Introduction

In recent years, pre-nuptial agreements are becoming more popular amongst couples-to-be in Hong Kong and elsewhere in the world. While such agreements have traditionally been uncomfortable topics to raise in marriage planning when both parties are hopeful for the future, societal attitude is changing, and such agreements are increasingly associated with peace of mind and protection. A well-advised pre-nuptial agreement grounded on mutual understanding could help a couple limit time and expense, as well as emotional stress, in the unfortunate event of divorce.

Under common law in Hong Kong, while pre-nuptial agreements have no solid binding effect on the Court or the parties, the Court may nevertheless at its discretion take the agreed provisions into account when granting ancillary relief. In this article, we shall share with our readers the recent legal development on pre-nuptial agreements in England and Wales, which increases the likelihood that pre-nuptial agreements may soon become enforceable in Hong Kong.

The Proposed English Reform

Radmacher v Granatino

The English initiative to reform the law on pre-nuptial agreements was largely premised on Radmacher v Granatino [2011] 1 AC 534. In that case, the Supreme Court of the United Kingdom held that the court should give weight to the pre-nuptial agreement between the parties, and could hold them to the agreement even when the result would be different from that which the court would otherwise have ordered, unless in the prevailing circumstances it would not be fair to do so. As the English Law Commission observed, the decision “developed the law as far as was possible without statutory reform”.

English Law Commission’s proposal

On 27 February 2014, the English Law Commission published its report on “Matrimonial Property, Needs and Agreements” (Law Com No. 343), in which it recommends the introduction of a scheme of “qualifying nuptial agreements” by way of legislation. The qualifying nuptial agreement is described as “a reliable way for couples to decide in advance how their property will or will not be shared, without having the fairness or unfairness of their agreement scrutinised by the court.”
Procedural Requirements

In order to ensure that qualifying nuptial agreements are only entered into knowingly and willingly, and without giving rise to hardship, several procedural requirements are recommended for such qualifying nuptial agreements (QNAs) to be valid and enforceable:

1. QNAs are required to be made by deed for the sake of solemnity.
2. A QNA must contain a statement signed by both parties stating that he or she understands that the agreement will remove the Court’s discretion to make financial provision orders, unless the agreement leaves either party without provision for their financial needs.
3. QNAs made less than 28 days in advance of the marriage will be invalid.
4. Both parties are required to give full disclosure of their respective financial situations. The parties could not waive their rights to disclosure.
5. Each party and his or her respective lawyer should sign a statement to the effect that the party has been advised on the nature and effect of the QNA.

Provision for Financial Needs

Apart from and on top of the procedural safeguards, there is one substantive requirement for an agreement to become a QNA: it could not contract out of provisions for a spouse’s financial needs. The level of financial needs would be determined according to the existing common law. The underlying rationale is that the spouse should not be left reliant on social security and their children should not be deprived of child support.

Upon divorce, if the parties so agree, they can apply for a consent order upon the terms of their QNA, which will be binding and enforceable. Where the parties are no longer in agreement, one of them may still apply for financial orders reflecting the agreement terms; the court would be prevented from making orders inconsistent with such terms except: (i) to meet either party’s needs, or (ii) in the interests of a child of the family.

Post-Agreement Changes

Although QNA, if legislated according to the English Law Commission’s recommendations, are legally binding and enforceable in court, this does not mean that parties could not provide for supplemental or variation agreements in light of changing circumstances during their marriage. By way of written consent, signed by both parties, QNA may be varied or even revoked. Further, such agreements do not prevent a party from giving more property to the other than what is provided thereunder upon divorce. As such, QNA serve as minimum guarantee rather than irrevocable financial arrangements in the unfortunate event of divorce.

Conclusion

The English Law Commission’s proposal strengthened the modern perspective that spouses should be allowed to ascertain in advance and autonomously plan ahead for their future
financial provisions. This would be useful in view of the increasing divorce rate in the last decade.¹

Back in Hong Kong, spouses-to-be may also consider entering into pre-nuptial agreements in conformity to the requirements recommended for QNA. As Radmacher v Granatino is a highly persuasive authority, perhaps in the very near future, pre-nuptial agreements will also be accorded significant weight by the Court in Hong Kong. Upon divorce, the Court may be more persuaded that the financial arrangements contemplated under the pre-nuptial agreement reflects the true informed intention of the parties, free of undue influence, and duly take into consideration the terms of the agreement when making financial orders.

As the saying goes, “Prevention is better than cure”, pre-nuptial agreements allow spouses-to-be to plan their future financial arrangements, at the same time to minimise the emotional and financial loss and pain in the event of divorce. In this regard, pre-nuptial agreements may provide for a sense of financial security and may also be utilised as a means to express love and commitment for spouses-to-be.

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Important: The law and procedure on this subject are very specialised 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.

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¹ Between 2001 and 2011, the proportion of male population who were divorced or separated increased from 2.1% to 3.2%, and for females, from 3.3% to 5.5%.