

Marital Agreements: in culture, in English law and for international families

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INFINITY FAMILY LAW

Speaker

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'David Hodson KC is well regarded for his work in the family law field.'

"He is a go-to for international matters".

"He is so knowledgeable and experienced. He has a fantastic track record. He is a leading family lawyer".'

Chambers HNW UK

'David Hodson continues in the top league of London family lawyers'

'What he doesn't know about international family work isn't worth knowing'

The Legal 500 UK



Marital agreements as part of a culture and law

- 🌍 Necessary in some countries for default regimes of marital law
- 🌍 Often where law is unpopular or resolution is unpredictable and long
- 🌍 Covers both death and divorce in some countries
- 🌍 Often favourable to the man
- 🌍 Favours wealthier party
- 🌍 Pressure from others to enter into them e.g. parents (safeguarding inheritances), financial advisers

Marital agreements as part of a culture and law

- 🌍 Major anxieties with (gender) power imbalance in their negotiations and outcomes
- 🌍 Rare culturally in some countries e.g. England

Marital agreements as part of a culture and law

- 🌍 Some countries have minimal or no pre-conditions
- 🌍 Some countries have severe pre-conditions, primarily to reduce likelihood of emotional or other influence (but does it?)

Marital agreements as part of a culture and law

- 🌐 What should we do about agreements entered into as valid in country of execution but not in country where the couple divorce?

Marital agreements in English law

- 🌍 For many years bad for public policy – they encouraged divorce!
- 🌍 Still not in statute law
- 🌍 Radmacher 2010 UKSC 42, leading case sets out our law
- 🌍 Recognised gender imbalance
- 🌍 Agreements *persuasively binding* in law

Marital agreements in English law

- Not fully binding but if fair, will be strongly taken into account
- Need several components
- Contractual validity and no fraud or misrepresentation
- Full disclosure or know what giving up via the agreement
- Independent legal advice or opportunity to take it
- Even so, cannot opt out of needs provision
- If agreement does not provide for needs, divorce court will over rule terms and substitute its own

Marital agreements in English law

- 🌍 What is English law on divorce?
- 🌍 Marital assets, acquired during marital relationship, are shared, often equally. Non marital assets e.g. premarital, inherited, gifts, some post separation, are not shared at all
- 🌍 However needs of either party can overcome, trump, the sharing entitlement. So there may be an unequal sharing of marital assets or some non marital assets may be paid to applicant spouse
- 🌍 Needs is primarily accommodation with any child, but also disparity in income or pensions. Based on standard of marriage

Marital agreements in English law

- 🌍 A Marital agreement fairly entered into will enable a party to avoid sharing marital assets. So an asset acquired by one by their work or endeavours during the marriage will not be shared if that is the terms of the agreement
- 🌍 But if the agreement does not reasonably provide for the needs of both, then the court will easily and readily interfere and change the terms
- 🌍 Parties are advised of this in England. Agreements provide for needs in order to be upheld

Marital agreements in English law

- 🌐 But this comes as a real shock to family members and their lawyers from abroad. If they did not take legal advice in England before entering into the agreement, they may find the agreement is almost worthless.
- 🌐 If at time of marriage parties never expected to be in England, why take English advice?!!

Marital agreements in English law

- 🌐 Government proposes (June 2026) to make marital agreements binding, but compulsory to take independent legal advice

What do we do about gender imbalance?

- Comments by Judge Hale in Radmacher
- *The object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she – it is usually although by no means invariably she – would otherwise be entitled*
- *In short, there is a gender dimension to the issue which some may think ill-suited to decision by a court consisting of eight men and one women*
- *Some may regard the recognition of these factual differences [imbalance of bargaining power] as patronising or paternalistic; others may regard them as sensible and realistic. Some may think that to accord a greater legal status to these agreements will produce greater certainty and lesser costs should the couple divorce; others may question whether this will in fact be achieved, save at the price of inflexibility and injustice*

What do we do about gender imbalance?

- 🌍 Many countries try to find an answer in independent legal advice as a pre condition
- 🌍 Is this enough?
- 🌍 Lawyers who advise a client to say no, *don't sign*, but she signs anyway.
- 🌍 Lawyers who wont do this work for risk of being sued years later
- 🌍 Lawyers who charge huge amounts due to risk
- 🌍 Lawyers who record the signing ceremony for their own protection
- 🌍 Lawyers (some lesser quality) offering cheaper fees but might give less protection to a disadvantaged party

What do we do about gender imbalance?

- The relevance of the date of the agreement before the ceremony
- Does for example 28 days in advance make much difference?
- Many weddings are planned many months in advance
- Might it in fact add to the pressure on the more emotionally engaged party?
- But may help in some cases

What do we do about gender imbalance?

- 🌍 Yet huge areas of the world where legal systems either do not expect independent or any legal advice or at most from one joint lawyer (who may be close to wealthier party and/or add to the pressure on the woman to sign)
- 🌍 What do we then say if they were to be enforced in our country?
- 🌍 English law gives little weight to these foreign agreements if vulnerable spouse did not know the likely terms
- 🌍 If England has any connection to the family and a country abroad has given an inadequate settlement based on an unfair agreement, England has power to make another financial settlement and often does. Foreign lawyers need to warn their clients

What do we do about gender imbalance?

- 🌍 The position of the nikah entered into under Islamic codes
- 🌍 Certainly not binding under English law, wherever entered into, especially as it is highly likely the woman had no independent or any advice and often perceived to be gender discriminatory

What can we all do internationally?

- 🌍 No early chance of changing internal laws of countries where (over centuries) no independent advice for marital agreements
- 🌍 But international family law treaties must do much more for gender imbalance
- 🌍 Must require, as a minimum, independent legal advice, disclosure and a period of at least 28 days before the ceremony
- 🌍 There must be training for all lawyers to recognise signs of coercive and controlling behaviour

Concluding remarks

- 🌍 With hopefully more globalisation, there will be more international families
- 🌍 They will reasonably want to have agreements to govern their financial affairs for divorce and death, wherever in the world they may then be
- 🌍 National laws should respect that
- 🌍 But that cannot be at the disadvantage of the more vulnerable , mostly women
- 🌍 Finding a balance is a real challenge for the international family law community
- 🌍 China has a big role to play in this

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