

**Should pre-nuptial agreements be recognised and enforceable in Hong Kong?
If so, how?**

Introduction

The divorce rate in Hong Kong is spiking at an alarming rate: from 1986 to 2009, the number of divorces increased by 299% (from 4,257 to 17,002), whilst the number of marriages increased by only 18%¹. In 2012, the crude divorce rate was 3.2 per 1,000 population as compared with 0.4 in 1981². In light of these statistics, pre-nuptial agreements should theoretically gain a similarly drastic degree of rise in popularity in Hong Kong. One should be expected to be disappointed: although there are no official statistics (since pre-nuptial agreements, like commercial contracts, are private, and the Hong Kong government does not maintain a database of such agreements), those who have signed pre-nuptial agreements are few and far between; it is expected that the percentage of couples entering marriage in Hong Kong who have signed a pre-nuptial agreement will be similar to or even lower than the 5% recorded in the US³. In other words, the notion, against all rationality, does not seem to be lifting off the ground by any means. This essay seeks to evaluate the success (or rather lack thereof) of the current state of laws, as well as a legal perspective on why recognising the enforceability of pre-nuptial agreements by reforming relevant laws is currently the best way forward for Hong Kong.

A pre-nuptial agreement is a written contract without consideration between two people who are about to enter into a marriage or a civil partnership. Contents of such agreements can vary widely, but commonly include, *inter alia*, the division in possession of assets and liabilities, guardianship and custody arrangements for

¹ Census and Statistics Department, Marriage and Divorce Trends in Hong Kong, 1981 to 2006, Hong Kong Monthly Digest of Statistics <http://www.statistics.gov.hk/pub/B70711FB2007XXXXB0100.pdf>. Retrieved 11/1/2014.

² *ibid*

³ Belsky, Gary Living by the rules. *CNN MONEY*, May 1996 at 102

future children or those from previous marriages, and maintenance in the event of a divorce. Some agreements even stipulate financial arrangements during the marriage itself, for example keeping bank accounts separate. Many jurisdictions, in particular civil systems such as the Netherlands, Italy and Brazil, recognise and generally enforce pre-nuptial agreements. 27 of 50 U.S. states also recognise and enforce pre-nuptial agreement under the Uniform Premarital Agreement Act. Interestingly, whilst the vast majority of jurisdictions around the world do enforce them, those which do not (such as Hong Kong, Singapore and the Bahamas) are all former British colonies and have thus undergone significant Anglophone legal influence. Therefore, Hong Kong's reluctance and conservativeness in recognising pre-nuptial agreements may simply boil down to legal heritage rather than careful reasoning. To this end, rethinking our current system will "shake off the dust", so to speak, and produce a more rational arrangement - surely a welcome relief to a progressive society such as ours.

In terms of legislation, pre-nuptial agreements currently have no clear statutory footing in Hong Kong; Sections 7 and 14(1) of the Matrimonial Proceedings and Property Ordinance (Cap.192) ("MPPO"), respectively laying out the factors that judges must take into account in issuing court orders for divorce and that the jurisdiction of the court reigns supreme above any agreement made between the parties, are currently of most relevance. However, even these provisions remain exasperatingly silent on pre-nuptial agreements. This ambiguity and lack of authority from LegCo makes it difficult for courts to decisively grant recognition and enforceability to pre-nuptial agreements in fear of facing the *ultra vires* accusation. In other words, further steps towards giving pre-nuptial agreements any more recognition than the *status quo* must come through legislative reform.

Relevant case authority is equally sparse; *L v C*⁴ affirmed the Edgar principle⁵⁶, which provides that pre-nuptial agreements should be enforced unless a compelling case (such as vitiating factors or unforeseen circumstances) amounting to

⁴ *L v C* [2007] 3 HKLRD 819

⁵ *Edgar v Edgar* [1981] 3 All ER 887 at 893.

⁶ *Edgar* was criticised in *Pound v Pound* [1994] 1 FLR 775 at 791 for promoting judicial unpredictability, as well as being logically circular (i.e. pre-nuptial agreements are made in order to avoid litigation, but the enforceability of such agreements are decided as a result of litigation). The *Edgar* principle therefore seems to be weak and easily defeated by the *Pound* comments.

"unfairness" can be made against. *M v M*⁷ (where the court regarded the agreement as merely a "relevant circumstance") and *K v K*⁸ (where the court went as far as enforcing the financial part of the agreement) also reflected a similarly liberal approach. However, this is unrepresentative of the conventionally hostile attitude of Hong Kong courts towards recognising pre-nuptial agreements at all. Therefore, since neither statute nor case law in Hong Kong are decisive or representative, the current status of laws in Hong Kong on pre-nuptial agreements is awkward, uncertain and, at best, uninformative. Since judicial certainty is one of the cornerstones of the rule of law and the integrity of our legal system, the lack of clarity in the current laws, as we will discuss shortly, is perhaps the most compelling argument in favour of reform.

At this point, we turn our attention to case law in England and Wales for reference and, hopefully, guidance. However, this seems futile, as Hong Kong's English legal tradition is the very reason behind the reluctance of our courts to recognise such agreements. That said, UK courts had recently altered their time-honoured stance through *Radmacher v. Granatino*⁹, a test case that sets an important precedent for pre-nuptial agreements to become recognisable in the UK, and, although not binding, this case will likely be a persuasive authority on Hong Kong courts in the near future. Thorpe LJ, the appeal judge in *Radmacher*, remarked that the past convention of categorically dismissing pre-nuptial agreements "does not sufficiently recognise the rights of autonomous adults to govern their future financial relationship by agreement"¹⁰ and therefore, within a free society, is "increasingly unrealistic"¹¹. However, whether a pre-nuptial agreement is enforceable is ultimately up to the court's discretion - the weight to be given to them vary on a case-by-case basis, and therefore, crucially, they are ultimately not legally binding. Furthermore, *Radmacher* laid down six factors which, in their own right, will render a pre-nuptial agreement legally invalid, namely where there is a child of the marriage, the general law of contract is violated, the court considers that injustice will be perpetrated by enforcing the agreement, either or both of the parties were not represented by independent legal counsel or failed to fully disclose

⁷ *M v M* [2002] Fam Law 177

⁸ *K v K* [2002] Fam Law 877

⁹ *Radmacher v. Granatino* [2010] UKSC 42

¹⁰ *Radmacher v. Granatino* [2009] EWCA Civ 649 at 29.

¹¹ *ibid*

information on assets, or where the agreement was signed less than 21 days prior to the date of marriage. In tandem, these safeguards set a very high threshold, meaning that, perhaps disappointingly, pre-nuptial agreements may, more often than not, still be simply dismissed in English courts in the near future. Still, this is a big step towards a less conservative direction, and, in all likelihood, Hong Kong courts will soon follow suit in this regard.

Stepping away from *Granatino*, the current convention in Hong Kong is that, if no valid pre-nuptial agreement is present, Hong Kong courts will generally automatically resort to the default 50/50 rule (or "yardstick of equality"¹²), which splits the monetary value of all marital properties and assets "down the middle". This was laid down in the UK case *White v. White*¹³, and affirmed Hong Kong by *DD v. LKW*¹⁴. Despite its simplicity, this is clearly a very crude and undeveloped law that requires urgent reform. Furthermore, what this rule means is often so unclear¹⁵ that a significant proportion of Hong Kong divorcees seem dissatisfied with default divorce financial settlements; according to a report in September 2013 by the Women's Foundation, 39% out of 2012 divorcees felt they had not received fair financial settlement¹⁶. The 50/50 rule is especially arbitrary and unfair when properties (such as an estate) are of sentimental more than monetary value, when there is a significant disparity in income and asset between the parties before and during the marriage, or if the marriage was particularly short. Even though courts do ultimately adjust this rule on the merits of each case (up to 80/20 in extreme cases), this does not completely eliminate the insensitivity of the 50/50 convention. It also creates another problem of judicial inconsistency, meaning uncertainty in the law which, of course, runs contrary to the rule of law and thus erodes the integrity of our legal system. With all these issues in mind, we will now investigate the cases for and against reform.

The case for reform

¹² See *White v White* [2001] 1 AC 1996. This approach is generally used in unions which lasted more than 3 years.

¹³ *ibid*

¹⁴ *DD v. LKW* (2010) 13 HKCFAR 537

¹⁵ See *Cowan v Cowan* [2002] Fam. 97, *Miller v Miller* ; *McFarlane v McFarlane* [2006] 1 FLR 1186 (conjoined appeal)

¹⁶ <http://www.thewomensfoundationhk.org/resources.php?id=182>. Retrieved 5/1/2014.

It comes as no surprise that, given the frustrating vagueness of the current legal weight given to pre-nuptial agreements, the Law Commission of England and Wales recently concluded that the goal of achieving certainty in the law is amongst the most convincing¹⁷ arguments for reform. The wide discretion to produce "fair" and "equitable" outcomes currently given to UK and Hong Kong courts creates much judicial uncertainty, as both are highly subjective values. That said, certainty must not turn into rigidity; the most striking observation that has emerged from our discussion so far is, perhaps, that categorically enforcing or dismissing any and all pre-nuptial agreements fails to treat divorce cases, each unique in their circumstances, as individual cases and with the sensitivity they deserve. Indeed, it is imperative to bear in mind that all divorce cases are unique and deserve to be treated with care and sensitivity. To this end, court discretion is an element of the *status quo* that should be preserved and, indeed, be a cornerstone and necessary condition of the reform model we will eventually arrive at.

Firstly, the paternalistic attitude displayed Hong Kong courts in failing to give pre-nuptial agreements adequate weight raises an important ideological issue of current divorce settlement laws running contrary to the value of libertarianism, which arguably is, amongst others, a key principle underlying a free society such as Hong Kong. This issue was enunciated by Sir Potter, President in *Charman v. Charman*¹⁸: "...should not the parties to the marriage, or the projected marriage, have at the least the opportunity to order their own affairs otherwise by a nuptial contract?". In Hong Kong, therefore, individuals should be allowed to do whatever they wish, provided it does not impinge on the rights of others. By this logic, it is difficult to see why, particularly in this day and age and given the intimate nature of the institution of marriage, those who wish to opt out of the marital property regime should not be allowed to do so, as well as why pre-nuptial agreements should not be equally as enforceable as a common commercial contract in Hong Kong courts. Marriage is ultimately a contract, and, as most of us can easily agree that contracting parties have the right to enter the contract on their own terms, marriage should be no different. In this way, libertarianism is a strong argument in support of reform.

¹⁷ January 2011, Law Commission of England and Wales, Consultation paper, the 'Marital Property Agreements (Pre-nuptials and Post-nuptials Agreements)'

¹⁸ *Charman v Charman (No 4)* [2007] 1 FLR 1246 at 124.

Furthermore, the generic, default rules provide much more room for bickering in the courtroom than a tailor-made pre-nuptial agreement, demanding much more time and human resources from the judiciary. In other words, divorce cases overburden the docket, since marital litigation upon a divorce tend to be very lengthy and emotional. In contrast, since pre-nuptial agreements provide a much calmer and more efficient platform for rational discussion than divorce settlements, and were drafted by the parties themselves and therefore would be fit more snugly to their individual circumstances, the scope of outstanding issues to be discussed before the court would be considerably narrowed, and thus the length of divorce litigation would accordingly be considerably shortened. In this sense, reform in favour of recognising and enforcing pre-nuptial agreements also serve the public interest by easing the already congested dockets of Hong Kong family courts.

There is also a wide array of social arguments which make the case for reform even more compelling. Firstly, recognising pre-nuptial agreements may well protect the assets and property of those more well-off and, in turn, decrease the number of "sham marriages", which are when a party enters a marriage for financial or other material benefits they can receive from the other party. The current 50/50 rule is problematic in that it provides incentive for those who "marry for money" to get a divorce. In contrast, signing a pre-nuptial agreement draws up clear boundaries, meaning that those who may want to marry someone more well-off for the money will be discouraged from doing so, since such an agreement will preclude them from exploiting divorce to their advantage. Secondly, pre-nuptial agreements can also protect those less well-off, since such agreements can provide them with the security of protecting their own property from being "up for grabs" in the event of a divorce. Thirdly, there has been a clear trend of couples in Hong Kong entering marriage later in life¹⁹. This means that couples will generally be bringing into the marriage more assets than ever. Since signing pre-nuptial agreements is an attractive way to protect these assets, increasing the enforceability of these agreements must surely be nothing more than an adequate response to the social phenomenon of a rising trend in the age of couples entering marriage. Fourthly, the process of drafting a pre-nuptial agreement requires mutual trust and honesty, surely foundations of a stable, healthy and long-lasting marriage. By

¹⁹ The median age at first marriage for men increased from 27 in 1981 to 31 in 2006 and for women, from 24 to 28 over the same period. For source link, see Footnote 2.

putting out all cards onto the table, the parties are forced to clarify their financial position and confront any possible financial problems that may arise during the marriage. Indeed, statistics have shown a positive correlation between the frequency of financial disagreements between married couples and percentage increase in the risk of divorce, especially for the husband: those who argue once a month about finances increase their risk of divorce by about 36%, whilst those who argue every day increase theirs by 164%²⁰. Therefore, although unromantic²¹, drafting a pre-nuptial agreement will lessen potential financial conflicts between spouses, and thus this pragmatic discussion is necessary for a healthier, more transparent and long-lasting marriage. Finally, Hong Kong is witnessing a much higher average life expectancy²², meaning that marriages will tend to last longer. Therefore, pre-nuptial agreements, which give couples a solid basis for detailed, long-term financial planning, should be recognised in order to give couples the incentive to discuss and sign one in the first place, which in turn will increase the number of financially well-planned (and thus more stable) marriages in Hong Kong. The above are just some examples of arguments point towards the conclusion that, apart from being only legally beneficial, pre-nuptial agreements have many broader social benefits which, in tandem, preserve the sanctity and integrity of the marriage institution. Therefore, considering reform will be highly beneficial, not only legally but also socially.

The case against reform - and why it does not stand

²⁰ Money Habitudes, *Financial Behaviour and Attitudes: Marriage and Money Stats, Financial Infidelity, Financial Planning*. <http://www.moneyhabitudes.com/about/press-news/financial-behavior-and-attitudes-statistics/>. Retrieved 31/01/2014.

²¹ It is interesting to note that people overwhelming tend to be over-optimistic regarding the success and longevity of their marriage. In a research done in the US, it has been shown that, although respondents consciously knew that the national rate of divorce is around 50%, they believed that their own chance of divorce was only 11.7%. Although this study was done in the US and not Hong Kong, one can expect this to be a largely universal trend. The point to take away here is that lowering the parties' optimism by discussing a pre-nuptial agreement is "unromantic" is a very weak argument, as the reality is that actual chances of divorce will generally be higher than the optimistic expectations of the parties, and postponing the necessary and inevitable discussion on finances until during or even after the marriage out of fear that such a discussion (i.e. a pre-nuptial agreement) would be "unromantic" makes for a weak argument. Data taken from http://www.law.harvard.edu/programs/olin_center/papers/pdf/436.pdf. Retrieved 15/01/2014.

²² From 71.45 in 1970 to 83.42 in 2011. Data from World Bank.

English courts (and, in turn, Hong Kong courts) have traditionally avoided recognising, still less enforcing, pre-nuptial agreements for purely public policy reasons. The first of these is articulated in the judgment of *N v N*²³, where Wall J held that "an agreement made prior to marriage which contemplates the steps the parties will take in event of divorce or a separation is perceived as being contrary to public policy because it undermines the concept of marriage as a life-long union". This is one of the main arguments against reforming the *status quo* of giving pre-nuptial agreement very limited enforceability. However, there are two counter-arguments that strongly challenge the strength of this point. Firstly, *Durant v. Titley*²⁴ (where this argument was first raised) was handed down about 200 years ago, and social attitudes towards marriage have become much less conservative since. Indeed, the only foundation that still gives some weight to the opinion that marriage must last "till death" is Christianity. However, since there has been a significant and decisive shift towards secularism and church-state separation in both the English and Hong Kong legal systems, this stance is no longer necessarily relevant or, indeed, valid. Happily, the Hong Kong Court of Appeal displayed support of this secularist stance in the recent case of *TCWF v. LKKS*²⁵. Secondly, the premise of this stance also means that any statutory or case law governing divorce equally contravenes public policy by allowing for the option of divorce in the first place. That is, of course, an absurd argument, but it is merely a logical extrapolation of the original argument. For these two reasons, one of the traditionally most persuasive arguments against recognising and enforcing pre-nuptial agreements must fall.

Secondly, the Lords in *Hyman v. Hyman*²⁶ also raised the concern that, if pre-nuptial agreements were given solid legal footing, it would be difficult for courts use their discretion to dismiss pre-nuptial agreements, even if enforcing the agreement will harm any vulnerable parties involved (either the party with weaker bargaining power or the children in the marriage). Baroness Hale defended this expression of paternalism by arguing that the parties do not always know what is in their own best interest, especially since heady emotions before a marriage can

²³ *N v N (Jurisdiction: Pre-nuptial Agreement)* [1999] 2 FLR 745

²⁴ *Durant v Titley* (1819) 7 Price 577, Ex Ch. Also see *Cocksedge v Cocksedge* (1844) 14 Sim 244. and a much later case, *Hyman v. Hyman* [1929] AC 601

²⁵ *TCWF v. LKKS* [2014] HKEC 47 at 38-39.

²⁶ *Hyman v. Hyman* [1929] AC 601

distort judgment, and therefore implying that relying on the courts' judgment and discretion rather than a pre-nuptial agreement would be "better" for the parties. A related concern is that circumstances, financial or otherwise, can change drastically and unpredictably during a marriage, be it inheriting an unforeseen property or the birth of a child, meaning that a pre-nuptial agreement can become wildly irrelevant by the end of a marriage. The above arguments can be seen as weak, as they rest upon two assumptions that are not necessarily true. The first of these is that marriage and emotions necessarily lead to lower levels of judgment (a problem which can be largely avoided if the parties were represented by separate legal counsel anyway). The second is that courts, and not the parties themselves, will always know and do what is "best" for the parties; this simply appears hubristic and over-confident. These arguments against enforcing pre-nuptial agreements are therefore not strong enough to completely outweigh the case for reform, though they are nonetheless potentially strong points against granting pre-nuptial agreements absolute enforceability. Therefore, when discussing possible reform models in the next section, these concerns will be topically addressed.

Proposing a reform model and conclusion

We have now established that the benefits of legislative reform, if properly debated and drafted, far outweigh the harm of maintaining the *status quo*. Furthermore, drawing together the analysis of the strengths and weaknesses of Hong Kong's current pre-nuptial agreement laws, below is an 7-point framework as a general direction to creating a comprehensive model that seeks to circumvent the issues we have thus far raised. Reforms should be enshrined in statute, presumably as amendments or annexes to the MPPO, in order to eliminate uncertainty and ensure judicial consistency.

1. Rebuttable presumption for pre-nuptial agreements to be recognised and enforced, unless proper formalities are lacking (see point 3), or the agreement is "plainly unfair" (see Point 4)
2. In order to target the issue of irrelevance as time elapses, a pre-nuptial should require:

- a) Require regular renewal (for example every 4 years - to be determined by LegCo) in order to extend its validity
 - b) Include a "sunset clause", which requires review and renewal (independent of Point 2a) whenever financially significant events (an open list that includes, for example, the birth of a child, to be determined by LegCo) arise.
3. General contract law should be incorporated. This means that formalities will be paramount in the drafting of pre-nuptial agreements, and that vitiating factors in contract law such as misrepresentation (including failure to achieve full and frank disclosure of properties and assets), duress (including failure to allow for sufficient²⁷ time between signing the agreement and the date of marriage), unconscionable conduct (when the agreement clearly favours one party to the disadvantage of the other - this overlaps with Point 4) and failure to renew or review agreement (see Point 2) can result in the court granting corresponding contractual remedies, *inter alia* restitutionary awards and, in extreme cases, rescission. As is the case in general contract law, a court should be able to declare a pre-nuptial agreement completely void should formalities be lacking. However, in light of Point 1, courts should be reluctant to do so, save under obvious or necessary circumstances.
 4. The "plainly unfair" standard
Lowering the threshold from the current "fairness" standard (which currently is, ironically, unfair as it does not tailor to the unique circumstances of each case and is generally offended if the pre-nuptial agreement strays from the arbitrary 50/50 default) to a "plainly unfair" test will serve to recognise more pre-nuptial agreements and preserve the rebuttal presumption of enforceability, in light of Point 1. This standard should prioritise children first; the agreement should be partially or completely nullified if it creates an injustice against any child of the marriage.
 5. In order to eliminate the arbitrariness of the 50/50 rule, statute should override it by:

²⁷ This should not be a fixed length of time, but judged on case-by-case basis. This is because the current *Radmacher* 21-day rule is arbitrary - this new approach would ensure that, if duress was perpetrated more than 21 days before the marriage, the courts will still be able to protect the weaker party.

- a) Incorporating the European "community of acquests" approach. This approach protects the properties and assets acquired by each party outside of the marriage (including inheritance, gifts or pre-acquired assets) from being converted into "marital" or "community" property, so that only properties and assets produced during the marriage are up for reallocation upon the dissolution of the marriage. Therefore, unless explicitly stated otherwise, the presumption should be that pre-acquired and external assets will belong separately to each party throughout the marriage.
- b) The 50/50 rule should remain an option of last resort.

6. Prioritising social welfare

Courts should balance between the responsibility owed by the parties towards each other (and any children of the marriage) and that owed by them towards the society in general. This means that agreements should be partially nullified if its execution would burden the taxpayer by placing any involved parties (especially children) into the social welfare system.

7. Singaporean approach of distinguishing between local and foreign pre-nuptial agreements²⁸

The jurisdiction in which the pre-nuptial agreement was made and to which jurisdiction the parties belong should have considerable bearing upon whether it should be enforced. This is because agreements are drafted according to the laws of the whatever jurisdiction it is drafted in, and therefore it is only reasonable that they should be given the same weight as the parties intended it would have at the time of drafting. This approach is particularly relevant to Hong Kong, as the number of expats, foreigners and mainland Chinese²⁹ are steadily increasing. The importance of international comity is shown through recent cases such as *SA v SPH*³⁰ (concerning German nationals) and *ML v YJ*³¹ (concerning PRC nationals). Therefore, in order to uphold Hong Kong's international image, Hong Kong courts should compromise with international pressure to recognise pre-nuptial agreements by ensuring that pre-nuptial agreements drafted outside our jurisdiction should be better respected than local agreements (especially if bringing the

²⁸ See *TQ v TR*, [2009] SGCA 6

²⁹ PRC law recognises pre-nuptial agreements. See Articles 17-19, *Marriage Law of the People's Republic of China*.

³⁰ *SA v. SPH* [2013] HKEC 212

³¹ *ML v. YJ* (2010) 13 HKCFAR 794

case back to its home forum would seriously disadvantage one of the parties), and largely insulated from the current complexities and conservatism towards pre-nuptial agreements in Hong Kong.

In conclusion, the law should indeed be reformed to achieve, at the very minimum, three broad objectives: certainty, respect for the autonomy of the parties and reflection of the shifting attitudes towards the marriage institution and demographics in society. The above 7-point proposal has addressed these objectives, and goes further by anticipating and attempting to overcome issues that may arise when pre-nuptial agreements are given legal enforceability. This proposal undoubtedly conspire to create a markedly different landscape to the conservative attitude Hong Kong courts currently hold towards pre-nuptial agreements, and therefore a generous "buffer" period should be allowed for the courts and the public to adjust. The above framework also succeeds in striking a healthy balance between preserving the jurisdiction and discretion of the courts, against respecting the decisions and autonomy of the parties. This balance is the key to ensuring that each case is treated fairly and on an individual basis and, thus, ensures that the "best interest" of the parties are preserved by encouraging an interactive dialogue between the parties and the court through engaging in active evaluation, as opposed to categorical dismissal, of pre-nuptial agreements. Although this framework is clearly skeletal and, at best, only a very general direction pointing towards possible reform options, it has hopefully shown, if nothing else, that topical reform is possible and, in fact, desirable. Given that Hong Kong's current pre-nuptial agreement laws are, mostly due to colonial influence, unsatisfactory at least on the count of uncertainty, reform seems urgent and necessary in light of exponentially increasing divorce rates. With adequate public consultation and drafting, it will hopefully only be a matter of time before the Law Commission and LegCo create a comprehensive reform model to confront the concerns of those intending to tie or sever the knot alike in Hong Kong today.