

Eyes wide open

How useful and enforceable are pre-nuptial agreements in Singapore?

By SUZANNE KINGSTON AND SHARANJIT KAUR

PRE-NUPTIAL and post-nuptial agreements are increasingly popular among wealthy individuals who wish to protect their personal or family wealth from the unfortunate consequences of potential relationship breakdown. Along with trust structures and tax planning, pre-nuptial (and post-nuptial) agreements may be a prudent option for couples who wish to attain a degree of certainty for the future and who are comfortable with the idea of addressing important (if somewhat unpalatable) issues at the outset of, or during, a marriage.

Understandably, some individuals may want to “ring-fence” assets which have been inherited or built up before the marriage from any future claims upon divorce. Others will want to keep their property separate throughout the marriage and for this to be reflected in the event of a marriage breakdown.

Frequently, it is the parents of those marrying or trustees for a family who are most anxious to have a pre-nuptial agreement in place, so that family wealth can be preserved. But exactly how enforceable are such agreements, particularly in Singapore? Given that they are often negotiated amid plans for the wedding and honeymoon, are they more trouble than they are worth?

The fundamental point to note is there is no international standard. Each jurisdiction has its own law in respect of nuptial agreements, and the treatment of and enforceability of such agreements vary widely. Accordingly, such agreements must be drafted by lawyers with specialist knowledge and experience within their jurisdiction, who not only understand the interplay between the various jurisdictions relevant to the couple, but also have a good network with counterpart lawyers in other countries such that the agreements are drafted with all of the international elements being considered.

In Singapore, a nuptial agreement is not enforceable and, in line with such jurisdictions as England and Wales, its terms cannot oust the jurisdiction of the court, which will scrutinise any financial agreement on divorce in accordance with its statutory duty. However, in many countries, such as the US, some European countries, Australia and Russia, nuptial agreements may be strictly enforced, if certain legal requirements are in place.

Nuptial agreements will carry less weight if certain safeguards have not been met in accordance with normal contract principles. It is very important to show that there has been no undue influence or duress in their coming into being, nor a lack of independent legal advice. Generally, there should have been full financial disclosure, such that each party is aware of



the material information needed to enter into the agreement.

The leading authority on the efficacy of nuptial agreements in Singapore remains the Court of Appeal judgement of *TQ v TR* [2009]. Here, the fact that there was a foreign element to the case was significant – the wife was Swedish and the husband was Dutch. They married in the Netherlands and there was a Dutch pre-nuptial agreement prior to the marriage in 1991 which specified that they would each keep their own assets on divorce. The couple subsequently moved to Singapore, but divorced here in 2005.

Governing law

The Singapore Court held the parties to their agreement. The governing law which applied to the pre-nuptial agreement was foreign law and the parties were expatriates. The agreement only dealt with capital division (the maintenance for the wife and children had been provided for) and the court found on the facts that the agreement could and should be enforced because the court found that it was fair to do so on the particular circumstances of this case.

Under Singapore’s Women’s Charter, the court is obliged to look at agreements made between the parties and it was held by the Court of Appeal in *Lian Hwee Choo, Phebe v Tan Seng Ong* [2013] that such an agreement could include a pre-nuptial agreement.

Further in that case it was held that if the applicant could establish that the parties’ intention had been that the agreement should “exhaustively govern the allocation of matrimonial assets upon the contingency of divorce, whenever that might actually happen”, then the agreement would

be enforceable. In this case the court did not actually find the necessary intention on the facts. So far the courts in Singapore have been reluctant to enforce pre-nuptial agreements.

Arguably, the fact that Singapore has a different approach to the division of marital assets on divorce (compared with some other jurisdictions) has reduced the necessity for nuptial agreements. Hong Kong and London are now dubbed “divorce capitals”, partly because the starting point is an equal division of all marital assets, wherever they are situated, with adjustments made based on the parties’ needs, their contributions and various other factors, with the overall aim of fairness. This often means in practice that there is departure from equality, but nevertheless the starting point is equality for both parties and all assets are in the pot unless the court decides otherwise.

Singapore starts from a different position. Here, there is no presumption of equality and crucially there is a distinction in the Women’s Charter between assets acquired before or after the marriage, with pre-marital assets being excluded from division, unless that asset has been substantially improved upon during the course of the marriage. Matrimonial homes are considered to be joint property but gifts and inheritances are outside the pot, unless again such assets have been substantially improved upon or their value enhanced during the marriage. Such statutory “ring-fencing” does mean that arguably there is a lesser need for protection using pre-nuptial agreements in Singapore. Certainly they are not as common here as elsewhere.

However, couples still often want to be able to arrange matters to avoid potential litigation in the future. The courts in Sin-

gapore have made a distinction between pre-nuptial and post-nuptial agreements (including separation agreements). Last year, the Court of Appeal in *Surindar Singh v Sita Jaswant Kaur*, set out the current law, clarifying the fact that post-nuptial agreements and separation agreements would normally, depending on the facts, be enforceable. Respect was given to a couple’s “legitimate right” to try to settle all matters without court action.

The judge acknowledged the judicial recognition given to post-nuptial agreements and suggested that these may be given more weight by the courts than pre-nuptial agreements, because “the circumstances (in which they were entered into) were very different”. The court acknowledged that there may be circumstances whereby a pre-nuptial agreement could be enforced in its entirety, such as the case of *TQ v TR* [2009] mentioned above.

The Singapore Courts are slow to rubber stamp pre-nuptial agreements to ensure that terms do not go against the policy behind the existing laws and to ensure that parties’ rights are not compromised by ignorance or emotion when the agreement was made. Nevertheless, there is an international trend towards favouring pre-nuptial agreements. As divorce rate rises, court lists get increasingly full and the cost of litigating a divorce can take a sizable slice out of a family’s accumulated wealth. In a world where not only the ultra wealthy have assets all over the world, an awareness of pre and post-nuptial agreements internationally can be crucial.

The different approach to nuptial agreements can be highly relevant in forum disputes, as seen in the recent Court of Final Appeal case last year in Hong Kong. In such scenarios expert international advice should be sought. Pre-nuptial agreements remain useful tools in family asset protection: They will at least be evidence of intention to make a bargain which will be taken into account even in jurisdictions such as Singapore which will not, prima facie, enforce them.

Nuptial agreements do come with a significant health warning: The negotiations leading up to them can be unpleasant and difficult if not approached professionally. However, when approached correctly, with the benefit of specialist, international legal advice, they can help couples avoid very expensive cross-border litigation in the future. If entered into properly, they can provide couples with clarity about the financial consequences of marital breakdown, evidence of their intentions for the court and ultimately more certainty about how family wealth is to be treated and protected in the future. ▣

Suzanne Kingston is Partner, Withers Worldwide, and Sharanjit Kaur is Partner, Withers KhattarWong