This is over and above the question of whether an agreement simpliciter exists. Even if an agreement pertaining to matrimonial assets is implied, this is not conclusive (or indicative) of the further issue of whether the agreement is meant to exhaustively govern the post-divorce allocation of the said assets.
- 30 Due to these hurdles, it would be extremely unlikely for a court to find that an agreement intended to exhaustively govern the post-divorce allocation of matrimonial assets ought to be implied from the behaviour of spouses. Married couples redistribute the ownership of matrimonial assets for all sorts of reasons, oftentimes without intending for the ownership of the same to be cast in stone vis-à-vis each other. The mere fact of inter-spousal transfer of ownership is normally equivocal, and could be construed to have been done for various reasons that have nothing to do with divorce or a severing of the marital connection

Prenuptials

MULTICULTURALISM IN SINGAPORE - THE WAY TO A HARMONIOUS SOCIETY – IAML Audrey Ducroux Lecture 2012 Singapore

Chief Justice Chan Sek Keong :-

- When the Singapore Court of Appeal was asked to recognise a prenup signed by two foreign parties that was valid under the governing law, ie, Dutch law, we asked ourselves whether there was any Singapore public policy reason for us not to recognise it. We found none. Singapore is a global city-state. We have many foreign couples working and living here. It is not our business to question and dismantle whatever arrangements and agreements couples might have voluntarily made among themselves in accordance with the laws of their domicile, unless we are bound by domestic law not to recognise such agreements.

Questions?

EVERSHEDS
HARRY ELIAS

Koh Tien Hua
Partner
Co-Head, Family & Matrimonial
Co-Head, Private Wealth
Adjunct Professor, SMU (Family Law)

SGX Centre 2, #17-01
4 Shenton Way
Singapore 068807
Email:- kohtienhua@eversheds-harryelias.com

eversheds-harryelias.com