

KEY POINTS

What is the issue?

The financial consequences of a marital breakdown within a family can have significant implications for the family business and/or trust.

What does it mean for me?

A typically robust way to protect a family business is for family members to enter a nuptial agreement. A nuptial agreement can help to ensure jurisdictional and financial certainty while easing cross-cultural complications and issues with a family charter.

What can I take away?

Regularly reviewing your clients' needs and seeking specialist family advice may ultimately save your client considerable time and money while sparing them the distress of a lengthy financial dispute.



A family affair

ROSIE SCHUMM AND ANNA FERSTER DISCUSS INTERNATIONAL ASPECTS OF PRE-NUPTIAL AGREEMENTS TO PROTECT A FAMILY BUSINESS

In the age of globalisation, clients are living increasingly peripatetic lives, often while running family businesses, sharing profits and income sources between members and across generations.

When a member of the family experiences marital breakdown, the financial implications can often be felt throughout the family business. It is therefore vital to review a family's financial dynamic and protect their wealth, in the event of relationship breakdown. This is especially important for multi-jurisdictional families where cross-border litigation can be very costly.

One of the most robust ways to protect a family business is for family members to enter a pre-nuptial agreement with their fiancé(e) before they marry. The aim of such an agreement is to set out what would happen to the couple's assets in the event of divorce, providing valuable certainty and security for the parties, while simultaneously avoiding the potential acrimony and significant costs that a dispute may bring.

Pre-nuptial agreements are not automatically binding in England and Wales, but they are likely to be upheld provided the following conditions are met:

- both parties had disclosure of the other's wealth;
- both parties had independent legal advice about the consequences of entering into the agreement;
- the agreement must make fair provision for the economically weaker party;
- the agreement was freely entered into by each party; and
- the agreement cannot completely dismiss any power of the court.

JURISDICTIONAL CERTAINTY

When a couple with international ties part ways, it is not unusual for the spouse seeking the divorce to have a choice of jurisdictions in which they can bring their application. As the law surrounding financial settlements on divorce varies throughout the world, the jurisdiction in which a spouse chooses to bring their application can significantly impact the type and size of any award they may receive. For example, London has long been known as the 'divorce capital of the world' due to its often generous financial settlements.

The dispute over where a divorce should take place can often result in lengthy and very costly litigation. The benefit of a pre-nuptial agreement is that issues of jurisdiction can be dealt with in advance. Couples with international ties should therefore be encouraged to enter into an agreement to avoid this potential issue.

FINANCIAL CERTAINTY

A pre-nuptial agreement can provide a level of certainty as to how the couple's assets will be divided upon divorce. Importantly for a family business, the agreement can set out which assets are to be shared in the event of divorce and which assets are not to be invaded. For example, pre-existing wealth can be excluded from the division of assets on divorce.

The agreement can ensure that the financial needs of both parties will be met following a divorce but that the wider family wealth will remain as intact as possible, preserving wealth for other family members and also for future generations.

FAMILY CHARTER

Although pre-nuptial agreements are becoming increasingly popular, it can sometimes be difficult for a family to ask one of its members to enter into such an agreement. One way to resolve this potential issue is with a family charter.

A family charter sets out a common understanding between family members. It is not intended to be legally binding, but it ➤➤



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can reduce the risk of misunderstandings and family disputes by setting out responsibilities, such as entering into a pre-nuptial agreement if a family member becomes engaged. Ensuring there is a common duty on family members to execute a pre-nuptial agreement can help to minimise the risk of internal family conflict. In turn, such agreements help promote sensible governance at the outset to minimise the risk of financial claims in the event of marital breakdown.

CROSS-CULTURAL COMPLICATIONS

Legal approaches to financial settlements following divorce vary greatly from one country to another. In many EU Member States, couples will often choose a matrimonial property regime when they marry that will dictate how their property will be divided on divorce. For example, in Italy, the default position is common ownership of goods. However, a couple can choose the separation of goods regime instead. This is strikingly different to the position in England and Wales, where assets are divided by considering the matrimonial pot, with the court then using its discretion to reach a fair financial settlement.

If, for example, an international couple has chosen a separation of goods regime in the country they live in at the time of their marriage, and they subsequently divorce in England or Wales, the courts will not automatically uphold their chosen regime.

As with financial settlements following divorce, legal approaches and, indeed, cultural attitudes to nuptial agreements also vary. In many countries, Switzerland and Sweden, for example, nuptial agreements are commonplace. In others, they are few and far between. The legal requirements for nuptial agreements are often different, as is the court's approach to whether they are to be upheld. Therefore, international couples might find that a nuptial agreement they entered in their country of residence will not be automatically upheld in the English courts. This can be a source of great concern.

One example is the court's approach to nuptial agreements in New York versus the approach in England and Wales. In New York, a pre-marital agreement is accorded the same presumption of legality as other contracts. As such, courts will strictly enforce such agreements and not merely look to them as one consideration or factor. In contrast, in England and Wales, nuptial agreements are not automatically binding and the conditions set out above must be met.

In the recent case of *Brack v Brack*,¹ a Swedish national couple had entered into three separate pre-nuptial agreements, signed in three different countries. The England and Wales Court of Appeal (the Court) held that there was no prorogation clause within the agreement giving the courts in Sweden exclusive jurisdiction, meaning that the Court of England and Wales could determine all of the wife's financial claims.

Contrast this with another recent case in England and Wales, *Versteegh v Versteegh*,² where a Swedish couple had signed a pre-nuptial agreement, choosing a separation of property regime. The Court held that the agreement should withstand and was satisfied that, despite not receiving legal advice, the wife knew the effect of the agreement (which was brief and simply drafted, as well as being commonplace in Sweden) and that it bound her in England.

The Court's approach to these two cases illustrates the grey area surrounding international pre-nuptial agreements and how difficult it can be for couples to be confident that their agreements will be upheld in England and Wales.

So, how can couples overcome this international hurdle? One approach would be for the couple to enter into a series of separate agreements in the countries with which they each have a connection, each agreement cross-referencing the others. Drafting the agreement in this way significantly increases the likelihood of it being upheld

by the court of the country where the couple bring their divorce proceedings.

However, multiple agreements inevitably mean large amounts of paperwork, and the potential for disagreement between different jurisdictions in the drafting and interpretation of the agreement, with all of the associated legal costs. The second, perhaps more favoured, approach would be to have a 'lead' agreement, setting out that certain clauses would need to be reviewed, or indeed a new agreement entered, if the couple move away and are no longer able to rely on the jurisdiction of that state.

This approach provides the couple with flexibility as to where they might wish to live in the future. However, flexibility often brings with it uncertainty and, therefore, this approach can also ultimately lead to further negotiation and legal costs.

An additional element to contend with is where international parties, or indeed their family members, are reluctant to comply with the recommended conditions when entering a nuptial agreement in England and Wales (as set out above). Often this is because the requirements are different from their home country, e.g. the level of financial disclosure the parties should provide. It is important to make clear to the parties that, without those conditions being met, the agreement is unlikely to be upheld in this jurisdiction.

CONCLUSION

The distribution of assets is often a thorny issue for couples when a relationship breaks down. This is especially the case when it impacts on wider family assets. Regularly reviewing your clients' needs and referring to specialist family advice may ultimately save your client considerable time and money, and spare them from the emotional distress that a lengthy financial dispute can bring.

#MATRIMONIAL #FAMILY BUSINESS
#CROSS-BORDER ESTATES

1 [2018] EWCA Civ 2862 2 [2018] EWCA Civ 1050