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It's a Wide Open Road.....
Cross border financial [prenuptial] agreements

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It's a Wide Open Road[1]*:* Cross Border Financial [Prenuptial] Agreements

Geoff Wilson[2]

LOVE HAS NO BORDERS, of course, which may help explain why it's not just the economy that's gone global. To hear estate and tax planners talk, cross-border marriages are skyrocketing – along with a host of international estate and tax-planning headaches….All told, nearly five million Americans in 2010 were married to someone who was born in another country, twice as many as in 1960, according to the Minnesota Population Center. Other countries have had similar jumps…..Not surprising, one of the biggest complications for cross-border couples is dividing everything up if it all ends in divorce. Calculating the right tax deductions for spousal or child support, or enforcing custody rules, becomes increasingly difficult when one partner moves back to their country of origin. The enforceability of prenups varies across the globe, but such agreements can help when there are specifics about property division, advisers say:"You can imagine the complexity of dealing with this on an international level." Says Mindel [Steve Mindel, managing partner of Feinberg, Mindel, Brandt & Klein, Los Angeles][3]

Introduction

Consider the following brief overview of the facts of *Radmacher v Granantino*[4]*:*

> *"The facts …. Involves the marriage of a French citizen and a German citizen celebrated in both London and Switzerland. Subsequently the couple cohabited in London and New York. Thus the case has all the hallmarks of internationality" (Thorpe LJ).****

Now consider the following scenario, closer to home, of the son of the German publishing tycoon about to marry an Australian woman. You receive the following instructions in your office in Australia:

The client, husband to be, is the son of the co-owner of a major German publishing house operating in the legal form of a German general partnership. The father has already granted to husband to be (and his siblings) a sub-participation in his shareholding in the business. Upon the death of the father, husband to be and his siblings will inherit the father's shareholding.

Husband to be will marry his life partner, wife to be, in a few months. His wife-to-be is an Australian national and has been living in Germany.

Pursuant to the terms of the sub-participation agreement, husband to be is obligated, when marrying, to enter into a marriage contract with his wife-to-be which contains the following regulations:

- agreement of the matrimonial property regime of separation of property (exclusion of the equalisation of property under matrimonial property law in the event of divorce)
- waiver of compulsory portion (limited to specific assets)

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[1] The Triffids, Recorded Mark Angelo Studios, London August 1985. Reached #26 on the UK Singles Chart in 1986, and #64 on the Australian Singles Chart, and has become the quintessential Australian classic (#4 on APRA top 30 Australian songs of all time).

[2] BCom, LLB (Hons) (UQ). Geoff Wilson is an Accredited Family Law Specialist and a partner of HopgoodGanim in Brisbane. The contents of this paper are not legal advice and not to be used as such. Legal practitioners and parties to agreements should form their own views as to the matters contained in Part VIIIA of the Family Law Act.

[3] "A Global Love Affair" by Neil Parmar, The Wall Street Journal

[4] (2010) UKSC42

- waiver of execution (limited to specific assets).

According to the donation agreement by which the sub-participation has been granted, the father has the right to revoke the donation of the sub-participation if husband to be fails to meet the obligation to enter into a marriage contract with the aforesaid terms. As a matter of utmost precaution, this right of revocation also applies in the event that the wife of husband to be, in case of a divorce or the death of husband to be, should make claims to inheritance, to compulsory portion, to surplus equalisation or any similar claims in relation to such sub-participation and should not waive such claims in favour of shareholders entitled to succession within one (1) year since pendency of the divorce proceedings or since the death.

In view of the aforesaid contractual obligations of husband to be, husband to be and his wife-to-be wish to enter into a marriage contract.

It cannot be ruled out that the wife-to-be of husband to be, in case of a divorce, will want to return to Australia and make claims resulting from divorce (e.g. property distribution claims or maintenance claims) before an Australian family court.

In light of the above, it is very important that the contractual agreements are valid also from an Australian law perspective.

In preliminary advice to husband to be and his German lawyers you write:

> *" We reiterate your concern which has given rise to our involvement in this matter is that whilst wife to be and you currently reside in Germany, your property interests are in Germany and your employment in Germany and you intend to live in Germany after you marry –Wife to be was born in Australia and her family remains in Australia. Wife to be has been living in Germanyfor the past one and a half years. You are marrying wife to be in Australia.*
>
> *A risk you recognise is that if your marriage breaks down in the future, wife to be may return to Australia and apply for financial relief to the Family Court of Australia or Federal Magistrates Court of Australia for property settlement and maintenance orders against you. The courts will have jurisdiction to entertain the applications by virtue of wife to be's citizenship and residence then in Australia. As to whether the Australian courts would be the appropriate forum to hear and determine the claims would be a moot point. Absent a prenuptial agreement that complies with Australian law there would be nothing to prevent the Australian Court at least entertaining wife to be's application and possibly making orders to your detriment even though you have entered a prenuptial agreement under German law. This happened in a case of Weinhopf[5]. It is therefore important to enter an agreement that complies not only with German law but also Australian law to preclude potential claims wife to be could bring against you for property settlement and spousal maintenance."*

In his forward to "International Prenuptial and Postnuptial Agreements" David Salter, then IAML President and Partner, Joint National Head of Family Law, Mills & Reeve LLP, UK identified the phenomena associated with international prenuptial agreements.

> *The last decade has seen a vast increase in the number of international relationships. This increase can be attributed to a number of factors: mobility of employment (particularly within the EU by reason of the policy of free movement of labour), ease of trans-global travel and the internet, to name but a few. Such relationships involve complex issues for the couples involved and for the family lawyers who may be advising them. The couple about to embark on what might broadly be termed an "international marriage" may well have it in mind to consider a pre-marital agreement because they have assets and homes in several different jurisdictions. However, the fact that premarital agreements have diverse functions in different jurisdictions adds an extra layer of complexity.*
>
> *"... a family lawyer faced with an international couple about to marry must therefore be careful to manage his or her client's expectations. An international premarital agreement will not be a simple, quick and inexpensive process. Sufficient time for the preparation of the agreement needs to be allowed before the date of the*

[5] [2009] FamCA 1084

marriage. It will certainly be necessary for at least one party (and, most likely, both parties) to take specialist legal advice in each of the jurisdictions involved. What then exactly will need to be done? First, it will be necessary to establish a team of experts in each of the relevant jurisdictions so that the client may be advised as to the effect and enforceability of a premarital agreement in each of the relevant jurisdictions. It may suffice for one party to receive advice solely in what might be regarded as the primary jurisdiction so long as that party's lawyer has access to the foreign advice made available to the other party (always being weary of potential conflicts of interest). Whilst the terms of the premarital agreement will, of course, be dictated by the requirements of the parties and by what is permissible in the relevant jurisdictions, the client will wish to consider a jurisdiction clause specifying the preference for the country in which any future proceedings should take place. The election of jurisdiction in a premarital agreement may well be persuasive or even determinative where a dispute arises in England as against a non-EU jurisdiction….

Outside the EU, a premarital agreement can be useful in supporting a jurisdiction choice, but it remains vital to act quickly to issue and progress proceedings in the chosen court….

Some premarital agreements contain applicable law clauses specifying the laws of a particular country should be applied to any consideration of the agreement. Such a clause is not the same as a jurisdiction clause. An application law clause is likely to be treated by the English courts as if it were a jurisdiction clause indicating that any proceedings should be dealt with in the country of the chosen applicable law ….

Finally, having obtained the appropriate advice in the relevant jurisdictions and decided upon the issues of jurisdiction and applicable law (by what is effectively a form of forum shopping in the premarital agreement), the family lawyer will need to consider the formalities which need to be undertaken. The advice received from the various experts may well be that there should be a primary premarital agreement reflecting the jurisdiction and the applicable law clauses possibly with full mirror agreements in the subsidiary jurisdiction(s). It is critical that the effect of mirror agreements in the subsidiary jurisdiction(s) is fully understood. It may be thought sufficient for the mirror agreements to deal solely with jurisdiction in each of the subsidiary jurisdictions. However, the view may be taken that primary and mirror agreements may provide potential for subsequent litigation and that, in consequence, the better course may be to have an omnibus agreement in the primary jurisdiction with contemporaneous, formal, agreed translations for each subsidiary jurisdiction. The omnibus agreement should reflect the advice received from experts in each jurisdiction. In this way, there should be no dispute as to what the agreed terms are. In any event, care should be taken to ensure that any formalities as to execution and/or registration are complied with in all relevant jurisdictions."

In this paper I canvass a number of the issues summarised by David Salter. I do not intend to write at any length about the requirements for preparing a financial agreement in Australia, as that will be assumed to be taken as understood. There are many papers written on that topic.[6] It suffices here to say:

- Australia has a statutory scheme regulating prenuptial agreements (see Parts VIIIA, VIIIAB and VIIIB).

- In Australia the prenuptial agreement is part of the family of relationship agreements known as "financial agreements" under the governing legislation, the *Family Law Act* (Commonwealth of Australia) ("Family Law Act"). The *Family Law Act* confers exclusive jurisdiction on the Family Law Courts (Family Court of Australia and Federal Magistrates Court of Australia) in respect of "matrimonial cause" and "de facto financial cause" which include proceedings with respect to the maintenance of one of the parties,[7] property of the parties or either of them,[8] a Part VIIIAB financial agreement[9] and a Part VIIIA financial agreement.[10] It is important to appreciate the jurisdictional coverage of family law in Australia. When dealing with matters in Western Australia, the state has its own *Family Law Act (WA)* and you ought to deal with practitioners from Western Australia in such matters. In respect of all other states and territories of Australia the relevant legislation is the *Family Law Act (Cth)*.

[6] For instance refer to my TEN Webinar paper "Financial Agreements: Should I Stay or Should I Go? Professional Ethics, Professional Liability and Binding (?) Financial Agreements"
7 Sections 4(1)(c),(caa)(d) & (ea); sections 4(a) & (b)
8 Sections 4(1)(ca) & (cb); Sections 4(c) & (d)
9 Section 4 (1)(e)
10 Section 4 (1)(ea)

- Section 71A of the *Family Law Act* provides:

  "This Part [which relates to property settlement and spousal maintenance] does not apply to:

  (a) Financial matters to which a financial agreement that is binding on the parties to the agreement applies; or

  (b) Financial resources to which a financial agreement that is binding on the agreement applies."

- *What is required is that the regime prescribed by the Act… is followed, and if that is done the agreement is binding upon the parties and ousted entirely the jurisdiction of the court in respect of matters dealt with in the Binding Financial Agreement. Accordingly, it does away for all time with the intervention of any form of judicial intervention so far as the affairs of the parties as dealt with in that agreement are concerned." Ju*[11]

- The 4 fundamental questions to ask at the front end (when preparing an agreement) and at the back end (when enforcing or challenging an agreement) are[12]:

  - Is there an agreement between the parties?

    - See section 4(1) of the *Family Law Act*;

    - Refer to *Pascot* [13]where Le Poer Trench J addresses the elements of the formation of the agreement – at least 2 parties, a clear offer, a clear acceptance, consideration, certainty, intention to create legal relations; and

    - Refer to *Fevia*[14] where Murphy J held:

      "By reference to the principles of contract (or equity), there may in fact, be no agreement between the parties. That there must be an agreement before there can be a financial agreement is made clear by the definition of "financial agreement" in s4 of the Act. The ordinary and natural meaning of "agreement" is, in my view, an agreement which is otherwise effective and enforceable at law."

  - Is there an agreement which qualifies as a financial agreement?

    - See section 90B of the *Family Law Act:*

      - It is in writing.

      - Timing: it is made in contemplation of the parties ("spouse parties") entering into a marriage.

      - Timing and scope:

        - Property settlement: How, in the event of a breakdown of the marriage, all or any of the property or financial resources of either or both of the spouse parties are to be dealt with at the time of the agreement or at a later time but before a divorce;

        - Maintenance: The maintenance of either of the spouse parties during the marriage, after divorce, or both during the marriage and after divorce;

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11 [2006] FamCA442
12 Senior and Anderson [2011] FamCAFC 129; Pascot [2011] FamCA 945
13 supra
14 [2009] FamCA 816

- Incidental and ancillary matters.

- No other financial agreement in force between the parties with respect to any of the above matters.
- It is expressed to be made under section 90B.
- It can be made with one or more other people who are not the spouse parties to the agreement.
- It may terminate an earlier agreement (see also section 90J).

- Is the financial agreement binding on the parties and the court as set out in section 71A?
  - See section 90G:
    - Signed by all parties.
    - Independent legal advice for each spouse about:
      - The effect of the agreement on the rights of that party; and
      - About the advantages and disadvantages, at the time that the advice was provided, to that party making the agreement.
    - Provision of statement by legal practitioner to party.
    - Provision of copy of statement to the other party or their legal practitioner.
    - Not terminated or set aside
  - See section 90G(1A):
    - Notwithstanding non compliance, an agreement may be declared binding.
  - See section 90DA:
    - The financial agreement is of no force or effect until a separation declaration is made.
  - See section 90E:
    - You must identify and specify the apportionment of spousal maintenance, if any.
- Is there a ground to challenge and set aside the agreement?
  - Before entertaining grounds to set aside an agreement, the agreement may fail in the following respects:
    - Court finds there is no agreement.
    - Court finds the agreement is not binding.
    - Parties terminate the agreement.
    - Claim is not covered by the agreement.

- Claim is against property which is not dealt with under the financial agreement.
- Court's jurisdiction in relations to spousal maintenance has not been ousted.

▪ See the grounds for setting aside an agreement under sections 90K and 90KA:

- Fraud (including fraud by non disclosure).
- Defrauding creditors.
- Void, voidable or unenforceable:
  - Note the intersection with section 90KA where the Court has power to set aside an agreement on the basis of ordinary principles of contract law and equity applicable in determining the validity, enforceability and effect of contracts.
  - Undue influence.
- Impracticable.

▪ Material change in circumstances relating to the care, welfare and development of the child of the marriage.

▪ Unconscionable conduct.

▪ Superannuation issues:

- Payment flag is operating
- Agreement covers an unsplittable interest.

- Finally parties are at liberty to enter into a bad bargain provided they make a fully informed decision to do so on a level playing field. There are a number of authorities[15] consistent with this position including the following statement of Murphy J. in *Hoult (no.2)*[16]*:*

  "In short, if the relevant pre-requisites are met, and there is an absence of vitiating factors, the parties are perfectly free to make a "bad bargain"."

  Compare this to the statements made by the Supreme Court (UK) in *Radmacher* referred to later in this paper and note the synergies.

The modern family (to be) may be a product of cross border connections giving rise to the need to document an international prenuptial agreement combining the elements of an Australian financial agreement and the agreement of foreign jurisdictions by virtue of:

- one or both of the parties are Australian citizens or Australian residents but live or work overseas prior to the relationship, or the parties intend to do so during the relationship; or
- one or both of the parties are foreign citizens or foreign residents but live or are employed in Australia prior to the relationship, or intend to do so during the relationship; or

[15] Hoult (no.1) [2011] FamCA1023; (no.2) [2012] FamCA 367; Logan [2012] FMCAfam 12; Sanger [2011] FamCAFC 210; Kostres[2009] FamCAFC 222 and Scribe [2006] FLC 93-302

[16] [2012] FamCA 367

- all or some of the parties' property (immovable and movable) is situated in Australia and overseas; or
- related entities of the parties own property or conduct business in Australia and overseas.

Overview of preparing a cross border agreement: practicalities

The ordinary risks, level of skill and specialization required to prepare a financial agreement under Parts VIIIA and VIIIAB of the *Family Law Act* which I addressed at the 6tth Annual Family Law Conference and in subsequent presentations for TEN, become amplified when cross border issues are introduced. An international prenuptial agreement takes on an added dimension of complexity, increases the skill required and increases the exposure to risk in the hands of the uninitiated.

The obvious but first step in engagement is to be in a position to identify the financial agreement you are about to prepare for your client has potential cross border ramifications. It is essential you take the time to tease out the instructions from your client that may lead to this revelation and then explore whether there is a need to engage with expert family lawyers in the other related jurisdiction(s) or not, leading to the preparation of an agreement tailored to meeting the requirements of all intersecting jurisdictions. In some cases the cross border issues will jump out at you, such as in the case of the opening scenario.

Apart from having expertise in preparing and advising on a financial agreement under Australian law, it is in my view critical that you have an understanding of the law and operation of prenuptial agreements in all other jurisdictions. That can only be achieved by engaging the lawyer in the other jurisdiction(s) to provide the advice you will need to then be in a position to advice your client of the very matters you are required to provide advice about, inter alia –

- about the effect of the agreement on the rights of that party and
- about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement.

It is my view that you cannot properly discharge your obligations to your client to provide such advice until you understand how the laws as to property settlement, spousal maintenance and prenuptial agreements operate under the laws of the foreign jurisdiction, so as to be in a position to provide a point of comparison for the client as to potential outcomes in each jurisdiction and which jurisdiction is the appropriate primary jurisdiction for the agreement, and thereby ensure the client can make an informed decision about whether they should enter the agreement. In particular, as a minimum you would need to know the following information about the foreign jurisdiction:

- Have an understanding of its different property regimes and the property regime that is applicable (separate, community, discretionary system…);
- Have an understanding of the country's treatment of private international law:
    - choice of law,
    - forum,
    - recognition and enforcement of the agreement;
- Have an understanding of the law applicable to property settlement and spousal maintenance in the intersecting jurisdictions and the potential outcomes for each party;
- Have an understanding about the Country's approach to estate issues and wills and the ability to waive and disclaim potential entitlements (In jurisdictions outside New South Wales parties cannot contract out of rights under Succession Act, however a prenuptial agreement/financial agreement may be relevant to assessing adequacy of provision (see *Hills v Chalk & Ors [2008] QCA 159, Vigolo v Bostin 221 CLR 568,Barns v Barns (2003) 214 CLR 169).* Further have regard to *Stanford [2102] HCA 52* where the High Court stated*:*

> *"If the parties have made a financial agreement about the property of one or both of the parties that is binding under* Pt VIIIA *of the* Act*, then, subject to that Part, a court cannot make a property settlement order under* s 79*. But if the parties to a marriage have expressly considered, but not put in writing in a way that complies with* Pt VIIIA*, how their property interests should be arranged between them during the continuance of their marriage, the application of these principles accommodates that fact. And if the parties to a marriage have not expressly considered whether or to what extent there is or should be some different arrangement of their property interests in their individual or commonly held assets while the marriage continues, the application of these principles again accommodates that fact. These principles do so by recognising the force of the stated and unstated assumptions between the parties to a marriage that the arrangement of property interests, whatever they are, is sufficient for the purposes of that husband and wife during the continuance of their marriage. The fundamental propositions that have been identified require that a court have a principled reason for interfering with the existing legal and equitable interests of the parties to the marriage and whatever may have been their stated or unstated assumptions and agreements about property interests during the continuance of the marriage."*

- Have an understanding of the following practical issues that may be applicable to entering the agreement in the other jurisdiction:
    - The need for, and availability of interpreters and translators;
    - Legal Costs, retainers required by lawyers engaged in the other jurisdictions, and potential need to take out or arrange top up insurance;
    - The time involved in preparing and executing the agreement;
    - The requirements for executing the agreement, e.g. whether the agreement needs to be notarized;
    - The logistics of holding conferences with your client (and the preference to eyeball the client even if it means using technology to achieve this such as skype or teleconferences);
- Have an understanding of the foreign jurisdictions requirements for:
    - Independent legal advice
    - Disclosure; and
    - Fairness tests
- Whether the agreement ought to be documented by parallel / mirror agreements in all jurisdictions or have one(omnibus) agreement
- Have an understanding of the Dispute resolution options and requirements in the jurisdiction(s).

I repeat what I said in my previous TEN paper "Financial Agreements: Should I Stay or Should I Go?...." about cross border agreements:

Cross border agreements are among the most difficult, time consuming and expensive agreements to draft. When the parties have a connection (e.g. through residence (past, current or intended), property or employment) a prudent lawyer will work with lawyers in each of the jurisdictions to ensure the agreement (or parallel agreements) is recognized and operates in those countries and will give effect to the parties agreement.

Extra care is required when preparing an agreement where there are cross border issues. You must engage with lawyers in the other jurisdictions to ensure the agreement will be recognized, binding and enforceable in those jurisdictions in the event the agreement is tested in those jurisdictions at a later time. For instance Swiss Courts will only recognize the last agreement entered between the parties if parallel agreements have been drawn. Thai courts do not recognize foreign laws and foreign prenuptial agreements.

What do you do when you are engaged? What is the line of enquiry likely to be?

In the scenario I have presented, I received requests from my counterpart German lawyers to provide the following information to them about Australian law:

Letter #1

"*I am a lawyer in the private client department of<xxx>, Germany. We have a high net worth client who is planning to get married to his Australian girlfriend. With view to the assets the client already owns as well as those which he will in the future inherit from his father he wishes to conclude a prenuptial agreement with his future wife. We see a certain risk that should the marriage fail the client´s future wife will return to Australia (very likely Queensland) and make claims before an Australian court based on the failure of the marriage (e.g. property rights, maintenance). Against this background we need to ensure that the provisions in the prenuptial agreement are also valid under the applicable Australian law.*

We are therefore looking for an Australian family lawyer who is experienced in dealing with / drafting prenuptial agreements for binational couples. Questions that need to be resolved are among others:

1. Which are the formal requirements for a valid prenup under the laws of Queensland? (E.g. Disclosure of assets, separate legal counsel)

2. Under the conflict of law rules of Queensland is a choice of law in favor of German law admissable with view to divorce, property division, post-marital maintenance, inheritance law?

3. Should the answer be "no": which law is under the conflict of law rules of Queensland applicable to divorce, property division, post-marital maintenance, inheritance?

4. Should Australian law be applicable: Are the provisions in the agreement which we have drafted admissible under Australian family/inheritance law?.."

Letter #2:

Questions to be clarified:

The following questions must therefore be clarified on the basis of Australian law:

1. *Formal requirements for the validity of a marriage contract under Australian law:*
    a. *What is the specific form required for a marriage contract?*
    b. *What are the requirements regarding the independent advice to be obtained by the parties?*
    c. *In the case at hand, would the client´s fiancée need to be obtain advice from an Australian and a German lawyer? Or would it suffice if she obtained counsel from an Australian lawyer?*
    d. *What are the requirements regarding the mutual disclosure of the financial circumstances?*
    e. *Do the parties´ financial circumstances need to be laid down in writing and attached to the contract?*
2. *Terms of the marriage contract*
    a. *Possibility of a choice of law:*

    The current draft of the marriage contract provides for a choice of German law for

    - *the general effects of the marriage*

- *the property law effects of the marriage*
- *the post marital maintenance*
- *the rights of the surviving spouse in the other spouse's estate.*

Would the choice of law made in the Agreement be recognised by an Australian court which has to decide on the consequences of the divorce or the surviving spouse´s rights in the estate of the deceased spouse, so that the Australian court would apply the relevant substantive German law and that the validity of the terms provided in the Agreement would be governed by the corresponding German law?

b. *Applicable law:*

In the event that the choice of law made in the draft marriage contract should be invalid, in whole or in part, it has to be examined which substantive law applies in accordance with Australian private international law to

- *the property law effects of the marriage,*
- *the post marital maintenance,*
- *the rights of the surviving spouse in the other spouse's estate,*
- *the general effects of the marriage.*

c. *Terms possibly to be agreed under Australian law*

If the choice of German law should be invalid under Australian conflict of law rules and if, under the Australian conflict of law rules, German law is not applicable anyways, but Australian law is applicable, it has to be examined whether the following terms provided in the draft prenuptial Agreement are valid under Australian substantive law.

i. *Separation of property*

Under German law it is possible to choose the matrimonial property regime of the "separation of property". This means that in the event of a divorce, there will be no distribution of property. Is such an agreement admissible under Australian law?

ii. *Maintenance*

Husband to be will hold a corporate shareholding from which he might receive very high income. Even if, given the way of life lived by the husband's family, it is unlikely that the husband to be and his family will live a life in particular luxury, the wife's maintenance claims in case of a divorce could still be substantial under German law.

This is why the husband to be wishes to include a maintenance regulation in the prenuptial Agreement which will limited the potential claims of his wife in the event of divorce. So far, the draft agreement provides for alternative regulations. It has been decided that the final decision regarding the contractual provision for post-marital maintenance will only be made once we know which types of limitations are admissible under Australian law.

Under German law it would be possible, for example, to limit the statutory rights to post-marital maintenance in terms of amount. Such limitation could be achieved by agreeing an absolute maximum amount. Alternatively, the maintenance could be based on a certain civil servant salary (e.g. 150% of a judge's salary earned in a certain salary scale).

Also, it could be agreed that any income earned by the spouse entitled to maintenance must be credited against the maintenance claims existing by law, taking into account the agreed maximum limit.

Would such regulations be admissible under Australian law?

What aspects would have to be taken into account with view to a contractual limitation of claims to post-marital maintenance under Australian law?

iii. *Waiver of the compulsory portion*

Under German law the surviving spouse is entitled to a minimum share in the estate of the deceased spouse if the will of the deceased does not grant the surviving spouse at least such amount ("compulsory share" / "forced heirship right"). Under German law this claim may be waived by way of an agreement inter vivos.

Which law is applicable to the estate of a deceased? Is a choice of law admissible with view to the law applicable inheritance law?

Under Australian inheritance law, does the surviving spouse have such a claim to a minimum share in the deceased's estate? If so, can such claim be waived in a prenuptial agreement?

Letter # 3

I have the following remarks/questions:

1. *Under para xxx you explain that an agreement is only considered a financial agreement if it is made with respect to:*

   *"how in the event of a breakdown of the marriage all or any of the property or financial resources of either or both of the spouse parties are to be dealt with at the time of the agreement or at a later time **before** divorce".*

   Our draft agreement however makes provision as to how the spouses ´ property shall be dealt with upon a divorce. Does the agreement qualify as a financial agreement regardless?

2. *Is my understanding correct that the agreement will be regarded as formally valid under Australian law if it has been executed in Germany in accordance with German law form requirements?*

3. *Is there a standard form in which disclosure of the financial circumstances is rendered? In particular, is it necessary to provide a valuation of each asset or would it suffice to specify the individual asset. I am asking this with view to the sub-participations which the husband to be has been granted by his father. It will be very difficult to assess the value of these sub-participations. If a value needs to be stated, does it suffice if the husband to be gives a range and the parties agree to accept this value for purposes of the disclosure. Also, do we need to specify the assets which the husband to be expects to inherit from his father - I am asking this with view to the waiver of the compulsory share in the other spouse ´s estate.*

4. *Which law applies to the estate of a deceased person under Australian conflict of law rules? In one of the few resources we have on Australian law I read that the movable estate is governed by the inheritance law of the country in which the decedent had his last domicile and the immovable assets are governed by the law of the country in which they are situated (lexreisitae). If this is correct, the husband to be ´s movable estate should be governed by German law - of course provided he does not give up his German domicile. Assuming all this is correct I suppose an Australian court would apply German inheritance law to the succession to the husband to be ´s sub-participation (and later his direct shareholding) in his father ´s publishing company, the publishing business. As a consequence the wife to be ´s waiver of her rights in the husband to be ´s estate should be valid at least with regard to his movable estate. Please let me know if this is correct.*

5. *You mentioned during our telephone conversation that you will be able to recommend a choice of lawyers for the wife to be. Our time schedule is as follows: the wife to be will be travelling to Australia; during this stay a meeting could be scheduled with the lawyer. For this reason it will be best if the lawyers whom you recommend were also based in Australia. However, as the civil wedding will already take place on xxx in Germany, I suggest that the wife to be´s lawyer should provide her beforehand with information as to the rights she would have under Australian law and which she waives by entering into a financial agreement governed by German law. As this advise is not contingent on the specific content of the agreement I suppose it will be possible for her lawyer to provide this advise before the final draft is at hand (we still need to discuss with the husband to be which maintenance provision he wishes to include). Please let me know your thoughts on this.*

6. *As regards your various suggestions to include additional language to ensure that the agreement will be regarded as a binding financial agreement under Australian law I am looking forward to receiving your draft provisions.*

Letter # 4

After having gone through your memo again, there are a few more issues which I would like to understand better.

1. *Under para xx. of your memo you are saying that the choice of jurisdiction clause contained in section xx of the draft prenuptial agreement would be upheld by an Australian court.*

   Does that mean that an Australian court would deny jurisdiction over an application for a property settlement order or a maintenance order irrespective of whether the agreement is considered to be a "binding financial agreement" under Australian law? Or is the qualification of the agreement as a "binding financial agreement" a prerequisite for the court to acknowledge the choice of jurisdiction clause?

   Should the latter be the case, it seems that the choice of jurisdiction clause will not be of great importance from an Australian law perspective as the Australian court will in any case not be entitled to make property settlement or spousal maintenance orders if property settlement and spousal maintenance are covered under the agreement. So ultimately, the choice of jurisdiction clause would only be of importance if the wife to be made an application for a property settlement or spousal maintenance order and either was not covered by the agreement. Is this correct?

2. *Also I am not sure in which cases the choice of law clause could become of importance from an Australian law perspective. Would the fact that the agreement is valid and binding under German law bar an Australian court from making a property settlement or spousal maintenance order even if the court found that the agreement was not a binding financial agreement under Australian law or the agreement was a binding financial agreement but could be set aside? From what you are saying in para xx of your memo I suppose this would not be the case. Please advise.*

3. *In the "General information about prenuptial agreements" which you provided you explained that an agreement may be set aside if "since the making of the agreement, a material change in circumstance has occurred (being circumstances relating to the care, welfare and development of the child of the marriage), and as a result of the change, the child or, if the applicant has care and responsibility for the child, a party to the agreement will suffer hardship if the court does not set the agreement aside".*

In this context I have the following questions:

   a. *Assuming that at the time of the making of the agreement there was no child whereas at the time of divorce there are children. Would this fact suffice to argue that a material change has occurred?*

   b. *Could the court assume a hardship even if the provisions in the agreement are valid agreements under German law and the parties have expressly stated in the agreement that it shall be governed by German law?*

Letter # 5

With regard to your emails I have the following questions:

1. ***Formal validity***

   You are saying that an Australian court will only consider the agreement to be formally valid if it also meets the Australian form requirements. Which exactly are those?

2. ***Choice of law clause:***

   I do not exactly understand your explications regarding the relevance of the choice of law clause. You are saying that it determines how the property settlement and maintenance payments will be determined under a binding financial agreement. From what you explained earlier my understanding was that the existence of a binding financial agreement would bar a court from making property settlement and maintenance orders provided that the agreement covers these issues. Did you mean that the choice of law clause will become relevant if there is a binding financial agreement which does not deal with e.g. maintenance? Would in this case the right of a spouse to maintenance be determined in accordance with German law?

3. ***Section 90K of the Family Law Act:***

   Is my understanding correct that you are of the opinion that the choice of law clause will bar the Australian courts from setting the agreement aside under section 90K of the Family Law Act? Does that in consequence mean that the question whether the agreement may be set aside will be exclusively determined under German law?

   Should your opinion not be followed by the court: Assuming there is no child at the time of conclusion of the agreement, but there are children at the time of divorce: Can a setting aside of the agreement under Art. 90K of the Family Act on the basis of a material change in circumstance only be prevented by providing for additional maintenance payments for this particular case? Or does it suffice if the parties explicitely declare that they consider the provisions in the agreement to be fair irrespective of whether there are children at the time of the divorce or not and that therefore the provisions shall apply unchanged even if there are children? If this is not the case: In which amount should the husband to be undertake to pay maintenance in order to prevent a court from assuming that the wife to be will suffer hardship if she is bound to the agreement even if there are children? We have discussed with the husband to be today which provision shall be included with regard to maintenance. He would like to include an agreement that the wife to be will be entitled to maintenance under the statutory provisions but limited in the amount to 1,5 times the income of a judge at the regional appeal court. This will amount to approximately EUR 10.000/month. Would that be sufficient? Please note that under Geman law child support will have to be paid in addition to the spousal maintenance.

   Please note: The agreement does not provide for child support. There must be a misunderstanding on your part. Under German law the amount of child support that has to be paid is not open to agreements between the parents. If this changes your assessment please let me know.

   Should the court apply Australian law in order to determine whether the agreement may be set aside and should the court come to the conclusion that it may be set aside on the basis of a material change in circumstance: Will the court be able to also deviate from the agreement of the matrimonial property regime of separation of property and make a property settlement order to the effect that the husband to be will have to transfer to the wife to be assets which he obtained by way of gift or inheritance from his father? If so, is there any way to prevent this?

4. ***Legal advise for wife to be by an Australian lawyer***

   There has been a misunderstanding on our part regarding the time schedule. The wedding will indeed take place on the xxx but in Australia, not in Germany. As we would prefer to have the agreement notarized by a notary in Germany the following questions arise:

   a. *Is it a requirement that the wife to be sees the Australian counsel in person or would it be acceptable if the Australian lawyer advised her in writing and/or over the phone?*

b. *If it is a necessity that the wife to be sees the Australian lawyer in person would it be possible that someone signs the agreement for her on the basis of a power of attorney? Then she could receive counsel in Australia and after a final agreement has been reached the final version may be notarized in Germany in the presence of the husband to be and an agent acting on behalf of the wife to be on the basis of a poa granted by her.*

5. *Information requested regarding the wife to be*

With view to your request under section 8.2 of your memo dated xxx I provide the following information:

a. *Wife to be has been born in Australia.*

b. *She does not own any considerable assets.*

c. *She expects to inherit a house from her father which is located in Australia.*

With view to the risk that a court may make an order to the effect that assets which the husband to be inherited from his father have to be transferred to the wife to be we have decided to include an additional provision in the agreement. Would the following be wording be sufficient from an Australian law view?

> *"In the event that at the time of the divorce joint children under age live with the wife to be, the husband to be agrees to provide the wife to be with a reasonable home for her free use. A home will be considered reasonable if it is at a location which corresponds to that of the family's home so far and if each of the joint children under age living with the wife to be has a room of his/her own. This obligation will end if and when none of the joint children under age lives with the wife to be permanently any longer (e.g. because they attend a boarding school), but no later than when the youngest of the joint children has turned 18."*

Is it acceptable that the obligation to provide accommodation terminates when all children have left the home, e.g. for boarding school, even if they are still under age?

6. *To my understanding Australian law requires the lawyers of the parties to a prenup to confirm in writing that they have advised the parties with regard to the prenup. I assume that we should also issue a respective confirmation and ask the wife to be´s German lawyer to do the same. Could you provide me with the appropriate wording for such confirmation?*

7. *Please let me know if my following understanding is correct: If the husband to be dies domiciled in Germany and he owns both moveable and immoveable assets in Australia, the wife to be could only claim further provision out of the estate under Australian law with regard to the immoveable assets located in Australia. As far as the moveable assets in Australia are concerned German law would apply and hence the wife to be could only make an application for a compulsory share under German law. If she has validly waived her right to her compulsory share under German law, an Australian court would not be entitled to grant her a provision out of his moveable estate located in or outside of Australia.*

The standing of foreign prenuptial agreements in Australia

The reported decision of the Honourable Justice Murphy of the Family Court of Australia at Brisbane in the matter of *Weinhopf & Weinhopf*[17] brings into sharp focus in proceedings instituted in Australian courts, the place of a prenuptial agreement executed outside Australia and the importance of the prenuptial agreement complying with Australian law where there are cross border issues.

In this particular case, the parties commenced cohabitation in 1972. They lived and worked in Europe. The parties executed a prenuptial agreement in Germany in 1976 prior to the marriage that year. At that time there was no statutory recognition of prenuptial agreements in Australia. It is not surprising to find therefore the German prenuptial

[17] [2009] FamCA 1084, judgment delivered on 17/11/09

agreement does not contemplate and provide for the parties ultimate residence in Australia nor does it comply with Part VIIIA of the *Family Law Act.* Eventually the parties moved to Australia to live. The husband worked overseas during the marriage.

A series of inter vivos gifts of real estate situated in Belgium, shares, bonds and cash investments were made by the wife's parents. The judge found: "it seems clear that the wife's parents made the transfers of property and gifts of cash in reliance upon that pre-nuptial agreement…"

The parties separated in June 2007. At the time of the trial the total wealth of the parties was $10M (AUD) comprising property in Australia and funds in Singapore amounting to $2.4M and European property worth $7.6M.

Despite the existence of the prenuptial agreement, the court entertained an application by the husband for a property settlement (under section 79 of the *Family Law Act*).

In relation to the German prenuptial agreement, the judge held:

> "45. *I accept the argument on behalf of the husband that the prenuptial agreement does not preclude the husband from pursuing his application for orders pursuant to s79, nor does it relieve the Court of its obligation to decide this matter in accordance with the provisions laid down in the Act. (See D & D Full Court, unreported, 30 April 1992, per Strauss, Lindenmayer and McCall JJ and the earlier decisions there cited)."*

The court did treat the gifts made by the wife's parents as a direct financial contribution made on the wife's behalf. The judge further dealt with the Belgian / European property (vis-a-viz the pre-nuptial agreement) as follows:

> *77. Central to the wife's position is a contention that it is unjust and inequitable for the husband to (in effect) share in any of the Belgian/European property in circumstances where the property was not acquired, in any substantial or significant way, through the joint endeavours of the parties during their marriage partnership and in circumstances where she implacably maintains a current and future intention to preserve it, effectively, in its entirety.*
> *78. To do so would, from her perspective, be to provide, in effect, a gift from her parents to the husband of a significant sum when the plain intention of the wife's father (as donor) was to achieve the very opposite. That intention is not only asserted by the wife but is manifest in the pre-nuptial agreement earlier referred to.*
> *79. The wife deposes (and it is not suggested to the contrary) that the pre-nuptial agreement provides that "any contributions, gifts or inheritance received by [the parties] from [their] respective families was to remain the property of the person receiving the property and that such property was to be excluded from the matrimonial property".*
> *80. Whilst ineffective at law to achieve its apparent intended purpose, the pre-nuptial agreement is, in my view, good evidence of the intention of the donor of this significant amount of property.*
> *81. I accept the evidence of the wife as to her intentions with respect of the property. I accept that she has no present or future intention to deal with the vast bulk of the property. I accept that her intention is to pass it on (at least in overwhelming substance) to the parties' child. I consider, consistent with her evidence, that any use of substantial or significant parts of that property by her would be likely to occur in extraordinary, or, at least, unusual circumstances not yet foreseen by her and not forming part of the anticipated future eventualities.*
> *82. In my view, the evidence as to the history of the management of the properties, and funds emanating from them, supports that conclusion.*
> *83. Specifically, I accept the evidence of the wife, for example, that she has not traded in any shares held as part of the property and that her involvement, or interest, in those shares has extended only to monitoring the movements in their price and comparing those movements with advice received from Belgian financial advisors (sought by her father but shown to her).*
> *84. I propose to take the matters just referred to into account when considering s 79(4)(e) and, specifically, as a matter relevant to s 75(2)(o).*
> *85. The evidence is clearly to the effect that the Belgian/European assets have been actively managed and preserved by, overwhelmingly, the efforts of the wife's father. That, too, is a contribution made, via his agency, by or on behalf of the wife.*

86. In considering that contribution together with all of the other contributions to which I have earlier referred, I conclude, in the exercise of my discretion, that contributions ought be assessed 85% in favour of the wife and 15% in favour of the husband.

Ultimately the trial judge ordered a division of the total property (including the Belgian / European property) as to 18% ($1.8M) to the husband and 82% to the wife. Essentially the Belgian / European property remained with the Wife; however the Husband received 75% of the remaining property.

In *Beidenhope and Cantanor*[18] [19]Forrest J dealt with a prenuptial agreement under Dutch law executed in the Netherlands in the context of determing an application to stay proceedings for property settlement instituted.

The relevant facts were:

1. The husband is a citizen of the Netherlands, currently living there. The wife is Australian, living here in Brisbane with the two children of the marriage.

2. Having met on holidays in Thailand in 1989, the couple commenced cohabitation in South Africa in 1990, and lived there until they relocated to the Netherlands in August, 1993.

3. In October, 1994, they signed a document described as a "pre-nuptial agreement" in the Netherlands and then married.

4. In April, 2002, the family moved to Australia after having lived in various parts of the world as well as the Netherlands.

5. The husband commenced proceedings for a dissolution of the marriage, spousal maintenance and property division pursuant to the pre-nuptial agreement in a court in the Netherlands in December, 2008. In early January, 2010, that application was struck out because the Dutch court lacked jurisdiction, the husband not having met the jurisdictional requirement of at least six month's residence in the Netherlands immediately prior to filing his application. Immediately afterwards, the wife commenced proceedings in this Court for property division. A few months later, the husband appealed the first instance strike-out decision of the Dutch court. In October, 2010, the husband filed an application in this Court seeking a stay of the wife's property division proceedings. In December, 2010, the husband's appeal in the Netherlands was dismissed and in January, this year, the husband filed another application for dissolution, spousal maintenance and property division in the Netherlands.

6. The husband seeks to have the Australian proceedings stopped so that the proceedings he has commenced in the Dutch court continue as the only process of judicial determination of the rights and obligations of the couple in respect to their property and finances consequent upon the breakdown of their marriage. The wife opposes the application for the stay.

7. The only real property of the parties or either of them is in Australia.

8. The prenuptial agreement provided:

   In the preamble, the English version says:-

   The persons appearing stated:

   > *that they are going to be married in [the Netherlands] on the [...] of October; that the proprietary effects of their marriage will be governed by Dutch law; that they wish to regulate these effects by the following:-*

[18] [2011] FamCA 669; [2012] FamCA 5
[19] [2011] FamCA 669

The document then contains all the operative articles and Article 13 says:-

> *Unless otherwise agreed the spouses will submit all disputes exclusively to the Court of the District in which their last joint place of residence in the Netherlands is situated and, in the absence thereof, to the District Court of the Hague, this unless otherwise determined.*

Forrest J. dealt with the prenuptial agreement in the following manner:

> *The point made most strongly by the husband's solicitor in his submissions was that because the couple entered into a pre-nuptial agreement in the Netherlands prior to their marriage, that included provisions that they submit any dispute exclusively to the jurisdiction of the courts of the Netherlands and that Dutch law was to apply to any settlement of property between them on a breakdown of the marriage, that the matter should not be litigated away from that forum making Australia a clearly inappropriate forum in the relevant sense....*
>
> *It appears clear that the couple, in 1994, agreed to submit any property dispute on marriage breakdown to the Dutch courts to be determined by Dutch law. Counsel for the wife submitted that Article 13 "does not necessarily exclude the parties from invoking an alternative jurisdiction from that of the Dutch courts", but, having regard to the wording I have set out above, with respect to counsel, I cannot accept that submission. I regard the intent expressed in the document as clear.*
>
> *The question then is whether, when all other relevant matters point to a determination that this Court is not a clearly inappropriate forum to be determining the controversy between the parties, the terms of that agreement referred to should be decisive of a finding that it is a clearly inappropriate forum?*
>
> *The passage cited above from the majority judgment in the High Court's decision in CSR Ltd v Cigna confirms the discretionary nature of the injunctive remedy.....*
>
> *I am mindful of the following important factors:....*
>
> *It has long been held that no agreement between parties to a marriage not made in accordance with the relevant provisions of the Family Law Act can preclude either party from bringing and pursuing an application for alteration of property interests under s. 79 of the Act, or for maintenance under s. 74 of the Act, nor prevent this Court from the obligation of deciding such applications in accordance with the principles set out in the Act.[17] Those principles include the obligation not to make an order pursuant to s. 79 unless satisfied that it is just and equitable to do so.*
>
> *This Court has previously held that it is not a clearly inappropriate forum to determine property division proceedings commenced here where the parties had executed a pre-nuptial agreement in France before their wedding that according to both parties' experts was a valid, binding agreement, at least in France. (see Stafford v Stafford [2005] FamCA 1393).....*
>
> *There is absolutely no evidence that when the parties moved to take up full-time residence as a family in Australia in 2002 that consideration was given to the ongoing relevance and applicability of the pre-nuptial agreement signed back in 1994 in the Netherlands or that their move was made and their property jointly acquired in Australia with cognisance of, and commitment to, any ongoing binding effect of the agreement.*

At the subsequent trial of the proceedings (*Catanor v Beidenhope*) before Kent J.[20], the husband did not appear and the matter proceeded as an uncontested hearing. In the course of his judgment, Kent J. found in relation to the prenuptial agreement:

> *As already found, the pre-nuptial agreement is not binding in this jurisdiction and little weight is attached to it.*

[20] [2013] FamCA 243

In *Renard & Geach*[21], Judge Small dealt with what purported to be 2 prenuptial agreements, one entered in Australia and the other in Bali. The Australian agreement was declared not to be binding for deficiencies in respect of the legal advice. In relation to the agreement entered in Bali, Judge Small found:

1. The parties were married at [omitted] on [date omitted] 2008 ("the Australian marriage"). Mr Renard, who is now 49 years old, is an Australian citizen and Ms Geach, who is 42, is an Indonesian citizen with permanent resident status in Australia.

2. The parties signed the Agreement on [omitted] 2008, the day before they flew out to Bali to prepare for their Bali wedding.

3. The issue of the validity of the document which all parties agree was signed at the home of the wife's parents in Bali on the morning of [date omitted] 2008 ("the Bali document"), was not specifically agitated at trial.

   For the sake of clarity, I find that as there were no lawyers admitted in an Australian jurisdiction present when the Bali document was signed, that document is not enforceable as a Financial Agreement made under s.90G(1) of the Act.

   In the matter of Ruane & Bachmann-Ruane [2009] FamCA 1101, Cronin J held that only advice from a lawyer qualified to practise in Australia is capable of satisfying s.90G(1). If the wife seeks to enforce the provisions of the Bali document, she will need to do so in Indonesia.

Australia is not a party to any convention on the recognition and enforcement of international prenuptial agreements.

> *Similarly, an overseas agreement which does not meet the legislative requirements for a binding financial agreement under Australian law would not be enforceable in Australia. Nor would such an agreement exclude the jurisdiction of the Australian courts in relation to its subject matter, save for a properly executed New Zealand agreement pursuant to the newly enacted Trans-Tasman Proceedings Act*, as discussed by John Spender. However, an overseas agreement may be given appropriate weight in arriving at a just and equitable division of assets and resources in property proceedings*[22].
>
> I note however section 20 of the Trans Tasman Proceedings Act (Cwth) 2010 (there is reciprocating legislation in New Zealand - *Trans-Tasman Proceedings Act 2010* of New Zealand) provides:
>
> > *"Exclusive choice of court agreements*
> >
> > *(1) On application under section 17*[23] *(and despite section 19), the Australian court:*
> >
> > *(a) must, by order, stay the proceeding, if satisfied that an exclusive choice of court agreement designates a New Zealand court as the court to determine the matters in dispute; and*
> >
> > *(b) must not, by order, stay the proceeding, if satisfied that an exclusive choice of court agreement designates an Australian court as the court to determine those matters.*
> >
> > *(2) However, subsection (1) does not apply to an exclusive choice of court agreement if the Australian court is satisfied that:*

[21] [2013] FCCA 617

[22] Ian Kennedy, INTERNATIONAL FAMILY LAW International Recognition and Enforcement of Property Orders and Maintenance and Child Support Obligations7TH FAMILY LAW CONFERENCE 2011 MELBOURNE: 22 MARCH 2011

[23] A defendant in a civil proceeding in an Australian court may apply to the court for an order staying the proceeding on the grounds that a New Zealand court is the more appropriate court to determine the matters in dispute

(a) it is null and void under New Zealand law (including the rules of private international law); or

(b) a party to it lacked the capacity to conclude it under Australian law; or

(c) giving effect to it would lead to a manifest injustice or would be manifestly contrary to Australian public policy; or

(d) for exceptional reasons beyond the control of the parties to it, it cannot reasonably be performed; or

(e) the court designated by it as the court to determine the matters in dispute between the parties to the proceeding has decided not to determine those matters.

(2A) Paragraph (1)(b) does not apply to an exclusive choice of court agreement if the Australian court is satisfied that it is null and void under Australian law (including the rules of private international law).

*(3) **Exclusive choice of court agreement**, in relation to matters in dispute between parties to a proceeding, means a written agreement between those parties that:*

(a) designates the courts, or a specified court or courts, of a specified country, to the exclusion of any other courts, as the court or courts to determine disputes between those parties that are or include those matters; and

(b) is not an agreement the parties to which are or include an individual acting primarily for personal, family, or household purposes; and

(c) is not a contract of employment."

To circumvent the prospect of a Family Law Court in Australia making unintended orders for property settlement or spousal maintenance where the marital relationship has cross border connections between Australia and other foreign jurisdictions, it is imperative for parties intending to marry, to enter a prenuptial agreement which complies with Part VIIIA of the *Family Law Act* or is declared to be binding by the courts[24].

Where there is compliance with Part VIIIA of the *Family Law Act,* the agreement is for all intents and purposes a binding Financial Agreement which will be recognised and enforced in Australia.

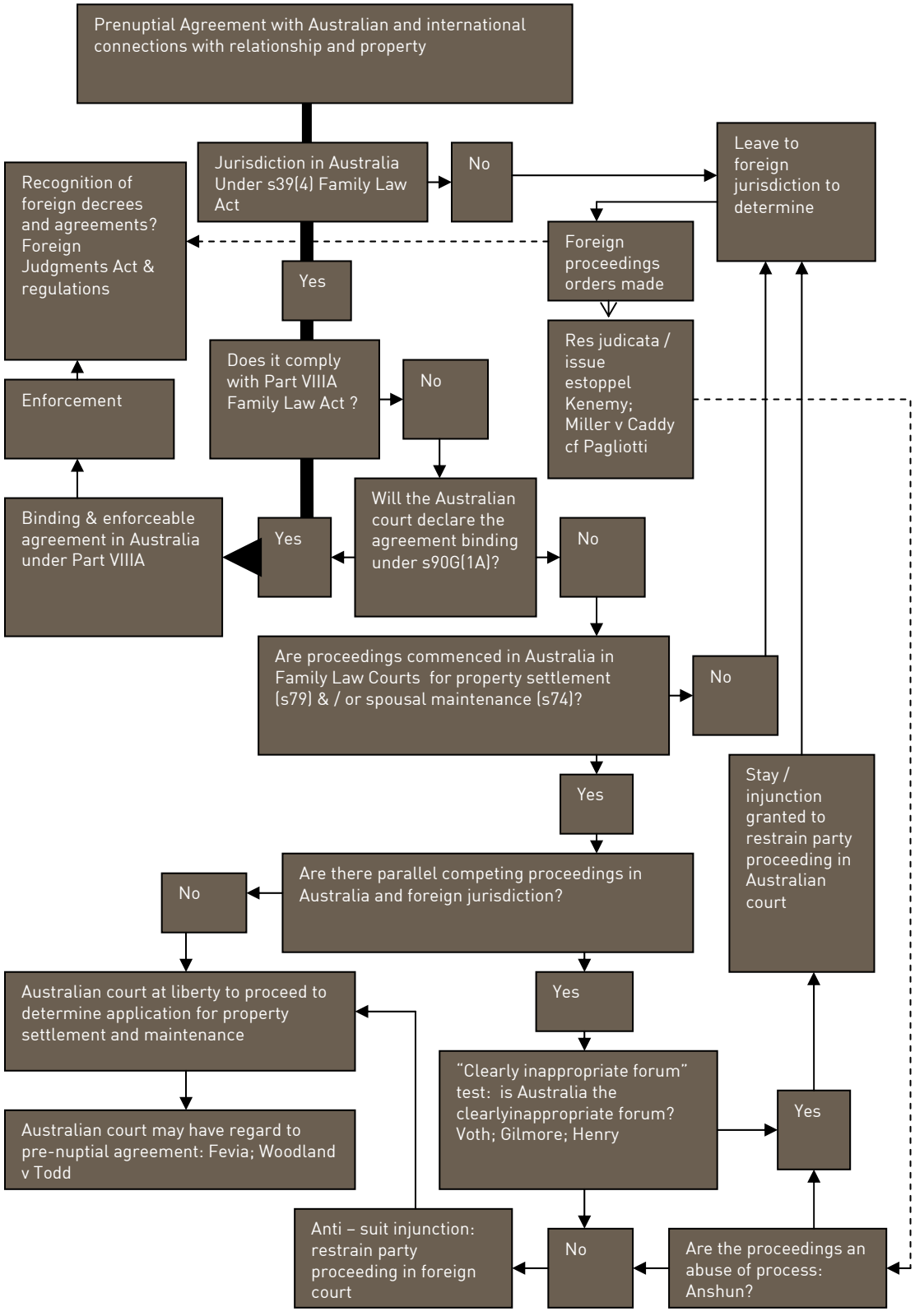
Where the agreement does not comply with Part VIIIA of the *Family Law Act*, the agreement is not binding for the purposes of Part VIIIA and leaves the opportunity for a party to commence proceedings for property settlement and spousal maintenance in Australia, unless the Court declares the agreement is binding under section 90G(1A).

In the absence of a binding Financial Agreement under Australian law, the parties risk being subjected to spousal maintenance orders and having all of their property both in Australia and overseas subjected to orders for alteration of property interests by the Family Law Courts of Australia.

The issue becomes whether the foreign pre nuptial agreement is capable of being recognised or enforced in Australia which I deal with below.

Cross border agreements, relationships and property

24 Under section 90G(1A)


Prenuptial Agreement with Australian and international connections with relationship and property
Jurisdiction in Australia Under s39(4) Family Law Act
No
Leave to foreign jurisdiction to determine
Recognition of foreign decrees and agreements? Foreign Judgments Act & regulations
Foreign proceedings orders made
Yes
Res judicata / issue estoppel Kenemy; Miller v Caddy cf Pagliotti
Does it comply with Part VIIIA Family Law Act ?
No
Enforcement
Will the Australian court declare the agreement binding under s90G(1A)?
Binding & enforceable agreement in Australia under Part VIIIA
Yes
No
Are proceedings commenced in Australia in Family Law Courts for property settlement (s79) & / or spousal maintenance (s74)?
No
Yes
Stay / injunction granted to restrain party proceeding in Australian court
Are there parallel competing proceedings in Australia and foreign jurisdiction?
No
Yes
Australian court at liberty to proceed to determine application for property settlement and maintenance
"Clearly inappropriate forum" test: is Australia the clearlyinappropriate forum? Voth; Gilmore; Henry
Yes
Australian court may have regard to pre-nuptial agreement: Fevia; Woodland v Todd
Anti – suit injunction: restrain party proceeding in foreign court
No
Are the proceedings an abuse of process: Anshun?

The following information may be trite to a seasoned Australian family law practitioner. However, when dealing with foreign lawyers it is important for them to understand the breadth and limitations of our jurisdiction and the powers of our Courts. You will invariably be asked about these matters when cross border agreements are being prepared. International family law specialists want to know about Australia's approach to private international law as it will impact on the decision making process for their clients.[25]

In his paper, "Jurisdictional & Other Considerations Under Australian Law in Family Law Matters" [26]Ian Kennedy AM, provides a very good summary of the matters to consider when there is a potential choice of jurisdiction. He poses the fundamental question for the practitioner inter alia: Which jurisdiction will provide the client with the best result?

Whilst an international prenuptial agreement is prepared with the co-operation of the parties and the collaboration of their lawyers in the intersecting jurisdictions, it still important to have one eye on the potential that the agreement will not ultimately hold and there becomes a forum argument when a party attempts to invoke the more advantageous laws of one country over another. Further in my view when providing the requisite advice to the client under Part VIIIA of the *Family Law Act* about the advantages and disadvantages of the agreement it is important to provide a comparative analysis of the intersecting jurisdictions and incorporate advice about which jurisdiction / forum produces the best outcome for your client vis-a-viz` the agreement and also absent an agreement (or if the agreement is set aside).

Ian Kennedy AM states:

> *"Two fundamental questions arise in any international family law matter in Australia:*
>
> *1. Does the court have jurisdiction:*
>
> *i. Under the Family Law Act? Or*
>
> *ii. In any other way? and*
>
> *2. If it does, should it (and will it) exercise that jurisdiction?*
>
> *In answering these questions the Australian courts will look at:*
>
> *1. whether the courts of any other country (or countries) also have jurisdiction;*
>
> *2. the nature and extent of the relief which could be obtained in the other jurisdiction(s);*
>
> *3. the advantages and disadvantages to each party of the matter proceeding:*
>
> *i. in Australia;*
>
> *ii. Elsewhere....*
>
> *Most jurisdictions, even if superficially similar to Australia, tend to apply principles which are very different from ours – and from each other....*
>
> *The jurisdictions with which Australian practitioners are most likely to come in to contact with are...New Zealand, United Kingdom, the USA....The correct choice of jurisdiction is fundamental to an optimal outcome....*
>
> *The natural instinct is to look immediately to Australia when making that choice....However:*
>
> *1. if you are acting for a wife, the United Kingdom may be better.*

[25] There are good texts on comparative arrangements in jurisdictions including "Family Law Jurisdictional comparisons" edited by James Stewart, Published by European Lawyer Reference, first edition 2011

[26] TEN released March 2012

2. *If you are acting for a husband, New Zealand might offer better results.*

3. *If the case involves substantial pre-marriage or inherited assets European civil law might better protect those from a claim by a spouse, and limit entitlements to a share of the "matrimonial" assets....*

The second major consideration is enforceability....That problem can be particularly acute where assets and resources are in more than one jurisdiction. The questions which then arise are:

1. *where will you get the best result (financially) for your client? And*

2. *What practical value will any orders made in a particular jurisdiction have?"*

Finally Ian Kennedy AM poses the following questions which are relevant when advising a client about an international prenuptial agreement:

"*Taking instructions in a matter involving foreign jurisdictions requires the practitioner to consider:*

1. *which countries potentially have jurisdiction;*

2. *whether each jurisdiction can determine the whole or only part (and if so, which part) of the matter;*

3. *the advantages and disadvantages of the foreign forum as compared to Australia, including:*

   a. *the scope of each of the jurisdictions with regard to the matters in dispute;*

   b. *the relevant principles likely to be applied;*

   c. *the likelihood of the foreign jurisdiction exercising jurisdiction;*

   d. *the likely outcome if the matter is pursued in either jurisdiction;*

   e. *the enforceability of Australian orders in the foreign jurisdiction, or foreign orders in Australia."*

To achieve this it becomes essential to engage specialist family lawyers in the other jurisdictions.

Jurisdiction

The Family Law Courts in Australia are courts of limited jurisdiction, subject to the jurisdiction conferred on it by legislation, particularly the *Family Law Act.*

The *Family Law Act* confers exclusive jurisdiction on the Family Law Courts in respect of "*matrimonial cause*" which is defined in section 4(1) to include:

"(c) *proceedings between the parties to a marriage with respect to the maintenance of one of the parties to the marriage; or...*

(ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings:

(i) *arising out of the marital relationship;*

(ii) *in relation to concurrent, pending or completed divorce or validity of marriage proceedings between those parties; or*

(iii) *in relation to the divorce of the parties to that marriage, the annulment of that marriage or the legal separation of the parties to that marriage, being a divorce, annulment or legal separation effected in accordance with the law of an overseas jurisdiction, where that divorce, annulment or legal separation is recognised as valid in Australia under section 104; or.....*

(ea) proceedings between:

(i) *the parties to a marriage; .....*

being proceedings:

(b) *with respect to the enforcement under this Act or the applicable Rules of Court of a maintenance agreement that is registered in a court under section 86 or an overseas maintenance agreement that is registered in a court under regulations made pursuant to section 89;*

(eb) proceedings with respect to the enforcement of a decree made under the law of an overseas jurisdiction in proceedings of a kind referred to in paragraph l."

If a proceeding is a"*matrimonial cause*" then it falls in the exclusive jurisdiction of the Family Law Courts. If it is not a matrimonial cause then apart from the exercise of inherent jurisdiction, the Family Law Courts do not have jurisdiction and the matter can only be dealt with by the state courts in Australia.

The jurisdictional requirements[27] for instituting proceedings for property settlement and spousal maintenance are that at the relevant date (when the proceeding is instituted) either party to the marriage or other relevant party to the proceedings are:

(a) an Australian citizen,

(b) is ordinarily resident in Australia, or

(c) is present in Australia.

Property is defined in the broadest context under the *Family Law Act* as "property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion".[28] It includes real and personal property, corporeal and incorporeal. For an example of the breadth of property refer to the High Court of Australia's treatment of the interests of the parties in a discretionary trust in *Kennon v Spry*[29] where it was held:

> *78. Gummow and Hayne JJ, in their joint reasons, characterise [the Wife]'s right with respect to the due administration of the Trust as part of her property for the purposes of the Family Law Act. I respectfully agree with their Honours that prior to the 1998 Instrument the equitable right to due administration of the Trust fund could be taken into account as part of the property of [the Wife] as a party to the marriage. So too could her equitable entitlement to due consideration in relation to the application of the income and capital.*
>
> *The husband's legal title to the Trust assets and his power to apply trust assets to the wife coupled with the wife's equitable rights, were property rights capable of providing a basis for the orders made by the primary judge*

The Family Law Courts have extraterritorial jurisdiction such that "the jurisdiction of the Family Court may be exercised in relation to persons or things outside Australia and the Territories."[30] This jurisdiction is circumscribed by the rules of private international law: "Where it would be in accordance with the common law rules of private international law to

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27 Section39(4)
28 Section 4(1)
29 (2008) 251 ALR 257
30 Section 31(2)

apply the laws of any country or place (including a State or Territory), the court shall, subject to the provisions of the *Marriage Act 1961*, apply the laws of that country or place".[31]

The *Mocambique rule* [32]has application in Australia[33] inter alia, the court cannot in the absence of express statutory authorisation exercise jurisdiction in respect of title to or possession of property situated abroad. [34] Dicey and Morris refer to the general principle, where a legal action concerns immovable property, then the court of the country where the land is situated has exclusive jurisdiction.[35] David Truex notes section 31(2) of the *Family Law Act* is consistent with this principle by virtue of the words "persons or things" do not relate to real property.[36] In *Pagliotti*the Full Court of the Family Court found:

> *" It would be surprising if an Australian court determining title to domestic real estate would do so according to the laws of another country, particularly in circumstances where that country has expressly disavowed any entitlement to seek to determine that issue... The Mocambiquie Rule case is "based on the sensible principle that only the court of the place where the land is situated can effectively enforce an order as to title and/or possession" (Nygh, PE Conflict of Laws in Australia, 7th ed., Butterworths, Sydney, 2002 at [7.31]). The Mocambiquie Rule case was approved by the High Court of Australia in Potter v Broken Hill Pty Co Ltd (1906) 3 CLR 479."*

Further in *Gilmore*[37]

> *"In that sense, and speaking generally the lexsitus governs the application of the matrimonial property regime to immovables (see Nygh at pages 384-5), whilst movables may be governed by the law of the matrimonial domicile at the time of the marriage (Nygh at pages 380-282, 386). In addition, s42(2) of the Family Law Act provides:*
>
> *"Where it would be in accordance with the common law rules of private international law to apply the laws of any country or place (including a State or Territory), the court shall, subject to the provisions of the Marriage Act 1961, apply the laws of that country or place."*
>
> *37. Nevertheless, these considerations, which need not be elaborated upon here, are of little, if any, ultimate relevance in matrimonial property proceedings as the court of the forum will apply its own law to the determination of that dispute: see Nygh at page 383; Hannema (l98l) 7 Fam LR 542. Relevantly here, the wife invokes the jurisdiction of the Family Court of Australia under s79 of the Family Law Act and if the Court hears the proceeding its warrant is s79 and it will apply the considerations contained in that provision and, save as is referred to hereafter, will include within that exercise all the property of the parties.*

However, proceedings under the *Family Law Act* for property settlement are *in personam.* Once the court is seized of jurisdiction in a property matter in Australia the court has the power to deal with property situated within Australia and overseas.[38] Australian law is the applicable law, even though some property is located overseas.[39] The court has power to order a party to deal with the overseas property in the matter of a personal obligation. [40]Nygh's Conflicts of Laws in Australia, summarises[41]:

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31 Section 42(2)
32 British South Africa co v Companhia de Mocambique [1893] AC 602
33 See Fogarty J in Gilmore[1993] FLC 92-353; Pagliotti&Hartner [2009] FamCAFC 18 @ p45
34 See also Nygh, PE, Conflict of Laws in Australia, 6th ed, Butterworths, Sydney, 1995
35 Dicey and Morris, Conflicts of Laws, 13th ed., 2000 at pp 938-948
36Truex, D., "International Matrimonial Property Litigation: some tips for the family lawyer", paper delivered to the 9th Australian National Family Law conference, Sydney, 4/7/2000
37 Supra at paragraphs 36-37
38Pastrikos (1980) FLC 90-897; Gould & Gould; Swire Investments (1993) FLC 92-434
39 Cain (1986) 11FamLR 540
40 In the marriage of Perry (1978) 3 FamLN 77
41 5th ed. At p 386

> *"There are no statutory limitations in respect of subject matter on either the Family Court of Australia or the Family Court of Western Australia. As the jurisdiction of the Family Court is in personam there is no objection in principle to the exercise of jurisdiction in respect of assets whether movable or immovable outside the jurisdiction."*

Justice Lindenmayer in *Chu*[42]explains the compatibility between the Family Court's reach to foreign immovable property and the *Mocambique rule*, as follows:

> *"The mere fact that the court may be required, for the purpose of determining the size of the property pool available for division between the parties, to decide whether one of the parties or some third party is the owner of or has a proprietary interest in a particular piece of land in a foreign country, does not mean that the court is thereby exercising jurisdiction over or in relation to the title to that land. As I have earlier suggested that would be the case only if the court sought to make an order directly in relation to that land or interest therein such as the party found to be the owner of it transfer it or some proprietary interest in it to the other....Thus the question of title to the land would arise only incidentally and not directly in the proceedings and Lord Herschell L.C. in the Mozambique case (supra), at 66, acknowledged "the undoubted jurisdiction of the courts ...incidentally to investigate and determine title to foreign lands" as distinct from trying an action founded on a disputed claim of title to foreign lands."*

Justice Warnick writing extra judicially expanded this view:

> *"In an action in personam in an Australian court, there is no compelling logic in refusing to order a party to transfer that parties' interests in foreign land to the other party the transfer to be in accordance with the laws of the overseas country. Indeed, if the Australian court has jurisdiction over the person and the orders relating to the dealing with that person's interests meet the requirements of the overseas property law, it is difficult to see the offence given to foreign laws....A broader and well-recognised proposition, which affects the Australian court exercising jurisdiction over interests in property overseas, is that a court "should not exercise extra-territorial jurisdiction where any order the court might make would be clearly futile."*[43]

A relevant connection may be established between the foreign property and the proceedings:

(a) Due to ownership or control of the property by one of the parties or their related entity; or

(b) Due to a foreign party dealing with the property and the parties, which have the effect of defeating an existing or anticipated order of the court and consequently draws the transaction and the foreign party into the proceedings.[44]

(c) *"The Family Law Act 1975 (Cth) s79 on the other hand, draws no distinction between matrimonial and other property.*[45] *All the property rights of the parties whensoever and howsoever acquired are liable to adjustment between the parties on the basis of contribution and need.....The law to be applied in each country is the law of the forum...In Australia there is no statutory provision but it has been held*[46] *that s79 can be invoked to adjust the property rights which parties have acquired under foreign matrimonial law."*[47]

Recognition and enforcement of foreign maintenance orders / decrees and agreements in Australia-more than problematic

The Family Court has held that the doctrine of equitable estoppel does not operate to prevent the court from exercising its jurisdiction to make orders particularly for property adjustment under section 79 or spousal maintenance under

42 Unreported judgment, 30 March 1994, page 52
43Warnick J., "Conflict of Laws" in Family Law, delivered to QLS / FLPA Family Law Residential,
44 See for instance Gould, supra; section 106B of the Family Law Act
45 We do not have a community property v separate property dichotomy
46 In re Hannema (1981) 7 FamLR 542
47 Hon. Dr Peter Nygh, "Voth in the Family Court: Forum Conveniens in Property and Custody Litigation", (1993) 7 AJFL 261 @ pp262-3

section 74 where there is an agreement between the parties to a marriage other than an agreement under the *Family Law Act*.[48]

Section 89 of the *Family Law Act* provides that regulations may make provision for:

> "(a) *the application of sections 86 and 87, with such additions, exceptions and modifications as are prescribed, to overseas maintenance agreements...."*

Sections 86 and 87 relate to the registration and approval of maintenance agreements which have been superseded by Financial Agreements. The provisions however remain in the *Family Law Act.*

Section 110A of the *Family Law Act* provides that regulations may make provision for the registration and enforcement of overseas maintenance agreements in Australia.

However, the scope for registration, approval and enforcement of a foreign prenuptial agreement is limited to the point of being non existent:

(a) An overseas maintenance agreement is defined as *"a maintenance agreement that has force and effect in a prescribed overseas jurisdiction by reason of the registration of the agreement, or the taking of any other action in relation to the agreement, under the law of that jurisdiction..."*[49]

(b) A maintenance agreement[50] is an agreement in writing made, whether within or outside Australia between parties to a marriage and makes provisions with respect to financial matters (including maintenance and property). Foreign prenuptial agreements would encounter the same difficulties which local pre nuptial agreements encountered prior to 2000 and would not fit within the definition of a maintenance agreement.

(c) The overseas maintenance agreement must have force and effect in a prescribed overseas jurisdiction. The only prescribed jurisdictions were New Zealand and Papua New Guinea.

(d) Prior to 1 July 2000, upon registration the agreement was enforceable in Australia as if it were registered under section 86 of the *Family Law Act.* The effect of this provision is that the agreement could not oust the rights of a party to apply under section 74 (for maintenance) or section 79 (for property settlement).

(e) Since 1 July 2000, there are no provisions in the *Family Law Regulations* for the registration of overseas maintenance agreements.

When it comes to the enforcement of "overseas maintenance agreements" the *Family Law Act* does not have exclusive jurisdiction:

> *"The fact that the Act makes special provision for maintenance agreements made in prescribed countries would seem to me to indicate that it was not intended by this Act to cover the field generally of overseas maintenance agreements. In particular it is not intended to oust the ordinary courts from the jurisdiction they have always had to enforce such foreign agreements as are enforceable by the common law."*[51]

The common law requirements for enforcement must then apply to the agreement (e.g. it must be incapable of being varied etc).

48 Woodcock v Woodcock (1997) FLC 739.
49 Section 4(1)
50 Section 4(1)
51 McLean v McLean (no.2) (1979) FLC 90-655

If the foreign pre nuptial agreement cannot be registered and / or enforced, there remains scope for the agreement to be taken into account in the process of determining property settlements and spousal maintenance and given appropriate weighting, as indicated above.[52]

Australia is a party to a number of international conventions and agreements regulating the recognition and enforcement of maintenance obligations.[53] relevantly:

(a) On the 14 March 1985 Australia became a party to The Convention on the Recovery Abroad of Maintenance signed at New York on 20 June 1956 ("the New York convention"); and

(b) On 15 November 2001 Australia acceded to the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations signed on 2 October 1973 ("the Hague convention"). We confirm the Hague Convention establishes reciprocal arrangements with other contracting states to recognise and enforce maintenance decisions made by judicial or administrative authorities in convention countries and recognise and enforce administrative assessments;

The *Family Law Act* 1975 (Cwth) [54] provides for the making of regulations for and in relation to:

(a) the registration and enforcement of:

(i) maintenance orders (section 110);

(ii) overseas maintenance agreements (section 110A);

(iii) overseas administrative assessments of maintenance liabilities (section 110A);

made by courts or authorities in reciprocating jurisdictions or jurisdictions with restricted reciprocity;

(b) the making of provisional maintenance orders (i.e. a maintenance order that has no effect under the law of the jurisdiction that made it unless and until it is confirmed by a court outside that jurisdiction and is usually made when the payer is already outside the jurisdiction)[55];

(c) the New York convention; and

(d) the Hague convention

Section 110 of the *Family Law Act* provides regulations may be made for the registration and enforcement of maintenance orders and provisional maintenance orders in reciprocating jurisdictions or jurisdictions with restricted reciprocity.

Section 111 of the *Family Law Act* provides for, and gives effect to the United Nations Convention on the Recovery of Maintenance 1956. Supporting regulations were made in Part IV of the *Family Law Regulations*.

Pre 1 July 2000, the *Family Law Regulations* provided for the registration of overseas maintenance orders made in reciprocating jurisdictions.

52Fevia, Woodcock; Woodland v Todd

53 Agreement between the Government of Australia and the Government of New Zealand on Child and Spousal Maintenance; The Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (see section 111A of the Family Law Act); The Agreement between the Government of Australia and the Government of the United States of America for the Enforcement of Maintenance (support) Obligations; The United Nations Convention on the recovery Abroad of Maintenance (see section 111 of the Family Law Act);

54 Sections 110, 110A, 111, & 111A

55 Regulations 28-28B

Post 1 July 2000, the Child Support Agency assumed responsibility for the registration and enforcement of overseas maintenance orders and agreements. An overseas maintenance agreement can be registered and enforced if it is otherwise a registrable maintenance liability. The *Child Support (Registration and Collection) Act* 1988 with supporting regulations under the *Child Support (Registration and Collection) Regulations* 1988 governs the registration, variation and enforcement of maintenance orders, agreements and assessments in reciprocating jurisdictions.

There are specific provisions relating to maintenance in respect of New Zealand[56] and the United States of America[57]

"With this background of amiable international comity it is not surprising that family lawyers just assume that a property adjustment order made by the Family Court of Australia will be automatically recognised and enforceable in England, and vice versa. The bad news is that this is not so."[58]

The fact remains, as with the recognition and enforcement of foreign prenuptial agreements, there is a lacuna in the *Family Law Act* for recognition and enforcement of foreign property orders. Parties are left to pursue whatever relief, if any, is available through Australian civil courts under the *Foreign Judgments Act.*

The courts have struck down attempts to accommodate the shortfalls in the enforcement procedures in foreign jurisdictions when attempting to dress up what effectively was a property order (with little or no prospects of being enforced offshore) as a maintenance order with better prospects of recognition and enforcement.[59]

Whilst there are problems with the enforcement of property orders per se, there are better prospects of enforcing money orders. In *Gilmore*[60] the court discussed the enforceability of Australian – New Zealand orders and suggested that the only prospects of enforcement arise in money orders.

In re Hannema[61], the parties were married in Indonesia. The day prior to the wedding the parties entered into a marriage contract. The parties arrived in Australia 5 years later and separated, a further 21 years later. The wife sought a property settlement under section 79. The husband opposed the claim relying on the terms of the marriage contract. His Honour found that the question of the validity of the marriage contract was governed as to form by the place of making, or by the proper law, and as to substance, by the law of the matrimonial domicile at the time of the marriage, as the presumed proper law of the contract. In this case the marriage contract as applicable to the parties domiciled in Indonesia remained valid and enforceable. The change of domicile to Australia did not affect the validity of the contract. It cannot be assumed that whenever there exists a pre nuptial agreement it is never just and equitable to alter its provisions. His honour however rejected an argument that the pre nuptial agreement prevailed over section 79 of the *Family Law Act.*

David Truex warns, when referring to the Australian jurisdiction: "*Do not assume international reciprocal enforcement – check the law, including the foreign law, carefully*".[62]

A party with a foreign prenuptial agreement that does not comply with Part VIIIA of the *Family Law Act* but has a real and substantive connection with Australia and no real prospects of having the agreement recognised and enforced in Australia faces significant risk that the other spouse will commence proceedings for property settlement and / or spousal maintenance under Part VIII of the *Family Law Act.* When this occurs then so begins the race to the line.

Where proceedings for property settlement and / or maintenance have already been determined in a foreign jurisdiction, then notwithstanding the problems associated with recognising and enforcing the orders in Australia, the foreign orders will present obstacles to a spouse attempting to litigate in an Australian court.

There is little authority in Australia on the recognition of foreign orders for matrimonial property division.

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56 Child Support regulations
57 Family Law Regulations, reg 28C – 28E
58Truex, D., "International Matrimonial Property Litigation: some tips for the family lawyer", paper delivered to the 9th Australian National Family Law conference, Sydney, 4/7/2000
59Fickling (1996) FLC 92-664
60 (1993) FLC 92-353
61 (1981) 7 FamLR 542
62 Supra, p5

Australia is not party to any international convention or agreement governing the recognition and enforcement of property adjustment orders.

There is a statutory scheme[63] in Australia for the recognition and enforcement of money and non money[64] orders under foreign judgments which fall within the scheme. Generally, the enforcement of foreign judgments in Australia is governed by the *Foreign Judgments Act* 1991 (Cth)[65]. To the extent that the *Family Law Act* does not cover the field in respect of the enforcement or recognition of a foreign decree or agreement then a party needs to turn to the *Foreign Judgments Act* to determine whether application can be made in a civil court. The list of foreign jurisdictions to which the legislation applies is relatively short. The *Foreign Judgments Act* 1991 specifically excludes actions *in personam* including matrimonial causes or proceedings in connection with matrimonial matters and therefore the Act has limited application if any to the enforcement of overseas property orders in Australia.

In Queensland, the Supreme Court of Queensland has jurisdiction to register and enforce the foreign judgment under the scheme. Foreign judgments that fall within the scope of the legislation must be enforced under that legislation. The scheme is designed to simplify enforcement of foreign judgments where there is substantial reciprocity arrangements between Australia and the foreign country and obviates the need to bring a cumbersome common law action based on the judgment debt.

In the absence of the application of the statutory scheme the principles of common law for the recognition and enforcement of foreign judgments may apply.

There is a considerable body of case law in Australia concerning the various issues arising under the common law recognition and enforcement of foreign judgments.

The following requirements must be established to recognise and enforce a foreign judgment at common law in Australia:

(a) The foreign court must have exercised a jurisdiction that Australian courts recognise (in the international sense). One of the following factors ought to be satisfied:

  (i) the judgment debtor was present at the time of service in the foreign jurisdiction;

  (ii) the judgment debtor was domiciled or ordinarily resident in the foreign jurisdiction;

  (iii) the judgment debtor submitted to the jurisdiction of the foreign court:

    (A) by prior agreement (e.g. choice of jurisdiction / forum clause in the antenuptial agreement)[66]; or

    (B) by voluntary appearance to contest the merits[67]; or

  (iv) it is a judgment in rem and the property is sited in the jurisdiction of the foreign court.

(b) The foreign judgment must be final and conclusive:

  (i) Final:

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63 Foreign Judgments Act 1991(Cwth)

64 Currently the legislation and regulations only apply to money orders.

65 For a good overview see Gilmore (1993) FLC 92-353 @ 79,732 – 79,739. The explanatory memorandum to the Bill states: "The basis of the scheme is reciprocity: the legislation will be applied with respect to judgments of courts of a particular country, by regulations, where the Governor-General is satisfied that substantial reciprocity of treatment will be given to the enforcement in that country of corresponding Australian judgments"

66 For instance, Dunbee v Gilman & Co (Australia) Pty Ltd (1968) 70 SR (NSW) 219

67 In Australia the position has been settled by section 11 of the Foreign Judgments Act 1991 (Cwth) which applies to enforcement proceedings brought at common law.

(A) A judgment will be final notwithstanding it may be subject to appeal;

(B) A judgment will not be final if it is capable of being varied by the foreign court which issued it;

(ii) Conclusive:

(A) It must be a decision on the merits.

(iii) The plaintiff bears the onus of proving that the judgment to be enforced is final and conclusive.[68]

(c) The identity of the parties must be the same and in the same interest in both proceedings (the foreign judgment and the enforcement proceedings); and

(d) If based on a judgment in personam, the judgment must be for a fixed debt or readily calculable sum of money.[69]

The onus of establishing the 4 conditions rests with the party seeking to rely upon the foreign judgment. Once the onus is satisfied then the judgment is prima facie entitled to be enforced unless the other party can establish one or more defences to enforcement of a foreign judgment.

Further for family law matters the long held view is that an order for property settlement must be ancillary to a divorce decree and the recognition of the property settlement order depends upon the recognition of the decree for divorce and in this regard:

(a) Section 104 of the Family Law Act provides recognition of any dissolution, annulment or legal separation effected in accordance with the law of an overseas jurisdiction provided either party had a specified connection with that foreign jurisdiction at the date the proceedings were instituted that resulted in the decree;

(b) The connection may be ordinary residence, domicile, or nationality;

(c) Section 104(5) of the Family Law Act provides that any dissolution, annulment or legal separation recognised as valid under the common law rules of private international law (i.e. real and substantial connection) but not otherwise entitled to recognition due to the above, will nevertheless still be recognised as valid in Australia.

The following defences are available to oppose the recognition and enforcement of foreign judgments under the common law in Australia:

(a) The foreign court lacked jurisdiction;

(b) The judgment is contrary to public policy in Australia;[70]

(c) The judgment was procured by fraud;

(d) The foreign court acted contrary to natural justice;

(e) The foreign judgment was penal or for a revenue debt;

(f) The judgment is stopped by an earlier inconsistent judgment in Australia;

(g) The Attorney General of the Commonwealth of Australia has issued a certificate under section 9 of the Foreign Proceedings (Excess of Jurisdiction) Act 1984 (Cwth).

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[68] Schnabel v Yung Lui [2002] NSWSC 15

[69] See Nygh's Law of Conflicts, [40.2] referred to in Bhushan Steel Ltd v Severstal Export [2012] NSWSC 583, [146].

70 De Santis v Russo (2001) 27 FamLR 414

I note:

(a) It is not open to a defendant to challenge the merits of the foreign judgment by alleging the foreign court made a mistake as to facts or the law;

(b) The defendant cannot raise a defence that was or could have been raised in the foreign proceedings despite it would have been a complete answer to the claim.

In Australia, at common law only in personam judgments are enforceable.[71] Money orders are clearly enforceable. In *Gilmore*, the Honourable Justice Fogarty of the Family Court of Australia highlighted the practical difficulties of enforcing a foreign order in relation to immovable property situated in Australia in an Australian court.[72:]

> "*if the judgment in question is not a money judgment it will not be capable of registration or enforcement in either Australia … as the law presently stands"*

This is contrasted by Nygh[73] who wrote:

> *"However, remembering that such an order is one in personam, it is not apparent why an Australian court would not enforce such a foreign order against a party present in Australia, if the foreign decree was entitled to recognition, on the same basis that Australian courts enforce foreign judgements in equity"*[74] *(The common law restraint never applied to judgments in equity).*

In respect of this statement Michael Kent SC (now a judge of the Family Court of Australia in its Brisbane registry) and Paul Doolan have said:

> *"It therefore seems that an Australian Court exercising family law jurisdiction in personam may well enforce the order of a foreign court made in personam particularly in circumstances where parties have clearly submitted to the jurisdiction of the foreign court and matters have been litigated to a conclusion in the foreign court, giving rise to the Australian court being a clearly inappropriate forum to re-litigate issues already dealt with, having regard also to the principles of cause of action estoppels."*[75]

The conundrum confronting parties who enter prenuptial agreements which do not comply with Part VIIIA is how they go about enforcing the agreement in Australia.

Under the *Family Law Act* there are limited opportunities to enforce foreign orders, worse still with foreign agreements that do not meet the requirements of Part VIIIA (or VIIIAB as the case may be) in Australia. The above details the plight of agreements.

Practical issues in preparing an international prenuptial agreement

The universal principle applies - these agreements are not for the ordinary punter. As Jeremy Morley states:

> *"Marital agreements between international couples require sophisticated and experienced international counsel"*

Understanding different property regimes:

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71 In the Marriage of Miller and Caddy (1986) FLC 91-720, [80063].

72 In the marriage of Gilmore(1993) 16 FamLR 285 @ 303-5

73 Nygh's Conflict of Laws in Australia, 8th Ed. Published 2010, Lexis Nexis

74 See for instance White v Verkouille [1989] 2 Qd R 191

75 International Elements in Financial Cases in Family Law, by Michael Kent Sc and Paul Doolan

Australia does not have a matrimonial property regime. There is no system of community of property under Australian law. Parties do not have a right to an interest in martial property or the division of marital property. A parties' entitlement only arises by operation of the *Family Law Act*.

Other countries have property regimes which can differ from country to country. It is important in being able to advise your client that you understand how the intersecting foreign jurisdictions property regime(s) work and how property settlements are arrived at. You will then be in a position to compare the benefits and disadvantages of your client proceeding to adopt the laws or regime of one country over the other thereby discharging your duty to the client under the *Family Law Act* to advise on the advantages and disadvantages of making the agreement.

Common property regimes around the world include the following:

1. Separate property regime
2. Community property regime
3. Other
4. Discretionary property regime.

Refer to the section on French law below for an explanation of a number of these regimes typically found in civil law countries.

Lost in translation – the importance of language and the need for translation& interpreters

It is particularly important when one agreement (as distinct from parallel / mirror agreements) are entered that parties and their lawyers are provided with a translated copy of the primary agreement particularly when one of the parties is not fluent in the language under which the agreement is prepared (or it is not prepared in their primary tongue).

Use language that your client understands and where necessary involve a translator. If a client's command of English is poor to moderate, ensure you utilise the services of the translator throughout the whole process. Have the agreement and other critical documents including your letter of advice translated into your client's natural tongue. Have the translator prepare a certificate to be attached to the agreement

Beware about how far you involve the translator – they are not entitled to provide the advice to the client as transpired in *Omar v Bilal*[76]. In this case the solicitor delegated his responsibility for giving advice to a translator. Where you represent a client who has a poor command of English and is in need of the services of a translator and interpreter then this decision serves warnings about the extent of your duty to advise and the steps to take in ensuring the client is properly advised.

The facts:

(a) The wife's asserted that the Deed could not be binding upon her as she was not provided with independent legal advice that she was able to understand from a legal practitioner about the effect of signing the agreement upon her rights, the advantage and disadvantages of signing the agreement at the time the advice was provided and/or prior to signing the agreement. Thus the wife submitted she could not give her consent, did not make an informed decision and the Deed should be set aside.

(b) The wife has no English and is virtually illiterate in Arabic her native language.

(c) The Deed is totally in English as is the certificate of independent legal advice.

[76] [2011] FMCFam 1430

(d) Nowhere in the Deed or in the certificate is there any indication that that the English Deed was translated into Arabic.

Henderson FM held:

> *"(a) Under section 90G of the Act an interpreter has no status to explain the legal ramifications of a Deed other than through a solicitor who is present with the client when words are being translated. The translator may be in person or available by some other electronic means. It is the duty of a solicitor giving independent legal advice to explain the legal ramifications of a Deed to a client directly or through the use of a translator. Not the other way around.*
>
> *(b) A solicitor explaining the ramifications of signing a Deed is matter of substance not mere technical procedure.*
>
> *(c) It was his duty to ensure that the wife understood his explanation of the effect of the Deed as he is the solicitor. He cannot abrogate this duty to an interpreter. Had the interpreter been at Mr Dalla's office with the wife and the 3 together had had a meeting for one hour regarding the Deed then my decision may well have been different. I could have found that the wife had been informed of the effect and advantages and disadvantages of the Deed by a solicitor through the use of an interpreter, not as I now find, explained by an interpreter.*
>
> *(d) It is improper for a lawyer to certify "I informed and gave legal advice to this person," if that person did not understand due to a language difficulty or some other impairment what was being said to them.*
>
> *(e) The whole tenor of the legislation is that when parties are giving away, compromising, affecting legal rights that they must have that consequence explained to them by a legal practitioner. A vital and necessary part of this understanding is that the communication between the solicitor and the client is sufficient for that client to understand the import of what they are signing. The fact that Mr Dalla sent the wife to an interpreter is a clear message to me that he realised the wife did not fully understand what he was saying to her. He abrogated his legal responsibility under section 90G to an interpreter and thus the certificate is of no consequence.*
>
> *(f) Agreement set aside."*

Legal Advice

In some countries it is not a requirement that a party must obtain independent legal advice to enter a prenuptial agreement. However failure to obtain such advice may result in the agreement being challenged and set aside.

> *"The receipt of independent legal advice by each party and the formalisation of its receipt by each of the parties is the cornerstone of the protection for the contracting parties. Section 90G has the receipt of that advice and its formalisation as its centrepiece" Fevia*[77]

Note the legal practitioner who provides advice about the Part VIIIA must be an Australian legal practitioner and not a lawyer from a foreign jurisdiction not registered as an Australian legal practitioner.

In *Ruane*[78]the financial agreement was held to be not binding because the legal certificate was signed by an English lawyer who was not an Australian legal practitioner and therefore did not comply with section 90G. This is important in the context of an "international" prenuptial agreement. To ensure the prenuptial agreement complies with Australian law, only a legal practitioner enrolled in a Federal Court of Australia or Supreme Court of a state or territory of Australia can provide the requisite advice and sign and give the statement:

> *"74. Section 4 of the Act provides that unless the contrary intention appears in the Act, "lawyer" but not "legal practitioner" is defined to mean a person enrolled as a legal practitioner of:*
>
> *(a) a federal court; or*

[77] Fevia supra para 189
78 See also Murphy [2009] FMCAfam 270

(b) the supreme court of a state or territory.

75. To argue the plain meaning of "legal practitioner" in the context of this Act and in particular Part VIIIA in its wide and generic sense does not sit comfortably with the seriousness of the object of the provision which is to oust jurisdiction.
76. In addition, the plain reading of s 90G is for parties to obtain legal advice. It does not follow that the advice has to be accepted or followed nor for that matter, for the advice to be correct. The purpose of the provision is to ensure the party understands not only the rearrangement of property and financial resources but also that rights are being affected. Those rights include exclusion of access to the courts subject to certain exceptions. It is this last point that requires consideration about whether the person giving the advice not only is competent in the sense of having access to the relevant knowledge but also accountable as an officer of the court so that the court could be reassured that the advice was directed to the exclusion of access as well as the explanation about the practical side of the settlement itself.
77. In Murphy v Murphy[2009] FMCAfam 270 Coates FM said legal advice was advice about the law of a particular jurisdiction. His Honour determined that legal practitioner meant a person entitled to practice in the jurisdiction. That would therefore exclude an Australian academic lawyer or an international lawyer who might have had significant experience in dealing with Australian law. This was the argument put by counsel for the third party lawyers. The husband says, adopting the reasoning in Murphy (supra), no other purpose appears on the face of the legislation or by inference, in the agreement. The wife rejects the argument. I think Coates FM was right but there are other matters that assist me…….
80. To engage in legal practice which is defined in New South Wales as the practice of law, under the Legal Profession Act 2004(NSW) a person requires to be a registered practitioner. That legislation sets out that its purpose is to protect the public interest in the proper administration of justice by ensuring that legal work is carried out only by those who are properly qualified to do so as well as to protect clients. Similar legislative provisions apply in Victoria. In Queensland, the Legal Profession Act 2007(Qld) sets out (s 21) that the main purpose of the Act is achieved by providing that legal practice is engaged in only by persons who are properly qualified and hold a current practising certificate.
81. The giving of legal advice lies at the very heart of the practice of the law (see Cornall v Nagle[1995] 2 VR 188).
82. Thus, to achieve the fundamental purpose of Part VIIIA, consistent with the common purpose of various state legislation, the ordinary meaning of "legal practitioner" must be a person who fits the description set out in s 4 of the Family Law Act.
83. I find that the financial agreement is not valid because the certificate did not comply with s 90G. "

In *Murphy* the wife received advice from a lawyer in the Philippines who was not a legal practitioner recognised in s90G(1)(b) and (c) as he was not enrolled as a practitioner in Australia. The court set aside the agreement and found:

> *"I think it is less a case of fraud and unconscionable conduct and more a case of the husband's lack of proper planning where he contributed to the circumstances as to where the wife received "legal" advice, signed and then produced a certificate, out of jurisdiction supporting the financial agreement. On the same basis the husband cannot rely on some form of estoppel operating to prevent the agreement being set aside. The evidence is that he planned the steps to be taken."*[79]

Choice of law and jurisdiction / forum clauses

"*Always include a forum clause if any chance of international element in the future. If a real issue already, consider advice from the other countries in which family will have their base. A combined multi national pre marriage agreement which holds water in various countries. May be influential on forum especially if Brussels I; (S v S (Divorce: staying Proceedings)…"*[80]

In her leading text, "International and Comparative Mediation Legal Perspectives" published by Wolters Kluwer Law International 2009, Nadja Alexander makes the following observations about choice of law and forum in the context of international mediation agreements which is apt for prenuptial agreements:.

[79] Murphy, supra @ para 77
[80] "Pre Marriage Agremeents" by David Hodson; www.davidhodson.cm/assets/documents/pre_marriage_agree.pdf

"Private international law primarily deals with issues of jurisdiction, choice of law and forum and the recognition and enforcement of foreign judgments. Mortensen explains these factors as follows. Jurisdictional issues deal with the question of whether the local court (forum) has the power to hear and decide the matter or whether the case has sufficient connection with another state to warrant the local court restraining or limiting its own power. Forum clauses indicate the parties' choice of court or jurisdiction in relation to disputes arising out of a contract. Choice of law refers to the law to be applied by the court which has jurisdiction. Choice of law clauses are vehicles for parties to choose the law they wish to apply to identified disputes. They are also referred to as proper law clauses. Issues relating to recognition and enforcement of foreign judgments occur where judgment has been rendered in another state and recognition or enforcement is sought in the local court. Subject to international agreements to the contrary, domestic courts are not required to recognise or enforce judgments of foreign courts. When parties select a specific legal system for dispute resolution, they risk a judgment from that national court being unenforceable in other territories, for example in the country where the other party resides or their business is located … Contract can be used to manage and reduce the risks associated with disputes that cross national borders. These risks include:

- *Excessive costs and delay associated with determining jurisdictional issues before the substantive matters can be heard;*
- *The unpredictability of law and forum and its impact on the subject matter of the dispute;*
- *Lack of clarity about preferred language and potential multilingual confusion; and*
- *The impact of unexpected economic changes and currency fluctuations.*

The dispute resolution clause is an ideal vehicle to manage private international law issues in relation to mediation. Most professionally drafted international dispute resolution clauses include a choice of law subclause and a forum selection subclause. Choices of forum and law encourage the export of legal and other services beyond borders and offer opportunities for increased access to justice where parties are able to negotiate their own dispute resolution terms. Drawing on freedom of contract principles, courts increasingly give effect to correctly drafted dispute resolution clauses.

Within a forum selection clause parties can designate a court in a particular jurisdiction or a specific dispute resolution process such as arbitration or mediation. Where parties select a forum by no law, it is no more than an indication that the law of the selected forum is to apply. Forums may be selected for reasons – such as interpersonal networks and familiarity with own courts – that have little to do with the nature and content of their laws…. The ability to select the applicable law in international transactions allows well resourced parties to choose a law tailored to their specific needs. It also permits powerful international actors to pursue standardisation through the same choice of law clause in all contracts. In a survey of 175 businesses across Europe, two thirds considered the ability to make a choice of law from different legal systems to be an advantage.

Other factors that are said to influence the choice of law in favour of a particular jurisdiction include the quality of the judiciary, the expertise of the courts in particular types of international disputes, the absence of corruption, the presence of witnesses in the selected jurisdiction and the efficiency and cost effectiveness of litigation.

In order to enhance the effectiveness of mediation, it is important for parties drafting dispute resolution clauses to select a jurisdiction with developed and suitable mediation laws that support not only the mediation process but also the outcomes of mediation. However, when signing a contract containing a mediation clause, parties are usually not thinking about disputes which may arise in the future, they may not even be sure in which jurisdiction a future mediation might take place. Accordingly the mediation friendliness of jurisdictions is seldom a primary factor weighing on the minds of parties when entering into their contractual arrangements."

S90KA of the *Family Law Act* provides the court will determine issues of validity, enforcement and effectiveness according to the principles of law and equity applicable to contracts and has the same powers and can grant the same remedies as the High Court of Australia.

The High Court has held in respect of choice of law provisions in contracts:

> *"In cases which have some "foreign" element and concern the law of contract, or concerns questions of status, it has long been accepted that the courts should identify and apply the law which governs the issue or issues that fall for decision. Thus, in cases concerning contracts, the courts seek to identify the proper law of the contract and in cases concerning questions of status, they seek to identify the relevant governing law. The process of choice of law has, therefore, been well understood and accepted in these areas."*[81] *And*
>
> *"As Brennan J observed in Oceanic Sun Line Special Shipping Company Inc v Fay:" A submission to the exclusive jurisdiction of the tribunals of a particular country is an indicium of the parties' intention that the law of that country is to be the proper law of their contract".....It is a relatively common feature of international contracts that disputes are submitted to the exclusive jurisdiction of the courts of a particular country, not infrequently the courts of England. It would be a serious and far-reaching interference with the freedom of the parties to such contracts to prevent them from making provision to that effect....Indeed, the law has always been solicitous that when parties do contract to submit their disputes to the exclusive jurisdiction of the courts of another country they should be held to their bargain...."*[82]

Ian Kennedy AM has stated:

> *"The Australian courts would not apply foreign law to issues to do with prenuptial agreements or marriage contracts.....Under Australian law there is no reason why an agreement cannot include clauses in relation to choice of law and choice of jurisdiction."*[83]
>
> *"Similarly, an agreement complying fully with the formal requirements of the Australian legislation could have the effect of excluding Australia as a potential jurisdiction due to it extinguishing the jurisdiction of the Australian Courts to make orders in relation to the subject matter of a binding financial agreement."*[84]

That is, in answer to the rhetorical question posed in section 90B:

A financial agreement is made with respect to:

(a) *Property:*

(i) *How, in the event of a breakdown of the marriage, all or any of the property or financial resources of either or both of the spouse parties are to be dealt with at the time of the agreement or at a later time but before a divorce.*

(b) *Spousal Maintenance:*

(i) *The maintenance of either of the spouse parties during the marriage, after divorce, or both during the marriage and after divorce.*

It is permissible to say that the property (and or spousal maintenance) will be dealt with under the laws of e.g. Federal Republic of Germany and all disputes will be heard by the relevant Courts in Germany and thereby oust the Australian laws (Part VIII of the Family Law Act) and the Family Law Courts from hearing and determining disputes in relation to the international prenuptial agreement.

It is open to make provision for choice of foreign law and forum under the financial agreement and it ought to have full force and effect provided that there is compliance with Part VIIIA of the *Family Law Act*.

Justice Nygh in *In re Hannema*[85](approved in subsequent cases including *Gilmore*[86]) highlights the interplay between choice of law and the determination of property settlement in Australia. The choice of law provision in a marriage

81 John Pfeiffer Pty Ltd v Rogerson [2000] HCA 36; (2000) 203 CLR 503
82 Akai Pty Ltd v People's Insurance Co Ltd [1996] HCA 39; (1996) 188 CLR 418
83 Ian Kennedy AM, :International issues for prenuptial agreements and marriage contracts – making them work under Australian law", paper delivered to Capetown IAML conference 4-7/9/2008
84 Kennedy AM, I., supra p5
85 7 FamLR 542

contract can function as a preliminary matter in a property settlement hearing. A choice of law may need to be made for the purpose of determining existing proprietary rights. Under section 78 of the *Family Law Act,* the court has power to declare the title or rights a party has in respect of the property. Justice Nygh found that the question of the validity of a marriage contract was governed as to form by the law of the place of making or by the "proper law" and as to substance, by the law of the matrimonial domicile at the time of the marriage, as the presumed proper law of the contract. He went on to find that the law of The Netherlands, as applicable to the parties domiciled in The Netherlands East Indies, rendered the contract valid and enforceable. However for the purposes of the section 79 application for property settlement he found the prenuptial agreement did not prevail over or oust the court's jurisdiction under section 79 and explained[87]:

> *"It is true that section 42(2) of the Act provides that "where it would be in accordance with the common law rules of private international law to apply the laws of any country or place…the court shall apply the law of that country or place". But this does not mean that the foreign law prevails over the provisions of the Act which allows the court to change the rights or status of the parties. It merely means that where, as for instance on an application under section 78 or an application for nullity, the existing rights and status of the parties have to be determined, this should be done in accordance with the foreign law if made applicable by the rules of private international law. Thus, if the husband had applied for a declaration under section 78 he would have been entitled to a declaration that the house belonged to him absolutely and the furniture to the wife. However, section 79 specifically authorises the court to alter the interests of the parties in the property and this is to be done in accordance with the lexfori….."*

I set out below some examples of choice of law and forum clauses from different countries:

1. Australia:

   "Governing Law and Jurisdiction

   i. Husband and Wife mutually covenant, agree and declare that:

   1. This Deed is governed by and construed in accordance with the laws of the Commonwealth of Australia [option as at the date of this Deed]

   2. Each party irrevocably:

   a. Submits to the non-exclusive jurisdiction of the Family Law Courts and the courts competent to determine appeals from those courts, with respect to any proceedings which may be brought at any time relating to this Deed; and

   b. Waives any objection it may now or in the future have that any proceedings have been brought in an inconvenient forum, if that venue falls within clause 3.4(a)(2)(A)."

2. United Kingdom:

   "Recital – Jurisdiction

   "(a) *A and B are each British nationals and are domiciled in the United Kingdom.*

   (b) A and B are each currently habitually resident in the United Kingdom but each agree and intend that the terms of this agreement shall be binding upon them and upon their heirs and successors in this jurisdiction and elsewhere in the world, wherever they may reside from time to time. In the event that they should reside in

86 [1993] FLC 92-353
87 Page 548

another jurisdiction, they each agree to take such steps as are necessary to enter into a binding marital agreement in that jurisdiction to reflect the terms of this agreement.

Operative clauses

Jurisdiction

In the event of a marriage breaking down and unless otherwise expressly agreed in writing, no proceedings in connection with the termination of the marriage shall be commenced other than in the jurisdiction of England and Wales, provided that England and Wales has the power to be seized of the proceedings. In any event, the parties hereby expressly agree and declare that they will be bound by the terms of this agreement to the maximum extent permitted by law, even if they should be forced to divorce in another jurisdiction in circumstances where England and Wales do not have jurisdiction.

Proper Law

This agreement shall be governed by and construed in accordance with the law of England and Wales."

From prenuptial and postnuptial agreements in the UK (England and Wales) by Nicholas Francis QC (chapter 9 of "International Prenuptial and Postnuptial Agreements" published by Jordans.

3. United States of America:

"Governing law. In as much as the parties anticipate that they shall reside in the state of New York during their marriage, all matters affecting the rights of the parties with respect to the subject matter of this agreement, including the interpretation and enforcement of this agreement, shall be governed by the internal laws by the state of New York without regard to conflict of law rules.

Choice of law. All actions or proceedings with respect to the interpretation, enforcement of modification of this agreement shall be brought exclusively in the Supreme Court of the state of New York, County of New York and in no other jurisdiction."

From the chapter the prenuptial agreement in the United States of America by Peter Bronstein from chapter 10 of International Prenuptial and Postnuptial Agreements published by Jordans.

Peter Walzer in his article "What every lawyer wanted to know about prenups, but was afraid to ask (an American)", IAML Online Newsletter P1 April 2013, makes the following statement about choice of forum and choice of law clauses apropos the United States:

" choice of forum and choice of law clauses are erroneously treated as boilerplate. In our mobile society, these provisions should be given careful thought. Often the "standard" choice of law clause provides that the law of the local where the contract was drafted will apply to the interpretation and validity of the contract. Consider choosing the substantive law that should apply. Should English substantive law apply? California law? Be realistic in drafting these provisions. Is it realistic that a court in Lyons will apply English law to a couple that has been living there for ten years or that a court in San Antonio, Texas will do the same? Choice of forum clauses are not typically found in premarital agreements, but with the advent of alternate dispute resolution, selecting a method of resolution of marital disputes may be prudent. In drafting this clause, anticipate that if the couple is divorced 35 years from now, the systems that we currently have in place, may not exist. Clearly selecting a particular person such as an arbitrator or even designating a dispute resolution service may not make sense considering that they may not be around at the time of divorce or death. Most countries in the world (and even Louisiana) have marital regimes. If your client will be moving to a regime country or has a home in a regime country, advise your client to meet foreign counsel to determine if it would be advisable to elect into a premarital regime. Also, if your clients will be moving to the United States, instruct a U.S. lawyer to establish the terms and draft the agreement. The laws vary from state to state and there is no standard "U.S. agreement". There are only state agreements. Texas law is as different as California law as is English law. You may advise your client to obtain two agreements – one that is applicable if the parties are divorced or die in England and one if the parties are divorced or die in California or any other state."

Dispute resolution clauses

Australia is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) and made no reservations to its accession. The International Arbitration Act 1974(Cth) (the IAA) enacted in 1975 gives effect to Australia's obligations under the New York Convention. The IAA permits recognition and enforcement of an award only if:

1. the award is made under an arbitration agreement Art II; s. 3 IAA; and

2. the arbitral award was made in the territory of a country other than Australia Art I; s.3 IAA; and

3. the other country is a Convention country; or

4. if the other country is not a Convention country then the person seeking enforcement at that time domiciled or ordinarily resident in Australia or a Convention country.

The IAA also adopts and applies the UNCITRAL Model Law (Part III of the IAA) as the law governing international arbitrations in Australia. See s16 IAA. Amendments to the IAA in 2010 enacted the 2006 version of the Model Law. The New York Convention and the Model Law cannot both apply. The IAA provides that the Convention takes precedence over the Model Law. See s. 20 IAA.

Clauses requiring parties to engage in arbitration and / or mediation (and collaborative practice developing) to resolve disputes emanating out of the agreement ought to be considered but if included then drafted with care.

The concepts of mediation and arbitration are diverse across the world. In some instances the practice is governed by statute and rules (such as arbitration in Australia, England and Wales (since 22 February 2012) and mediation in Hong Kong) and in other instances governed by contract (such as mediation practice in Australia, United States and England). When drafting a dispute resolution clause it is important to have an understanding of the customs and practices of the intersecting jurisdictions and importantly the applicable law.

The law concerning the enforceability of dispute resolution clauses is as yet unclear in Australia. The High Court will enforce a *Scott v Avery* clause that makes arbitration a condition precedent to instituting court proceedings.[88]

An agreement to negotiate is unenforceable (*Walford v Miles*). It is difficult to provide a remedy for non- compliance.

There is obiter dictum in *Reed Construction v Federal Airports* that an arbitration agreement that stipulates various steps to take before arbitration takes place, was enforceable such that the parties were *"contractually bound to attempt to mediate the disputes, and if mediation fails to arbitrate them."*

Even if a clause is not binding it may be advantageous to include the clause in the agreement because at least there is some focus on the possibility of resolving a dispute via some other method than litigation.

In the United States it has been held that there is no public policy objection to arbitration clauses in prenuptial agreements (see *De Lorean v De Lorean*, 211 N.J. Super 432, 511 A.2d 1257.) In the high profile case of former Dallas Cowboy football legend Deion Sanders and his former wife Pilar, the parties' prenuptial agreement was at the centre of a dispute. Pilar alleged the agreement was forged and there was non-disclosure. Pilar sought to have the agreement set aside. Judge Wheless of Collin County ruled that the dispute was to go to arbitration. The arbitrator ruled on 20 March 2013 that the agreement was valid.

Whilst arbitration *"will undoubtedly remain the preferred mechanism for adjudication of international business disputes..."*,"a *new study of dispute resolution practices in Fortune 1,000 corporations shows that many large companies are using binding arbitration less often and relying more on mediated negotiation and other approaches aimed at*

88 see Codelfa Construction v State Rail Authority of NSW

resolving disputes informally, quickly and inexpensively."[89] Perhaps those trends apply to international prenuptial agreement / family disputes as well as experience in Australia suggests mediation is by far the preferred method over arbitration.

Consider the following comments from Malcolm Holmes QC in his article "Taking an uncomfortable seat: International template unsuited to domestic arbitration law" published in April 2013, Proctor (Queensland Law Society journal):

> *" Today most cross border disputes and the arbitration processes used to resolve them are bound to involve the application of a number of different legal systems. The substantive rights of the parties may be determined by the proper law of their contract. However, an arbitration agreement found in one of the clauses of the main contract is regarded as a separable and distinct contract and therefore may be subject to a different proper law (see Sulamerica v Enesa [2012] EWCA Civ 638).*
>
> *After the dispute arises, the arbitration process may also be subject to different legal systems…As a result it is necessary to isolate and identify as far as is possible the legal system which regulates the conduct of the arbitration and which of its courts supervise the process. It is in this context that the concept of the seat of an international arbitration has evolved.*
>
> *To avoid , as far as is possible different legal systems applying to their international arbitration, parties may choose a single legal location for the arbitration although hearings and other steps in the process may physically take place elsewhere…..The seat.. is also the place where the award is made for the purposes of the New York Convention…The seat must be identified as a location where the arbitration law is clearly identified. For example, if the parties choose England, the law to apply and the courts are immediately identified. They may not choose a federal or non-unitary state as the seat, such as Australia or Switzerland, because these do not have a unitary legal system and both the arbitration law and the court system from state to state [question however whether the same applies for Family Law matters which are subject to arbitration rules and one federal system]….However there are many arbitration agreements and arbitrations which might not be characterized as commercial as defined in the Model Law (prepared by UNCITRAL) and as a result they would no longer receive statutory support…such arbitration may not be enforced except at common law."*

In his paper, "Family Arbitration – a soft launch or a hard landing? Some provisional thoughts" by Rhys Taylor[90]he observes:

> *" The late Professor Schmitthof once said that to draft an arbitration agreement clause without specifying a venue or seat of the arbitration was an act of professional negligence. It is clearly desirable to specify a seat, thereby indicating the judicial seat of the arbitration, the supportive and supervising regime of the courts which is available to the parties and the mandatory requirements to which the arbitration will be subject…there are family arbitration schemes in Australia, Canada and now Scotland, so the need not to confuse the venue of a possible arbitration with its seat is readily apparent.*
>
> *There is also a trend towards undue complexity in the drafting of arbitration clauses. The draftsman might do well to remember that an arbitration clause which simply says "arbitration London" is an effective clause under English law."*

The decision in *IMC Aviation Solutions Pty Ltd v Altain Khuder* LLC is expected to have wide-reaching ramifications for parties seeking to enforce (or oppose) arbitration awards obtained in a foreign jurisdiction 23/8/11 – Victorian Court of Appeal

I set out below some examples of dispute resolution clauses from different countries:

1. Australia:

89 "What does the Fortune 1,000 Survey on mediation, Arbitration and Conflict Management Portend for International Mediation?" by Thomas Stipanowitch, 27 March 2013, Kluwer Mediation blog, http://kluwermediationblog.com/2013/03/27/what-does-the-fortune-1000-survey on….

90 www.familylawweek.co.uk/site.aspx?i=ed96021

a. Recommended dispute resolution clauses of the Institute of Arbitrators Australia and the Australian Centre for international Commercial Arbitration:

"*Any dispute or difference whatsoever in connection this contract shall be, and is hereby submitted to arbitration in accordance with, and subject to (insert the rules which are to govern the arbitration eg UNCITRAL Arbitration Rules, the London Court of International Arbitration Rules, The Family Law Act and Regulations (*Part II, Division 4 ss10L to 10P; and ss13E to 13K of the *Family Law Act* 1975 [Cth] and Part 5, regulations 67A to 67T of the *Family Law Regulations* 1984 [Cth]) or other rules as selected by the parties.

If the parties have failed to insert the arbitration rules selected by them UNCITRAL Arbitration Rules shall apply.

Subject to any contrary provision in the selected rules, the appointing and administering body shall be Australian Centre for International Commercial Arbitration, Melbourne / Sydney / Darwin (delete one); there shall be one arbitrator; the language of the arbitration shall be …. The place of the arbitration shall be,,,,,,and if the parties have failed to insert such language or place of arbitration, they shall be English and Melbourne Victoria, respectively (as the case may be)."

b. Suggested contract clauses of the Australian Commercial Disputes Centre:

"(1) If a dispute arises out of or related to this contract or the breach, termination, validity or subject matter thereof the parties agree to first endeavor to settle the dispute by mediation administered by the Australian Commercial Disputes Centre (ACDC).

(2) In the event that the dispute has not been settled within twenty eight (28) days (or such other period as agreed to in writing between the parties hereto) after the appointment of the mediator the dispute shall be submitted to arbitration administered by ACDC under the (Rules of the London Court of International Arbitration or UNCITRAL Rules) which rules are deemed to be incorporated with reference to this clause:

(a) any such arbitration shall be administered by ACDC acting for the LCIA as its Asia-Pacific Registry;

(b) the appointment authority shall be (LCIA in the case of LCIA Rules; ACDC in the case of UNCITRAL Rules)

(c) the number of arbitrators shall be (one or three)

(d) the place of arbitration shall be (city or country)

(e) The language to be used in the arbitral proceedings shall be …..

(f) The governing law of this contract shall be the substantive law of ……"

c. Alternative family law clause:

i. Dispute resolution

1. Husband and Wife mutually covenant that:

a. save where there is a specific procedure for resolving disputes between the parties provided in this Deed, all and any future difference, disagreement or dispute arising out of or under this Deed will be referred in the first instance to mediation;

b. the mediator will be agreed between them within one calendar month of the difference, disagreement or dispute arising and failing agreement, then a mediator will be appointed by the Chairperson for the time being of the Australian Institute of Family Law Arbitrators and Mediators;

c. failing resolution at mediation then the difference, disagreement or dispute will be determined by an approved arbitrator under the Family Law Act (Cwth) appointed pursuant to the provisions of Family Law Regulations; and

d. the arbitrator will be agreed between them within 14 days of the conclusion of the mediation and failing agreement, then an arbitrator will be appointed by the Chairperson for the time being of the Australian Institute of Family Law Arbitrators and Mediators.

2. Husband and Wife mutually covenant that at the joint election of the parties, they may endeavour to resolve any future difference, disagreement or dispute arising out of or under this Deed through the collaborative practice process.

2. United Kingdom:

""Mediation/collaboration in the event of a dispute

Any difference, disagreement or dispute arising out of or in connection with this agreement will be referred in the first instance to mediation, without prejudice to the right of either party to apply subsequently to the Court for adjudication" or

"The parties will endeavour to resolve any difference, disagreement or dispute arising out of or in connection with this agreement through the collaborative family law process."

From "precedents for cohabitation agreements" published by Resolution, 2006.

Form of international agreement and collaboration

One agreement or parallel agreements?

Ian Kennedy AM describes the threshold issue for international pre-nuptial agreements is:

"whether the relevant jurisdictions can be covered in the one agreement or whether two agreements (or more, if there are more than two jurisdictions involves) are preferable."[91]

The choice of one agreement or parallel agreements is a balancing exercise or a matter of judgment taking into account a myriad of factors including the practical and legislative requirements of the intersecting jurisdictions; the circumstances of the parties; aligning the cultural, procedural and practice differences relating to preparing pre nuptial agreements; the parties budget and the agendas of the parties.

The preferred position in England and Wales (per Mark Harper) is for one agreement as follows:

"In the past, many people have said that in Anglo-European cases, two agreements are necessary, a marriage contract and a prenuptial agreement. There may be no alternative but difficulties will always remain where the clauses in each are somewhat different or inconsistent. Therefore, it is usually better to have one agreement if possible."[92]

91 Kennedy AM, I., Cape Town IAML conference, supra p5

92 Mark Harper (International Issues for Prenuptial Agreements and Marriage Contracts the English Perspective)

The preferred position in the United States of America is for one agreement as follows:

> *Use of agreement in multiple jurisdiction: use of more than one agreement raises issues of one agreement superseding or being inconsistent with the other. Use one agreement reviewed by Counsel in multiple jurisdictions so that drafting can take into account requirements of multiple jurisdictions.*[93]

The preferred position in France (per Alexandre Boiche) is for one agreement as follows:

> * *"In an international case, I am very reluctant to advise the parties to sign more than one prenuptial agreement, because if the French Courts would have to hear the case, they would not take into account the French prenuptial agreement but the more recent one. The Hague Convention allows the spouse to sign a specific contract to designate the law of a country in which they have some immovable, for these properties and the ones they may acquire. This is the sole situation in which the Hague Convention gives to the spouse the opportunity to sign more than one contract and to designate more than one applicable law. The Hague Convention contains also some rules about the automatic change of applicable law (articles 4 and 7) which makes me strongly recommend signing a prenuptial agreement to every potential international couple who wants to get married."*[94].

A collaborative team approach is required in preparing an international prenuptial agreement: engaging with, and taking advice from a specialist in the foreign jurisdiction(s) as soon as possible.

Process

Appendix 1 contains a flowchart of a suggested process for entering an international financial agreement in Australia

Comparison of jurisdictions

I set out in the Table in Appendix 3 a summary of features of prenuptial agreements and jurisdictional issues in various jurisdictions that I have extracted from the text "International Pre-Nuptial and Post-Nuptial Agreements" Edited by David Salter, Charlotte Butruille-Cardew and Stephen Grant, published by Family Law, a publishing imprint of Jordan Publishing Limited, 2011.

What follows is further analysis of the requirements and treatment of prenuptial agreements in the United Kingdom, United States, France and New Zealand. It is important to consider the treatment of prenuptial agreements in these jurisdictions and compare it with the current positioning of agreements in Australia. In particular the Supreme Court (UK) approach in *Radmacher* may provide some guidance to the Australian courts as to how to proceed with prenuptial agreements.

Prenuptial Agreements in the United Kingdom (England and Wales)

1. Prenuptial agreements under English law are not binding or recognised as such. An agreement between spouses cannot oust the jurisdiction of the Court.

2. Under the present law in England, for any prenuptial agreement, whether under English law or foreign law to carry weight with the Court, four requirements have to be satisfied:

    a. Full financial disclosure;

    b. Independent legal advice in all relevant jurisdictions;

    c. The agreement should be signed at least 21 days prior to the wedding (case law does not require this but it is the best practice);

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[93] Allan Mayesky "International Issues for Prenuptial and Marriage Contracts a New York Perspective"
[94] (Alexandre Boiche) "Marriage Contracts and Prenuptial Agreements in French Law"

d. The most difficult of all, the terms of the agreement have to be regarded as fair in the eyes of the Judge as at the date of the divorce.

3. Many foreign law prenuptial agreements may contain financial provision which in the eyes of a English Judge, depending on the facts at the time, would be regarded as unfair and so carry no weight with the Judge when he exercises his discretion taking into account all the relevant statutory factors.

4. This is a particular problem with marriage contracts, since these are an alien concept under English law. A marriage contract usually elects a particular form of matrimonial property regime which governs division of assets in the event of divorce.

5. The existence of a foreign prenuptial agreement, especially one electing a foreign jurisdiction for divorce and/or foreign law to apply, may help to block a divorce in England (eg. *S v S* (1997) 1WLR1200: Ella 2007 2FLR35 and *Bentinck* (2007) 1LA32. The most effective use of foreign prenuptial agreements or marriage contracts is to try to block a divorce in England. Recitals in the prenuptial agreement may record how close the couples connections are with another country, possibly their home country

6. The only example in which any part of a foreign law prenuptial agreement may be binding in England is if an election is made under article 23 of the Brussels I regulation, elected jurisdiction for maintenance claims.

7. There has been a growing trend among many of the English judiciary in favour of prenuptial agreements eg. *Crossley* (2008)1FLR1467 where the wife was held to the terms of the prenuptial agreements.

8. Choice of jurisdiction and governing law may assist to prevent divorce in England. However, given that prenuptial agreements are not binding under English law it could be dangerous to elect that English law is the governing law of any agreement.

9. Choice of divorce jurisdiction may be of no use if at the time of the divorce that country does not retain jurisdiction for divorce. Moreover such a choice may be ineffective if a period of separation is required before being able to file for a divorce (eg. Australia – 1 year; Italy – 3 years) and so it would be impossible to file for divorce in the race to file first.

10. Avoid the use of the word "contract":

"The approach of English law to nuptial agreements differs significantly from the law of Scotland, and more significantly from the rest of Europe and most other jurisdictions. Most jurisdictions accord contractual status to such agreements and hold the parties to them, subject in some cases to specified safeguards or exceptions. Under English law it is a Court that is the arbiter of the financial arrangements between the parties when it brings a marriage to an end. A prior agreement between husband and wife is only one of the matters to which the Court will have regard."

11. In England and Wales there is no choice of property regime, unlike many Civil Law countries. Consequently, there is no opportunity to select whether one marries into separate property or community of property regimes. Each spouse owns his or her own separate property; however on an application for financial provision ancillary to divorce, the Court has an unfettered discretion to reapportion the assets that each holds. For instance in *Charman* (2007) 1FLR1246, Sir Mark Potter president of the family division said:

"Almost uniquely our jurisdiction does not have a marital property regime and it is scarcely appropriate to classify our jurisdiction as having a marital regime of separation of property. More correctly we have no regime, simply accepting that each spouse owns his or her own separate property during the marriage but subject to the Court's wide distributive powers in prospect upon a decree of judicial separation, nullity or divorce."

12. *"The consequences of the developments in Family Law over the past decade for rich people living in England and Wales are hard to overstate. It is remarkable how many foreign nationals living in England are astonished by the power of the English Court to apportion their family funds in a way vastly different from their home country. This can lead to "forum races" with spouses racing to Court to be first in time. The failure to be first by even only a few minutes can cost millions. Those advising spouses where there is the possibility of a choice*

of jurisdiction for their divorce must act quickly and with the benefit of specialist knowledge from all potential jurisdictions. These are precisely the sort of cases where a prenuptial agreement is most likely to be of real benefit to the richer spouse."

In *Charman* the following often quoted statement:

"In big money cases the White factor has more than doubled the levels of award and it has been said by many that London has become the divorce capital of the world for aspiring wives."

13. In *MacLeod v MacLeod* (2008) UKPC64 [2010]1AC298, the Privy Council explained why the spousal duty to live together no longer subsisted and swept away the long standing rule of public policy which had been constructed by reference to it namely that contracts which made financial arrangements for a separation which had not already occurred were void at Common Law

14. The facts of *Radmacher v Granatino*: The husband was a French national and the wife was German but they married in England and spent most of their marriage life in England. They had two children. The wife came from a very wealthy family and had significant assets before she married the husband. Upon the wife's request the parties entered into a prenuptial agreement under which they waived any claims for maintenance following divorce. The clause in the agreement disclosing their respective assets was deleted and disclosure was never provided. The husband was French and was not provided with a translation of the German agreement, although the notary took the parties through the agreement in English explaining the fundamentals of the agreement. The husband had been a successful investment banker and at one time had been earning £330,000 per annum. He gave up his career in banking for an academic post at Oxford University. The prenuptial agreement failed to deal with children. The husband had lack of opportunity for legal advice despite the fact the husband knew what he was signing.

15. Judgments were handed down by the Supreme Court in *Radmacher formerly Granatino v Granatino [2010] UKSC42* on 20 October 2010. The appeal to the Supreme Court was highly unusual first in that it was heard by a bench of 9 Justices and secondly because 7 of those Judges gave a collective Judgment. Lord Mance gave a second judgment agreeing with the majority and Baroness Hale gave a vigorously dissenting Judgment.

16. In the Court of Appeal Lord Justice Thorpe held that insofar as the rule that prenuptial agreements were void survive, it was increasingly unrealistic. It did not sufficiently recognise the rights of autonomous adults to govern their future financial relationship by agreement, in an age when divorce was statistically common place. Part of the rationale for this view was that it was desirable to reduce rather than maintain rules of law which divided England and Wales from the majority of European and the States. If prenuptial agreements were not given greater force and effect, said Lord Justice Thorpe there was a risk of England and Wales becoming isolated in the wider common law world.

17. In *Radmacher* the Court of Appeal held that pending the report of the law commission (due in 2012) in future cases such as the instant case Judges should give weight to the marital property regime into which the parties have freely entered.

18. Before the Supreme Court in *Radmacher* the wife relied heavily on the ability of foreign law to influence the exercise of discretion (and note that she had, as one of her juniors one of the editors of Dicey, Morris and Collins and note further that the third names author of that authority was one of the panel of Judges in the Supreme Court). The contention, put simply, is that it would be "absurd for a Court which is required to look at all factors to ignore perhaps the most obvious factors in the present case" ie. that one party is French, the other German and that they chose German law to govern their prenuptial agreement. The wife's skeleton argument invited the Court to rule that "where a prenuptial agreement is valid and effective by its proper law it is normally to be treated as of decisive weight in the distribution of the parties' assets and divorce".

19. The headline principles of *Radmacher*:

    a. Public policy rule obsolete: The Court swept away the long standing rule that prenuptial agreements are void as contrary to public policy.

b. Intention to be bound: So far as intention to be bound is concerned it is made clear that anyone entered into a prenuptial agreement to which English law applies after the date of the Judgment can expect an inference that they intended to be bound by it.

c. Distinction between pre and post nuptial agreements: The Supreme Court held "*if parties who have made such an agreement whether anti-nuptial or postnuptial then decide to live apart we can see no reason why they should not be entitled to enforce their agreement. .... The Ancillary Relief Court should apply the same principles when considering anti-nuptial agreements as it applies to postnuptial agreements*".

d. Not contractually binding: It is essential to enforce that the Court did not state that prenuptial agreements are contractually binding: *"A Court when considering a grant of ancillary relief are not obliged to give effect to nuptial agreements whether they are ante-nuptial or postnuptial. The parties cannot, by agreement, oust the jurisdiction of the Court."* The most often quoted passage of the Judgment is paragraph 75 which held: *"This Court should give effect to a nuptial 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 the agreement."* That then led to the Caveat in paragraph 76: "*That leave outstanding the difficult question of the circumstances in which it will not be fair to hold the parties to their agreement. This will necessarily depend upon the facts of the particular case, and it would not be desirable to lay down rules that would fetter the flexibility that the Court requires to reach a fair result."*

e. Compensation featured heavily in the House of Lords decision in *McFarlane.* It was also referred to in *Charman*. However compensation did not feature particularly in many of the decisions following that case. It is clear now that a prenuptial agreement will not displace the doctrines of need or compensation: "Of the three strands identified in *White v White* and *Miller v Miller*, it is the first two needs, and compensation, which can most readily render it unfair to hold the parties to an ante-nuptial agreement. The parties are unlikely to have intended that their ante-nuptial agreement should result in the event of the marriage breaking up with one party being left in a predicament of real need while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement."

f. The safeguards and the interpretation of "fairness": "If the terms of the agreement are unfair from the start, this will reduce its weight, although this question will be subsumed in practice in the question of whether the agreement operates unfairly having regard to the circumstances prevailing at the time of the breakdown of the marriage." The Court offered some assistance as follows:

   i. "Agreement cannot be allowed to prejudice the reasonable requirements of any children of the family."

   ii. There must be respect for autonomy. The Court should not override an agreement simply because the Court knows best especially where "the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future."

   iii. A term in an agreement which makes express provision for non matrimonial property is more likely to be fair. The further an agreement tries to go towards addressing unknown future contingencies the more likely it is that developments over time will render it unfair.

   iv. An agreement is unlikely to be able to displace claims based on need or compensation. It is much more likely to be able to displace the sharing principle.

20. At paragraph 67 the Supreme Court identified the three main questions to be determined:

a. Where there circumstances attending the making of the agreement that detracted from the weight that should be accorded to it? Parties must enter into an ante-nuptial agreement voluntarily, without undue pressure and be informed of its implications the question is whether there is any material lack of disclosure, information or advice.

b. Were there circumstances attending the making of the agreement that enhanced the weight that should be accorded to it; the foreign element? In 1998 when the agreement was signed, the fact that it was binding under German law was relevant to the question of whether the parties intended the agreement to be effective, at a time when it would not have been recognised in the English Courts. After this Judgment it will be natural to infer that parties entering into agreements governed by English Court will intend that affect to be given to them.

c. Did the circumstances prevailing when the Court's order was made make it fair or just to depart from the agreement? An ante-nuptial agreement may make provisions that conflict with what a Court would otherwise consider to be fair. The principle, however, to be applied is that a Court should give effect to a nuptial 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. A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children of the family but respect should be given to individual autonomy and to the reasonable desire to make provision for existing property. In the right case an ante-nuptial agreement can have decisive or compelling weight.

Applying these principles to the facts, the Court of Appeal concluded that there were no factors which rendered it unfair to hold the husband to the agreement.

21. In relation to points of principle and policy the following emerged from the three judgments of the Court of Appeal in *Radmacher v Granitino*:

a. "Although prenuptial agreements cannot be strictly binding under English law as it is presently constituted, the law should provide that a prenuptial contract is determinative of financial issues between divorcing parties unless one party can demonstrate a strong reason why it should not. (eg. duress, lack of opportunity to obtain independent advice etc).

b. Where form of law is a matter for the Law Commission, which has already been asked to report and make recommendations about prenuptial agreements and Parliament.

c. Lord Justice Wilson said: "I suffer forensic discomfort about the lack of clarity about the treatment of prenuptial contracts under our present law and a loss of confidence in the justice of an approach which differs from that adopted by most of the other jurisdictions to which we have the closest link..... the very basis of our present law also concerns me." He said it was "patronizing, in particular to women" to approach prenuptial contracts on the "unspoken premises [that] prior to the marriage, one of the parties, in particular the woman is by reason of heightened emotion and the intention of desire to marry, likely to be so blindly trusting of the other as to be unduly susceptible to the other,s demands even if unreasonable." He said that he would "prefer the starting point to be for both parties to be required to accept the consequences of whatever they have freely and knowingly agreed". Lord Justice Thorpe said: "Due respect for adult autonomy suggests that, subject of course to proper safeguards, a carefully fashioned (prenuptial) contract should be available as an alternative to the stress, anxieties and expense of a submission to the whip of the judicial discretion."

22. Jeremy Posnanski QC in his article "Farrer client wins landmark decision on prenupts", 20 October 2010, stated: "*The Supreme Court identified factors which would influence the weight to be given to a prenuptial agreement. The majority judgment identified these factors*:

a. If an agreement is to carry full weight, both the husband and wife must enter into it of their own free will, without undue influence or pressure and informed of its implications.

b. Was there any material lack of financial disclosure, information or advice?

c. Did each party intend that that the agreement should be effective?

d. Duress, fraud or misrepresentation will negate any effect the agreement might otherwise have. Similarly, unconscionable conduct such as undue pressure (falling short of duress) will also be likely

to eliminate the weight to be attached to the agreement and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage to reduce or eliminate it.

e. *The Court may take into account a party's emotional state and what pressure he or she was under to agree. But that cannot be considered in isolation from what would have happened had he or she not been under those pressures. The circumstances of the parties at the time of the agreement will be relevant. Those will include such matters as their age and maturity, whether either or both have been married or been in long term relationships before.*

f. *Another important factor may be whether the marriage would have gone ahead without an agreement or without the terms which have been agreed.*

g. *If the terms of the agreement are unfair from the start, it will reduce its weight.*

h. *Does the agreement operate unfairly having regard to the circumstances prevailing at the time of the breakdown of the marriage.*

i. *Foreign elements such as in the Radmacher case itself, under which the agreement would be binding under the parties' national law (or under the law they chose to govern the agreement) might bear on the important question of whether the parties intended the agreement to be effective.*

j. *If a prenuptial agreement deals with the key considerations of need, compensation and sharing in a way that the Court might adopt absent such an agreement, there is no problem about giving effect to the agreement.*

k. *The Court might adopt the terms of the prenuptial agreement even if they do not follow what a Court would regard as fair.*

l. *A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children of the family.*

m. *The reason why the Court should give weight to a nuptial agreement is that there should be respect for individual autonomy. It would be paternalist and patronising to override their agreement simply on the basis that the Court knows best.*

n. *A wish to make provision for what is to happen in the event of divorce, to property owned by one or other at the date of the agreement, prior to the marriage or property that one or other anticipates receiving from a third is understandable and in line with current law. There is nothing inherently unfair in such an agreement and there may be good objective justification for it.*

o. *The more the agreement seeks to address future and long term contingencies, the more may be the risk of unfairness. The circumstances of the parties often change over time in ways or to an extent which either cannot be or simply was not envisaged. The longer the marriage has lasted the more likely it is that this will be the case and this may give rise to unfairness.*

p. *The parties are unlikely to have intended that their prenuptial agreement should result in the event of the marriage breaking up in one partner being left in a predicament of real need, while the other enjoys a sufficiency or more, and such a result is likely to render it unfair to hold the parties to their agreement.*

q. *If the devotion of one partner to looking after the family in the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned.*

r. *Where, however, two previous considerations do not apply and each party is in a position to meet his or her needs, fairness may well not require a departure from their agreement.*

23. In "marital agreements for international families after Radmacher" David Hodson wrote:

> *"This decision is good for the international family lawyers community and good for international families.*
>
> *The decision in Radmacher was par excellence in an international family; a French husband, a German wife, German inheritances, German pre-marriage agreement binding it under both German and French law, choice of law clause, separation of assets and classic community of property regime, awareness that other countries may ultimately deal with the divorce and then the divorce occurring in a country which applied only local law. Apart from the curiosity of the husband being the applicant and the level of the assets which was a quite frequent international occurrence.*
>
> *It is a familiar situation for international family lawyers in many countries. So it was a very appropriate case for England's highest Court and the decision is an excellent one to help international families.....*
>
> *Foreign law would be considered by the English Courts looking at these agreements to the extent that it is necessary to ascertain what, under the relevant foreign law of the country of the agreement, with the impact and status of the agreement and the intent that the parties would be bound. It is likely that English lawyers will be consulting foreign lawyers for advice about this particular aspect."*

24. In their article on "prenuptial agreements" Manches LLP state in relation to the best prenuptial agreements:

> *"English lawyers are drafting a growing number of prenuptial agreements, particularly for clients with international interests who may wish to rely on the agreement in another jurisdiction but also for clients whose personal and business interests are in England and who would therefore expect that any legal disputes they might have would be dealt with in England.... Following the decision in Granatino it seems that the emphasis will now be more on whether the parties in fact understood the possible consequences of the agreement when it was signed, and whether it was freely signed, than on strict compliance with a set of legal "requirements", particularly in international cases.*

As Simon Bruce, Partner of Farrers, the lead lawyer (who represented the German paper heiress in the UK decision of *Radmacher* handed down on 20 October 2010) said in a press interview to BBC News following the decision:

> *"Katrine and her ex-husband had promised each other that if anything went wrong between them they wouldn't make financial claims against each other. It was meant to be a marriage for love, not for money. Sadly, that promise was broken by him. Marriages can go wrong and fair pre-nups can reduce the bitterness of divorce. Couples can now decide in the best of times what the outcome would be in the worst of times. Pre-nups are like a form of fire insurance, far better taken out before the event than after it."*

Prenuptial Agreements in the United States of America

I summarise the position in the United States from the following papers: Jeremy Morley "Pre- and Post- nuptial Agreements in the USA" and Peter Walzer's papers "Enforcing Foreign Marriage Contracts in California" and "What every lawyer wanted to know about prenups, but was afraid to ask (an American)".

1. There are two basic standards for the validity of pre and post nuptial agreements in the United States namely fairness and unconscionability.

2. New York is an example of an unconscionability state (see examples *Crowther v Crowther* 27 Misc.3d 1211(A)910 N.Y.S.2d 404 (New York Supreme Court 2010); *Bronfman v Bronfman* 229 A.D.2d 314,645 N.Y.S.2d 20; *Van Kipnis v Van Kipnis*, 43 A.D.3d 71,76,77[2007]. Duly executed prenuptial agreements including agreements executed in a foreign country, are accorded the same presumption of legality as any other contract (*Greschler v Greschler*, 51 N.Y.2d 368(1980). The doctrine of unconscionability has no application to property settlement provisions of separation agreements where there is no fraud, duress, overreaching or incompetence (*Christian v Christian*, 42N.Y. 2d 63(1977). Further "*an agreement is not unconscionable merely because in retrospect, some of its provisions where improvident or one sided, and simply alleging an unequal division of assets is not sufficient to establish unconscionability*" (*Schultz v Schultz,* 58 A.D.3d 616(2009)).

3. Washington State is an example of a fairness state. A prenuptial agreement that is "*disproportionate to the respective means of each spouse, which also limits the accumulation of one spouse's separate property while precluding any claim for the other spouse's separate property*" is substantially unfair. (*Bernard*, 165Wash.2d at 905,204 P.3d 907).

4. The Uniform Premarital Agreement Act UPAA: at least 27 states are now parties to the Uniform Premarital Agreement Act, although there has been some variation in the statutory terms in some states. These States are: Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oregon, Rhoda Island, South Dakota, Texas, Utah, Virginia and Wisconsin. The Uniform Act provides that prenuptial agreements are valid if they are in writing unless the party against whom enforcement is sought establishes either of two extremely limited defences that are specified in Section 6 of the Act:

    a. The first defence is that the party did not execute the agreement voluntarily;

    b. The second defence requires proof:

        i. That the agreement was 'unconscionable" at the time that it was executed; and

        ii. That before the execution of the agreement that he or she:

            1. Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

            2. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided;

            3. Did not have or reasonably could not have had an adequate knowledge of the property and financial obligations of the other party.

    c. Section 3 provides that the parties may contract with respect to the choice of law governing the construction of the agreement.

5. California's version of the Uniform Act adds several critical elements:

    a. The parties have been represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, for representation by independent counsel.

    b. Have had not less than 7 calendar days between the time that the party was first presented with the agreement and advised to seek independent legal counsel and the time that the agreement was signed.

    c. If unrepresented by legal counsel, have been fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up by signing the agreement; have been proficient in the language in which the explanation of the parties rights was conducted and written; received a written memorialization of the rights and obligations relinquished prior to signing the agreement and, must, on or before the signing of the premarital agreement, execute a document declaring that he or she received the required information and indicating who provided that information.

    d. A provision in a premarital agreement regarding spousal support is not enforceable if the party against whom enforcement of the spousal support provision is sought was not represented by independent counsel when signing the agreement or if the provision regarding spousal support is unconscionable at the time of the enforcement.

e. The parties against whom enforcement is sought and was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel.

f. The agreement was not executed under duress, fraud or undue influence and the parties did not lack capacity to enter into the agreement.

g. That party was not provided a fair, reasonable, and full disclosure of the property or financial obligation of the other party unless that party did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided, or that the party will not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

h. The agreement does not promote divorce.

6. Most but not all of the other states that have adopted the Uniform Act have enacted their own legislation on prenuptial agreements. As to the execution requirements most require simply that the agreement be in writing (eg. Alabama, Maryland, Massachusetts, Michigan, Ohio, Texas) but other states require notarization (eg. Louisiana) and Minnesota and Missouri requires notarization and the attestation of witnesses while New York requires acknowledgment in the manner required for a Deed).

7. Recognition of foreign agreements and choice of law issues: there is no simple answer as to which law governs a prenuptial agreement in a United States Court. The New York Courts have dealt with more cases concerning the enforceability of foreign prenuptial agreements than other states. (Refer to *Stein–Sapir v Stein-Sapir* 52 A.D.2d 115, 382 N.Y.S. 2d799; *Stawski v Stawski*, 43,A.D.3d 776,843 N.Y.S. 2d 544; *Van Kipnis v Van Kipnis*; *Crowther v Crowther*.

8. The most significant conclusion that may be drawn from the New York cases is that the result of each case was that the foreign agreement was upheld.

9. The following general principles may serve as a useful starting point:

a. Unlike the principle in most areas of family law that the United States Court will apply the law of a forum only, US Courts may apply choice of law rules to prenuptial agreements.

b. When a United States Court applies choice of law rules to prenuptial agreements, the starting point is the choice of law rule that is applied in the forum jurisdiction to contracts in general.

c. Accordingly, a prenuptial agreement will generally be governed by the law of a place of its execution or the law of the place with which it has the closest connection.

d. The parties may select the law that will govern their prenuptial agreement and their choice will generally be upheld.

e. The terms of the agreement are contrary to the public policy of the forum state, its courts will not enforce the agreement.

f. These principles apply to agreements executed in overseas jurisdictions just as much as they apply to agreements executed in sister states.

g. The rules and customs concerning prenuptial agreements vary enormously around the world. United States Courts should respect those differences when considering the effect of foreign prenuptial agreements.

h. A choice of law clause should be drafted broadly. In one case a Court in Oregon applied the law chosen by the prenuptial agreement (Californian law) only as to the construction of the agreement, but did not

apply Californian property law because the choice of law clause was limited to construction issues (marriage of Proctor 203 OR.App.499,129 P.2d 801(2005)).

i. Choice of law clauses should provide for the application of both substantive and procedural law of the foreign jurisdiction to be effective.

j. A choice of Court clause allows the parties to select a forum whose Courts will have jurisdiction to interpret and implement the agreement. It enhances the choice of law clause since the chosen Court will usually be located in the jurisdiction that applies to the chosen law.

k. A New York case concerning prenuptial agreements with a clause that selected New York Law as the law to govern the agreement and the Supreme Court of New York County (Manhattan) as the exclusive forum was Steiner v Steiner, 3 May 1997 N.Y.L.J.25,col5 (Supreme Court New York City). It held that forum selection clauses are prima facie valid and should not be set aside except in the event of fraud or overreaching or where the enforcement of the clause would be so unreasonable and unjust that a trial in the selected forum would be "so gravely difficult and inconvenient that the challenging party would for all practical purposes be deprived of his or her day in Court".

l. The parties cannot create jurisdiction by contract in a court whose rules do not confer jurisdiction in the particular case. Nevertheless a choice of Court clause should generally be included in prenuptial agreements.

10. Some guidelines for negotiating and drafting agreements for parties with a United States connection (a combination of suggestions from Jeremy Morley and Peter Walzer (see also appendix 2):

a. The agreement should be organized and labeled so that it is easy to navigate (table of contents and headings);

b. The recitals become very important if the agreement is challenged;

c. The prenuptial agreement is a legal document and should be written as such;

d. The severability clause is significant

e. Disclosure is fundamental to the agreement;

f. Do not include clauses that unduly restrict the parties from making necessary personal and business transactions;

g. Choice of forum and choice of law clauses (see the choice of law section for Peter Walzer's comments);

h. Independent representation: make sure both parties are represented by independent counsel;

i. Time gap prior to marriage: prudent attorneys will not draft an agreement if the wedding invitations have been sent out;

j. Formalities are critical;

k. Store every email;

l. We don't charge enough for them…One prudent English lawyer insisted that the client pay for a Lloyd's insurance policy to cover her for a specific agreement. If you do a lot of these agreements, it would be prudent to invest in coverage to protect you in your retirement."[95]

m. Voluntariness;

n. Specific execution requirements vary from state to state;

o. Some specific issues:

   i. Retirement waivers;

   ii. Religious issues (most likely unconstitutionally unenforceable);

   iii. Regulation of conduct during marriage;

   iv. Change of domicile provisions;

p. Identify current and future separate property: most United States state divorce laws are based upon a distinction between separate and marital property and this distinction should generally be the basis upon which prenuptial agreements intended to be affected in the United States should be structured. That is, identify separate property (it is customary to identify separate property in detail in a schedule and then to add provisions to include specified types of assets to be acquired in the future). Many states in the United States provide that the increase post marriage value of "active assets" is marital property while premarital "passive assets" are not divided. Great care must be taken to handle this is appropriate.

q. No comingling provisions: laws in the United States convert separate property into marital property if there is comingling.

r. Specifically defined marital property: it is usually good practice for a prenuptial agreement to expressly define what will constitute marital property and what will constitute separate property.

s. Assets acquired during cohabitation: generally United States do not provide for any asset sharing resulting from pre-marital cohabitation in the absence of a contract.

t. Marital residence: it is customary to include extensive provisions regarding ownership of a marital residence and such matters as credits for premarital contributions upon a divorce.

u. Carefully judge whether the agreement is going to be beneficial to your client;

v. Medical issues: since there is no public medical program in the United States and since health issues may be the kind of unanticipated event that might cause a Court to override a prenuptial agreement, it is highly recommended that consideration be given to health insurance and healthcare expenses when drafting a prenuptial agreement. Consider a "catastrophic illness" provision.

w. Spousal support: consider:

   i. Ignoring this factor since it is the area most likely to be challenged all because the exposure is limited in the estate in which the parties plan to reside; or

   ii. Precluding spousal support if the marriage does not survive a designated period; or

[95] Peter Walzer, What every lawyer wanted to know about prenups, but was afraid to ask (an American)", IAML Online Newsletter P1 April 2013

iii. Limiting the spousal support to a spouse's needs that might be defined to exclude certain needs.

x. Provisions to enhance fairness: write a fair agreement;

y. Death provisions: it is customary to include specific provisions to deal with the potential death of either spouse such as a waiver of inheritance rights. *"In the United States we spend as much time drafting the clauses that address what happens at death as what happens at divorce. In fact, it is prudent to enlist both a family lawyer and estate planning attorney to draft the agreement together..."*[96]

z. Include in the agreement a general release of any claims between the parties;

aa. Consider a prevailing party "attorney" fee clause;

bb. Publicity and confidentiality clauses; and

cc. Remember laws change, customs change, people change: *"....As Sergeant Phil Esterhaus said to his squad before they went on an assignment in the television show "Hill Street Blues", "Hey, lets be careful out there."*.

11. Can you limit claims for spousal maintenance? Uniform Premarital Agreement Act authorises agreement regarding "the modification or elimination of spousal support" and "any other matter including the personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty." Note similar to provisions in Australia under Section 90F of the Family Law Act, waivers of alimony will never be enforced if it would render the spouse a public charge.

12. In New York spousal maintenance terms must be "fair and reasonable at the time of the making of the agreement and.... Not unconscionable at the time of entry of the final Judgement" and a provision that waives or reduces support must not render a spouse "incapable of self support and therefore it likely to become a public charge". The one case in which the New York Court upheld the very one sided provisions of a prenuptial agreement that gave very little to the wife in the way of asset division, the Court used a statutory maintenance provision to provide some relief to the wife. The wife had meagre resources and had been out of the work force for more than 10 years while the husband had assets over 30 million dollars and earned $4 million per year. The Court modified a cap on housing expenses of the wife from $200,000.00 to $2 million (*Cron v Cron* 8 A.D.3d186 780 N.Y.S.2d121).

13. Post nuptial agreements are not covered by the Uniform Premarital Agreements Act. Many states have specific statutory provisions for post nuptial agreements. For example, Minnesota provides that they are substantially valid if:

a. There was full disclosure; and

b. They are procedurally and substantively fair and equitable at the time of execution and at the time of enforcement;

c. They do not cover child support or child custody; and

d. Each was represented by separate legal counsel. A minority of states hold invalid all post nuptial agreements. Many states impose a higher burden of providing substantive fairness than they do for premarital agreements. New York and many other state review post nuptial agreements in accordance with the same standards that apply to prenuptial agreements.

[96] Peter Walzer, "What every lawyer wanted to know about prenups, but was afraid to ask (an American)", IAML Online Newsletter P1 April 2013

14. If a couple marries in California without a premarital agreement, California Community Property Law applies. Under California Law, a couple may also modify their legal relationship by entering into a premarital agreement drafted by their attorneys. California law does not provide "ready made" frameworks for premarital agreements similar to the marital regimes.

15. The Uniform Premarital Agreement Act and California's Premarital Agreement Act provide the parties may contract regarding "the choice of law governing the construction of the agreement". There are no California cases interpreting the Uniform Premarital Agreement Act's choice of law provision.

16. The parties may be able to select the forum and the form of dispute resolution that they will use to resolve any disputes relating to the interpretation or application of the agreement.

17. The only California case, *Fernandez v Ferandez* (1961) Cal.A.PP.2d 782 that even mentions foreign marital contracts which designate a regime of marriage does not address the recognition issue because the parties already stipulated that they would follow Mexican law.

18. The California Court will enforce the choice of law clause in a premarital agreement according to the doctrine set forth by the California Supreme Court in *Nedlloyd Lines B.V. v Superior Court* (1992) 3Cal.4th 459 "That is for the Court first to determine either:

    a. Whether the chosen state has a substantial relationship to the parties or their transaction; or

    b. Whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the enquiry, and the Court need not enforce the parties' choice of law. If, however, either test is met, the Court must next determine whether the chosen states' law is contrary to a fundamental policy of California. If there is no such conflict, the Court shall enforce the parties' choice of law. If however, there is a fundamental conflict of California law, the Court must then determine whether California has "materially greater interest than the chosen state in the determination of the particular issue….".

A fertile source of professional liability issues in the United States relates to the waiver clauses in the agreement.

Marlene Moses from Moses Townsend & Russ PLLC, of Nashville highlights a practical professional liability issue for lawyers in the USA arising under prenuptial and postnuptial agreements is the failure to obtain pension waivers through Federal process pursuant to ERISA clauses of the agreement. The process is often overlooked with the agreement prepared under the relevant State law. Parallels can be drawn in Australia (particularly in New South Wales) to failure to obtain the Supreme Court's approval of release from Family Provision claims (see *Neil v Jacovou*;).

"It is very important that the terms in an agreement are clear and unambiguous…if there is an intent to waive or limit rights to alimony and/or equitable distribution state the intent directly….In Napier (351 N.C. 358, 543 S.E. 2d 132 (2000)…the court concluded that this broad language was not sufficiently "express" to constitute a valid waiver of alimony…The key to good draftsmanship is to remember the all important rule: will a District Court judge, one, two, or ten years from now, be able to determine what the agreement actually means and what was intended - that should be the drafting attorney's "guiding light".

……..

A general waiver in a premarital agreement may be ineffective to waive the spouse's ERISA rights to a share of the other spouse's qualified pension or profit-sharing plan as the party attempting to waive these benefits was not a spouse when the premarital agreement was executed. Because federal law pre-empts where there is a conflict, and ERISA overrides the Uniform Premarital Agreement Act, the rights of the spouse in a qualified retirement plan may only be waived in the manner prescribed by 205 of ERISA….There are certain steps attorneys may take to eliminate the dilemma of future spouses signing premarital agreements. The drafting attorney may consider including provisions in the premarital

agreement which require the parties to execute additional waivers after the marriage ceremony; however, follow up must be made and the additional documents actually executed following marriage."[97]

Peter Walzer states:

"*Despite the media hype, properly drawn premarital agreements are binding and enforceable. They are rarely set aside..*"[98]

Walzer's partner, Christopher Melcher confirms California prenuptial agreements are generally upheld and there are not a lot of cases. However awful prenuptial agreements (one sided agreements are at risk).[99]

I summarise in Appendix 2 a review of the papers prepared by reputable lawyers from the United States regarding practical issues for the preparation of an agreement. The review reveals common considerations that have a universal application when preparing financial agreements. A lot of the checklists ring true for Australian family lawyers as many of the safeguards are built into the *Family Law Act* or represent best practice.

Prenuptial Agreements in France

I summarise the French position from the following papers, "International Pre-Nuptial Agreements in France" by Charlotte Butruille-Cardew and "Marriage Contracts and Prenuptial Agreements in French Law" by Alexandre Boiche:

1. French law recognizes both the validity and enforceability of *contrats de marriage,* which organize the matrimonial regime (the matrimonial property rights) of the parties.

2. In French law, the spouses have the possibility to sign a marriage contract prior or during the marriage. A French marriage contract deals with the consequence and non-consequence of the marriage on the spouses properties acquired before or during the marriage. But a marriage contract in French law only relates to the spouses' properties, normally it does not contain any stipulation about the amount of maintenance in the case of divorce or separation. A French Court will be probably reluctant to enforce this kind of stipulation from a foreign prenuptial agreement. To avoid any risk, between European countries, it is advisable for the parties to designate a jurisdiction to deal with the maintenance issue in the application for prenuptial agreement as this designation is possible and binding under article 23 of the European regulation on jurisdiction, recognition and enforcement in civil and commercial matters (Brussels I).

3. There is no concept in French law of the prenuptial or post nuptial agreement.

4. In some circumstances French Courts applying French private international law will recognize the enforceability in France of a foreign prenuptial or post nuptial agreement.

5. During the marriage, the matrimonial regime of a couple determines the powers of the spouses, either individually or jointly to administer their assets and the rights of third parties (e.g. creditors) in relation to their estate.

6. Various matrimonial regimes exist in France (there are three main types of matrimonial regime defined in the French Civil Code):

    a. Community of assets;

    b. Separation of property;

    c. Universal community;

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[97] "Family Law Traps: Risk Management Handouts of Lawyers Mutual", North Carolina, www.lawyersmutuallnc.com
[98] "To have and to hold: Most premarital agreements are binding and enforceable" by Peter M Walzer
[99] Melcher, C., "Prenuptial Agreements: Drafting Provisions for Effective Distribution of Assets", 8 January 2013

d. Participation;

e. regime of separation in acquisitions.

7. The matrimonial regime of a couple is determined either by a contract entered by the spouses or the law in the absence of a contract.

8. The primary regime (*re `gime primaire*) is a set of mandatory rules which apply automatically to all married couples and organize their duties and rights in respect of managing the assets and administration of their estate (articles 214 -226 of the French Civil Code):

a. It automatically applies to a married couple residing in France irrespective of their nationality or the secondary regime chosen;

b. The matrimonial regime (secondary regime / matrimonial property rights) can add to the primary regime but not derogate from it as the latter is regarded as establishing rules of public policy.

9. When the marriage terminates the matrimonial regime of the couple is wound up and each spouse, according to the regime chosen, is allocated a portion of the assets accrued during the marriage.

10. French Legal regime: If the parties have not entered a pre or post nuptial agreement/a contrat de marriage they will be deemed to have opted implicitly for the French community of assets regime ("le regime de communaute d'acquets"). This is based on the position between the personal assets of each spouse and the community of assets:

a. Community assets are deemed to be belong equally to each spouse who have an equal right to administer them; they comprise acquisitions made by the spouses together or separately during the marriage, and coming both from their personal activity and from savings made from the fruits of their personal property;

b. Personal assets belong personally to each spouse and therefore excluded from the community. They comprise assets given to them individually before their marriage and/or inherited and the growth on those acquired personally.

Upon the winding up of the matrimonial regime each spouse will get the property that belongs personally to him or her as defined above plus half of the value of the community. There may be additional financial compensation to the spouse who has invested in the community assets money belonging to him or her personally. The financial compensation will be equivalent to either the sum invested or that plus the capital gain on the investment made.

11. Conventional regime chosen by the parties: If the parties enter a contrat de marriage, they may opt for one of the most commonly known regimes or simply amend one of the regimes by inserting special clauses in relation to the administration or the winding up of the matrimonial estate during their lifetime in the event of a divorce, otherwise on death.

12. Under the French separation of property regime "la separation de bines" the assets acquired, given or inherited during the marriage remained in the name of the spouse who acquired, benefited from or inherited them. Each spouse retains full ownership of his or her separate property.

13. Special clauses may modify the functioning or the winding up of the regime.

14. Conditions of validity and enforceability of contracts contrat de marriage:

a. It must be signed by both parties present at the same time before a notary;

b. Publicity measures will be organised once the contrat de marriage is signed and the marriage celebrated;

c. The contract must be entered before the marriage.

Within 5 years of its signature the nullity of the contract may be sought if the agreement of one of the parties was obtained by fraud or by error. Further the spouses are able to validly change their matrimonial regime after 2 years of marriage by signing a new contract before a Notary.

15. France has ratified the Hague Convention dated 14 March 1978 on Applicable Law to Matrimonial Regime. The convention has been ratified only by Netherlands, Luxembourg and France, but it is universal and contains the rules of conflict of law applicable in France on this matter. The convention commenced in France on 1 September 1992 and is applicable to all couples married after this date. For spouses married before 1 September 1992 the French rules of conflict of law are applicable. The rules are based on the principle of the freedom of choice of the applicable law to the matrimonial regime. Spouses were free to choose the law they wanted without limitation. For example a French and English couple married in Cape Town could decide to make a matrimonial contract based on the Australian Law. In the Hague Convention the principle is still freedom of choice but the choice is limited to laws designated at article 3. Therefore the French Court would have to apply foreign law designated by the spouses in their marriage contract. But, even when the spouse did not sign a marriage contract, a French Court would have to apply a foreign law to the spouse's matrimonial property because article 4 of the Hague convention designated a law of the spouses first habitual residence after the marriage as applicable to their matrimonial regime. If the spouse married before 1 September 1992 the rules of conflict designated the law with the strongest connection with the family and in particular with the presumption to the law of their first domicile of the spouses. Therefore often a French Judge could apply a foreign law to the matrimonial regime and often spouses are not aware a foreign law is applicable to the matrimonial regime.

16. The Hague Convention applies to all spouses who have an international element in their marriage or matrimonial regime but does not cover spousal maintenance, financial compensation on divorce based on needs and inheritance rights. Article 11 of the Hague Convention provides "the designation of the applicable law shall be by express stipulation or a rise by necessary implication from the provisions of a marriage contract.". Article 4 of the convention provides "that the spouses, before marriage, have not designated the applicable law, their matrimonial property regime is governed by the internal law of the State when the spouses establish their first habitual residence after marriage." Provided that the foreign contract/agreement complies with the requirements of the Hague Convention 1978 and with French public policy it would be fully enforceable in France with respect to the matrimonial regime provisions. Article 8 of the Hague Protocol of the Law applicable to Maintenance Obligations states that with respect to the choice of law that "unless at the time of the designation the parties were fully informed and aware of the consequences of their designation, the law designated by the parties shall not apply where the application of that law would lead to manifestly unfair or unreasonable consequences for any of the parties".

17. French Divorce Judges operate a distinction between the provisions of the foreign pre or post nuptial agreement as between:

a. Those relating to the matrimonial regime of the parties, which provided they comply with the Hague Convention and French public policy, will be valid and enforceable;

b. Those dealing with the financial compensations in the case of divorce, which validity will depend upon the finding of the applicable law.

18. Traditionally the validity in France of pre or post nuptial agreements covering financial compensation is dependant on choice of law rules;

19. Pursuant to French international private laws, if France has jurisdiction for a divorce, French Divorce Judges may apply either French divorce law or a foreign divorce law to the divorce suit;

20. If the French Judge applies French divorce law, international or national agreement it might be valid or enforceable in so far as it covers the question of capital payment and maintenance on divorce: the Court of Appeal of Paris held that "the provisions of the prenuptial agreement setting the obligations of Mr de Riviere after the decree of divorce cannot be enforced before the Divorce Judge because they are contrary to French public policy";

21. If the applicable law on divorce is a foreign divorce law, which recognises the validity and enforceability of prenuptial agreements covering full ancillary relief, then such agreements will be enforceable by the French Judge on divorce. The French Supreme Court ruled that "an agreement on maintenance, if entered validly pursuant to the applicable law designed by international French private law, it not to be regarded as contrary to French Public Policy" (Todorovich case).

    As and from June 2011 and pursuant to the Hague Protocol on Applicable Law on maintenance dated 23 November 2007, it will be possible for the parties to include financial compensations on divorce in pre or post nuptial agreements by submitting them to a foreign law which will recognise their validity.

The relationship between Prenuptial Agreements in Australia and in New Zealand

I am indebted to Peter Szabo who provided to me an opinion prepared by Gray Cameron, Barrister, Auckland, New Zealand which deals with practical issues confronted by lawyers in New Zealand when advising clients about pre - nuptial agreements. Further I have benefited from a review of the material provided by the Family Court of New Zealand and the Family Law Section of the New Zealand Law Society.

The relevant legislation in New Zealand concerning pre-nuptial agreements is the Property (Relationships) Act 1976 ("PRA"), which was introduced (by the Property (Relationships) Act 2001) on 3 April 2001 and commenced operation on 1 February 2002. The legislation renamed the previous Matrimonial Property Act 1976.

Part 6 of the PRA details the contracting out provisions and in particular enables parties to enter pre-nuptial agreements.

The following are the distinguishing features of the PRA vis-a-viz the Australian legislation:

1. The PRA applies to both marriages and de facto relationships (including same sex relationships). The Family Law Act applies to marriages and de facto relationships (including same sex couples).

2. The PRA delineates between "Relationship Property" (which will be divided equally unless the Court considers there are extraordinary circumstances that will make equal sharing repugnant to justice) and "separate property" (which is any property which is not relationship property and which will remain the property of the owner and be quarantined from claim unless it is transformed into relationship property pursuant to provisions of the PRA such as Ss9A, 15A, 17 and 17A).

3. The PRA also makes provision for the division of property upon the death of one spouse and gives the surviving spouse an election to take under the will or to receive a half share of the relationship property.

4. The PRA enables parties to make agreements about the status, ownership and division of property. The parties can enter an agreement to contract out of the PRA, in much the same way as parties can contract out of Part VIII of the Family Law Act in Australia. A distinguishing and positive feature of the PRA designed to minimise legal expenses, is the ability to make regulations prescribing model forms of agreement.

5. In the same way I summarised the features and requirements of the Australian pre-nuptial agreement above, I detail the requirements of Part 6 of the PRA as follows:

#	Requirement	Section of PRA	Comment
1.	The pre-nuptial agreement is entered by 2 persons in contemplation of entering a marriage	S21(1)	Same as in the FLA
2.	The agreement addresses any matter they think fit with respect to the status, ownership, and division of their property including future property: a. during their joint lives; and / or	S21(1) S21(2)	Not as extensive as the FLA

	b. when one of them dies. And in particular <u>may</u> do all or any of the following: ❑ provide that any property is to be relationship property or separate property; ❑ define the share of the relationship property the parties receive when the marriage ends or on the death of one of them ❑ provide the methodology for calculating the shares or how the relationship property is to be divided	 S21D S21D(1)(a) S21D(1)(b) & (c) S21D(1)(d) & (e)	
3.	Model forms of agreement may be prescribed	S21E	Not in the FLA
4.	The agreement must be in writing	S21F(2)	Same as the FLA
5.	The agreement must be signed by the parties and witnessed by a lawyer.	S21F(2) & (4)	Same as FLA except no requirement that the agreement be witnessed by a lawyer
6.	Each party must have independent legal advice before signing the agreement.	S21F(3)	Same as FLA
7.	The lawyer who witnesses the signature of a party must certify that before that party signed the agreement, the lawyer explained to that party the effect and implications of the agreement. Example Certificate: *'I [xyz] a barrister (or solicitor) holding a current practising certificate in xxxx do hereby certify that before the said [abc] signed this agreement I explained to him / her the effect and implications of the agreement.* *Dated this xxx day of xxx 2004* *.....* *Signature witness."*	S21F(5)	Not as detailed as the FLA. However the simplicity of the certificate is misleading. There have been at least 2-3 cases where following the upsetting of an agreement the unfortunate party has sued the certifying solicitor on the other side and it has been held that the certifying solicitor may owe an obligation / duty to the other party upon which they are reliant, and with a consequence in damages.[100]
8.	Setting aside prenuptial agreements in circumstances where: ❑ the general principles of law and equity apply to the contract ❑ an agreement is void because it does not comply with the form in ss 21F (2) - (5). ❑ The Court is satisfied that giving effect to the agreement would cause serious injustice. The Court must have regard to:	 S21G S21F(1) S21J	

[100] see Connell -v- Odlum [1993] NZFLR 189. Note the same principle in the High Court of Australia decision of Hawkins -v- Clayton

	1. the provisions of the agreement; 2. the length of time since the agreement was made; 3. whether the agreement was unfair or reasonable at the time it was made and since it was made; 4. the desire of the parties to achieve certainty; 5. any other matters the Court considers relevant.	S21J(4)	

To overcome the conversion of separate property to relationship property by the maintenance, sustenance or other contribution by one party to the separate property of the other, a suggested clause is:

> "*For the avoidance of doubt the provisions of sections 9A, 15, 15A, 17 and 17A of the Property (Relationships) Act 1976 (New Zealand) are hereby expressly negated and this agreement shall for all purposes be read and construed as if such sections had never been passed into law to the intent that the classification of property herein contained as the separate property of the party entitled thereto shall not be affected in any way by the application of relationship property or the actions or contributions of the other party thereto*."

If the Family Court of New Zealand invalidates a prenuptial agreement, then the provisions of the PRA have effect as if the agreement had never been made.

Checklist the 10 Critical steps to a Successful Cross Border Agreement

- Engage with an Australian specialist and specialist in the other jurisdiction(s) and translators
- Strict compliance with Part VIIIA of the *Family Law Act*
- Where feasible suggest one international prenuptial agreement not parallel / mirror agreements
- Disclosure: Full and frank disclosure is a universal requirement of entering an agreement to ensure informed decisions are made. Where disclosure is wanting; the risk of setting aside is real. It is best practice to undertake disclosure through the following:
    - Recitals
    - Disclosure clause
    - Disclosure documents
    - Valuations and source documents
    - Schedule of net property and resources
- Fairness:
    - Focus on making provision covering children and the primary carer
    - Provision of the home
    - Motor vehicle
    - Insurance

- Cash settlement [structured by fixed payment, graduating payments, percentage of acquest of pool etc
- If maintenance is provided then fix a reasonable amount – if child or no child, by reference to the payer's income etc
- Cover living expenses
- One sided awful agreements look good on paper but are horrible in court when challenged: infect the relationship: there is nothing to lose in challenging such agreements

- Tailor drafting to the specific circumstances of the parties
- Ensure there is independent legal advice from an Australian legal practitioner and preferably also from legal practitioners in the intersecting jurisdictions: Independent legal advice is another universal cornerstone of agreements. Under the Act it is a mandatory requirement. Evidence of such advice is essential to withstanding a challenge. The absence of a file is fatal to the agreement.
- Have a watertight risk management system
- Timing is of the essence
- Costs: charge appropriately (for risk) and review insurance coverage.

Conclusion

A prenuptial agreement under Part VIIIA of the *Family Law Act* is a practical imperative where there is a nexus between Australia and the property of the parties or residence / domicile of the parties in a broader international context

The stark reality is obvious when preparing an international pre nuptial agreement where there is a real and substantial connection (or likely to be) with the Australian jurisdiction. Do you take shortcuts and risk uncertainty of outcomes for your client in the absence of an agreement that complies with Part VIIIA of the Family Law Act or do you strive for finality by ensuring the agreement complies with Part VIIIA? I would not be trying to run the gauntlet of an application under section 90G(1A) for a declaration the agreement is binding due to non compliance.

Paul Doolan and John Barkus anecdotally[101] refer to "the Boxhead Case" involving them as Sydney based lawyers, the London silk and the Beverley Hills lawyers working together preparing a prenuptial agreement for a client. They muse that each jurisdiction had idiosyncratic approaches to the universal problem for each practitioner in preparing the agreement, namely balancing greatest risk against lowest reward and particularly how each handled the retainer with the client. It is not surprising that in Australia we are still grappling with the issue and educating the client about the intrinsic value of the agreement that ought to sound in a fair fee to balance the risk for us and our insurers.

David Truex makes the following fundamental observation:

> *"The golden rule in matrimonial financial cases where international issues arise is that, before negotiations or proceedings are commenced, indeed, before the client is given recommendations as to a particular course of action, advice should be sought from expert family lawyers in all other relevant jurisdictions."*[102]

This is a truism that ought to be observed when preparing a pre nuptial agreement and there is a real and substantial connection to Australia.

There is much to be said for this approach and a collaborative approach between lawyers in relevant foreign jurisdictions and their Australian counterparts representing the interests of a client in the preparation of a prenuptial agreement. By

101 Doolan, P. &Barkus, J., BFAs & DRAs: Are the risks worth the rewards?, 2008 QLS / FLPA Family Law residential Qld, August 2008
102Truex, D., supra p4

ensuring the agreement ticks all of the boxes for a Part VIIIA Financial Agreement will serve your client well and may circumvent the minefield of recognition, enforcement and competing forum issues that otherwise resonate in Australia.

> *"As this case unfortunately demonstrates, agreements designed to avoid costly litigation can have expensive consequences if the intention of the parties is not readily discernable from the drafting of the agreement.... Thus care in establishing the mutual intention of the parties, and drafting the terms of the financial agreement with precision assume the utmost importance... This makes it even more essential that the substantive clauses of such agreements are drafted with precision to ensure effectiveness, especially as they may be dealing with future acquired property or other interests in property"* Kostres

A failure to observe the requirements of Part VIIIA of the *Family Law Act* will inevitably end in tears for your client if it is essential that the agreement be upheld, for otherwise, as Justice Warnick observes:

> *"Provided the client meets the requirements of connection with this country for the institution of proceedings, it will only be in a rare case when your client will not be able to achieve any worthwhile result (under sections 74 and 79) in an Australian court"*[103]

That of itself presents uncertainty for the client due to the inherent difficulty of being able to predict how a judge will exercise the broad discretion they have in determining a property settlement. It will be a very unsatisfactory outcome for the client.

103 Justice Warnick, supra p16

Appendix 1

The Interview

Explore client's agenda, proposed terms, contributions, future intentions, allay misconceptions – reality testing, advice on law and limitations, detail the process, use a checklist (eg Lexon kit).

Collation of Information

Particularly the preparation of the Schedule of Property.

Collaborative Negotiation – Including Use of Mediation

Contrast adversarial intervention.

Due Diligence/Full and Frank Disclosure – The Other Party's Property, Interests and Resources

Including obtaining valuations and production of documents.

Give Advice on the Law, the Agreement and the Impact of Agreement on Entitlements

You may require assistance of accountants, financial planners and counsellors when having to complete the statement on matters such as financial/other advantages and prudency of client entering the agreement – professional liability and indemnity issues.

Instruct counsel

Where necessary to settle Deed and advise.

Negotiate and draft the Deed / parallel – mirror agreements

Letter of Advice

Do detailed letter to client as record of advice. Have client acknowledge copy obtain indemnity from client if necessary.

Finalise the Deed

Have colleague proof read and review Deed.

You Sign Statement of Independent Legal Advice

Exchange statements

Provide Statement to other spouse party/their lawyer and obtain other party's statement

Execute the Deed –preferably round table / note requirements including notarisation

Retain Deed in safe custody.

Retain File and All Notes

Retain indefinitely – mark not to be destroyed.

Appendix 2

Appendix 3

Further reading

"International Pre-Nuptial and Post-Nuptial Agreements" Edited by David Salter, Charlotte Butruille-Cardew and Stephen Grant, published by Family Law, a publishing imprint of Jordan Publishing Limited, 2011

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