

Comment,
**THE ENFORCEMENT OF PREMARITAL
AGREEMENTS AT THE INTERNATIONAL
LEVEL**

Pre-marital agreements can bring about clarity in divorce proceedings, but the variability of legal enforcement can also cause confusion. The difference in foreign and domestic laws can make it difficult to prepare a document that will be fully effective across multiple jurisdictions. Couples facing international marriage or divorce handle the scenarios in a variety of ways, usually to comply with the laws of the country that will be their immediate, primary residence. The concern of divorce in a different country often does not cross the minds of couples ready to tie the knot. However, each country is unique and can pose various legal issues to resolve. Professor Ann Estin of the University of Iowa College of Law has written the International Family Law Desk Book to help explain several issues affecting family law issues internationally.¹ This article uses her chapter on the “Financial Aspects of Marriage and Divorce” as a reference for connecting issues of pre-marital agreements at an international level. This article reviews how a handful of non-U.S. countries view marriage in their legal system, and then takes a look at how those varying laws are applied in a foreign jurisdiction.

I. International Views on Marriage

The laws of the following countries are more in depth than the constraints of this article will allow. Therefore, a brief synopsis of how pre-marital agreements are viewed in these countries is all that will be provided.

A. Canada

The Divorce Act is a federal statute that governs the laws of divorce in Canada and allows a court to grant a divorce in the

¹ ANN LAQUER ESTIN, INTERNATIONAL FAMILY LAW DESK BOOK (2012).

event of a breakdown of the marriage.² A breakdown of the marriage occurs when the spouses have lived separately for the one-year preceding the action, or there has been adultery, physical or mental cruelty since the celebration of marriage.³ While the Act does not demand compliance with pre-marital agreements, it does state that a pre-marital agreement should be considered as a factor in the event of divorce.⁴ With regard to pre-marital agreement provisions concerning child custody, the court will only support the provisions if they are in the best interest of the child.⁵ In Canada, there is a unified presumption across all the provinces towards equitable distribution and pre-marital agreements should strive to comply with this sort of division of assets if they wish to have their pre-marital agreement upheld.⁶

B. *China*

The Marriage Law of the People's Republic of China is the governing law for marriage and family relations in China.⁷ According to Article 34, divorce can be granted under the Law if a desire to divorce is mutual or else under the circumstances of unfaithfulness, living separately, or violence within the home.⁸ Unique from the other countries mentioned, the Law in China allows divorce for a party indulging in gambling and drug taking who refuses to reform after repeated persuasion.⁹ Article 19 of this Law allows parties to contract a pre-marital agreement in regards to property acquired during the marriage and property

² John C. Soby, Q.C. & Alicia T. DuBois, *An Overview of Pre-Nuptial Agreements in Canada*, INTERNATIONAL ACADEMY OF MATRIMONIAL LAWYERS, http://www.iaml.org/library/iaml_law_journal/back_issues/volume_1/an_overview_of_pre_nuptial_agreements_in_canada/index.html#Ref4

³ Divorce Act, R.S.C. 1985, c. 3, 8.

⁴ Divorce Act, R.S.C. 1985, c. 3, 15.2(4).

⁵ Soby & DuBois, *supra* note 2.

⁶ *Id.*

⁷ The Marriage Law of the People's Republic of China (promulgated by the Chairman of the Standing Comm. Nat'l People's Cong., Sept. 10, 1980, effective Jan. 1, 1981), http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384064.htm (China).

⁸ *Id.*

⁹ *Id.*

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owned beforehand, so long as the pre-marital agreement is in writing.¹⁰

C. England

Courts in England have generally held pre-marital agreements as unenforceable because they directly conflict with the public policy protecting the sanctity of marriage.¹¹ England enacted the Matrimonial Causes Act 1973 as an Act to govern matrimonial proceedings, maintenance agreements, and divorce.¹² The Act sets the standard for divorce, which is allowed for adultery, the inability to live together, or desertion by a spouse for a continuous period of at least two years.¹³ Section 25 of the Act determines which matter the court has power over¹⁴ and a pre-marital agreement is thought to be in direct conflict with this power.¹⁵ Section 34 of the Act covers maintenance agreements and states a pre-marital agreement, or other type of agreement, will be deemed void if it purports to restrict any right to apply to a court for an order containing financial arrangements.¹⁶

D. Malaysia

Malaysia follows very unique statutory language when it comes to governing marriage and divorce. While countries will often adopt legal concepts from foreign countries, Malaysia goes a step further by directly following English law in regards to marriage and divorce.¹⁷ The first Article (47) of this Part (VI) lays out the “Principles of law to be applied” as follows:

Subject to the provisions contained in this Part, the court shall in all suits and proceedings hereunder act and give relief on principles which

¹⁰ *Id.*

¹¹ Jeremy Posnansky, *Prenuptial Agreements in England and Wales*, INTERNATIONAL ACADEMY OF MATRIMONIAL LAWYERS, http://www.iaml.org/library/iaml_journal/back_issues/volume_1/prenuptial_agreements_in_england_and_wales/index.html.

¹² Matrimonial Causes Act, 1973, c. 18 (Eng.), <http://www.legislation.gov.uk/ukpga/1973/18>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Posnansky, *supra* note 11.

¹⁶ Matrimonial Causes Act, 1973, c. 18 § 34.

¹⁷ LAW REFORM (MARRIAGE AND DIVORCE) ACT 1976 (2006 REPRINT), available at <http://www.jafbase.fr/docAsie/Malaisie/Mariage&Divorce.PDF>

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in the opinion of the court are, as nearly as may be, conformable to the principles on which THE HIGH COURT OF JUSTICE IN ENGLAND acts and gives relief in matrimonial proceedings.¹⁸

However, Part VII covers “Matter Incidental to Matrimonial Proceedings” and gives the power to the Malaysian court to order the division of matrimonial assets.¹⁹ While the Act does not explicitly single out pre-marital agreements, the language seen in both the mentioned articles provides some guidance that the outcome of divorce proceedings in Malaysia may be very similar to the outcome of divorce proceedings in England at the time of the proceeding.²⁰

E. *Ireland*

Pre-marital agreements are not enforceable in Ireland.²¹ Public policy in this country is in direct conflict with divorce and looks to balance out financial provisions in the event there is a marital breakdown.²² The Constitution of Ireland demonstrates several times how the nation values family.²³ Articles 40 through 44 of the Constitution list the Fundamental Rights of the people, including “The Family” in Article 41.²⁴ In this section, the State “guarantees to protect the Family in its constitution and authority.”²⁵ In addition, it states that it will guard the institution of marriage with “special care” and only grant a divorce in the event of living separately four out of the previous five years, where there is no reasonable prospect of a reconciliation, and where provisions for the spouses and children are prescribed by law.²⁶

¹⁸ *Id.* at Art. 47.

¹⁹ *Id.* at Art. 76.

²⁰ Foo Yet Ngo, *Pre-Nuptial Agreements in Malaysia*, INTERNATIONAL ACADEMY OF MATRIMONIAL LAWYERS, http://www.iaml.org/library/iaml_law_journal/back_issues/volume_1/pre_nuptial_agreements_in_malaysia/index.html.

²¹ Anne Dunne SC, *Pre-Nuptial Agreements in Ireland*, INTERNATIONAL ACADEMY OF MATRIMONIAL LAWYERS, http://www.iaml.org/library/iaml_law_journal/back_issues/volume_1/pre_nuptial_agreements_in_ireland/index.html.

²² *Id.*

²³ IR. CONST., 1937, art. 40-44, available at <http://www.irishstatutebook.ie/en/constitution/index.html>.

²⁴ *Id.*

²⁵ *Id.* at 41.1.2.

²⁶ *Id.* at 41.3.

II. Enforceability of Foreign Pre-Marital Agreements

After looking at the various views on marriage and pre-marital agreements in this handful of countries, one might be able to foresee the problems that might arise in certain circumstances. If a marriage occurs in a country that allows pre-marital agreements, then relocates to a country that will not enforce a pre-marital agreement, intense litigation may very likely occur following a divorce. The decision on which legal system will even govern the divorce and the related pre-marital agreement may be more important than many individuals think.

In the United States, courts may comply with pre-marital agreements from other countries as long as it does not conflict with the public policy of the state in which a party is trying to enforce. For example, in *Stawski v. Stawski*, a New York court held that a pre-marital agreement signed in Germany was valid and enforceable based on evidence of behavior in accordance with the pre-marital agreement during the marriage.²⁷ The husband was a German citizen.²⁸ The plaintiff wife was an educated, 22-year old but argued that she did not understand the pre-marital agreement, even though she signed it voluntarily.²⁹ The pre-marital agreement required the spouses to retain ownership of property owned before and acquired during the marriage to be held separately in accordance with German law.³⁰ The Court held that she had acted in accordance with the terms of the pre-marital agreement during the marriage – evidenced by separate bank accounts and property held solely in her name.³¹ The Court referenced the pre-marital agreement as “Germany’s equivalent of a Blumberg form.”³² Blumberg forms are legal documents that are referenced by New York statutes.³³ The court made this reference as further evidence against the dissent that the plaintiff

²⁷ *Stawski v. Stawski*, 43 A.D.3d 776 (N.Y. App. Div. 2007).

²⁸ *Id.* at 776.

²⁹ *Id.* at 777.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 778.

³³ See NEW YORK MATRIMONIAL LAW AND PRACTICE § 18:7 2013.

understood and followed the terms of the pre-marital agreement based on her level of education and behavior.³⁴

In a more recent New York case, the wife filed a motion to vacate or set aside a pre-marital agreement based on fraud or duress. The pre-marital agreement was executed in France and written in the wife's native tongue.³⁵ The wife argued she lacked the mental capacity and understanding to enter into the pre-marital agreement.³⁶ The record showed evidence of a contradictory affidavit and a doctor's letter that did not support the wife's current duress argument.³⁷ The Court held that the evidence of pregnancy, threat of cancelling the wedding, and lack of legal representation did not equate to duress.³⁸ The husband took the necessary steps to make sure the foreign pre-marital agreement would be enforceable in the United States through filing requirements.³⁹ These cases provide several examples of New York courts upholding foreign pre-marital agreements as valid, absent a lack of understanding of the contract.

III. Enforcement of Foreign Judgments Relating to Family Law

When judgments are issued with regard to family law matters abroad, there are a few guidelines courts will follow for enforcement. Below are details on the procedure by which enforcement is pursued at domestic and international levels.

A. Domestic Acts That Influence Interstate Judgments

With regard to the United States, states will often adopt uniform acts to be bound to rules similar to those in other states. The states have agreed to be bound in a process that will expedite legal hearings at a federal level. The binding principle is at work at a domestic level among states that have accepted acts pertaining to family law issues. A majority of states have

³⁴ *Stawski*, 43 A.D.3d at 778.

³⁵ *Cohen v. Cohen*, 93 A.D.3d 506 (N.Y. App. Div. 2012).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 507.

adopted the Uniform Enforcement of Judgments Act.⁴⁰ If a judgment is made in another state and all opportunities for appeal have lapsed, a party can file a suit in another state that has adopted the Act to determine if a court will enforce the judgment. It was drafted to provide a way of enforcing foreign judgments by implementing the principle of full faith and credit.⁴¹ The Uniform Interstate Family Support Act was promulgated in 1992, establishing a system to resolve multistate jurisdictional issues.⁴² This Act forces foreign states to defer to child support orders entered by the courts in the child's home state.⁴³ This seems to be easy to regulate within the United States; however, family law issues are regulated differently at an international level.

B. *Treaties that Influence International Judgments*

Foreign-country judgments can be recognized by treaty agreements among countries. Treaties made under the authority of the United States are treated as the "supreme law of the land" and such treaties bind all state courts.⁴⁴ In general, countries must be party to a treaty to be bound by its terms. The following are international treaties that impact family law related issues:

1. *The Convention on the Recovery Abroad of Maintenance (1957)*

This United Nations treaty allows the international enforcement of judicial decisions regarding maintenance.⁴⁵ An individual can seek out child support and alimony if the individual and the person from whom they are seeking maintenance are both

⁴⁰ UNIF. ENFORCEMENT OF JUDGMENTS ACT, (1948), available at <http://uniformlaws.org/LegislativeFactSheet.aspx?title=Enforcement%20of%20Foreign%20Judgments%20Act>

⁴¹ *Id.*

⁴² Eric M. Fish, *The Uniform Interstate Family Support Act (UIFSA) 2008: Enforcing International Obligations Through Cooperative Federalism*, 24 J. AM. ACAD. MATRIM. LAW. 33, (2011).

⁴³ *Id.* at 37.

⁴⁴ U.S. CONST. art. VI, cl. 2.

⁴⁵ Convention on the Recovery Abroad of Maintenance, art. 1, June 20, 1956, 268 U.N.T.S. 3, available at <http://www.unhcr.org/refworld/country3dda24184,0.html>

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residents of countries that are members of the Convention.⁴⁶ There are currently 65 parties to the Convention.⁴⁷ This treaty became effective in May of 1957.⁴⁸ Similar to the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (2007 treaty), this convention required member states to create designation agencies.⁴⁹ While the 2007 treaty requires a “Central Authority”, this treaty required “Transmitting and Receiving Agencies” to serve the role of transmitting information and receiving documents related to cases.⁵⁰

An example of the agencies would be seen if a wife was awarded maintenance in Brazil, but then moved to Argentina – both countries being contracting parties to the treaty. The wife would then file an application with the transmitting agency in Argentina for the recovery of maintenance.⁵¹ The transmitting agency in Argentina would then be in contact with the receiving agency in Brazil. The transmitting agency in Argentina would take all the reasonable steps necessary to make sure they comply with the laws in Brazil.⁵² While the transmitting agency’s role is mainly to communicate and transfer necessary documents to Brazil, the agency does have the ability to express opinions on the merits of the case and recommend free legal aid for the wife in this example.⁵³

The United States is not one of the 65 parties that have adopted this treaty.⁵⁴ Of the five non-US countries mentioned earlier in the article, only Ireland and the United Kingdom are parties to this treaty.⁵⁵ The 2007 treaty below has taken the same principles and since updated them. If countries are members of

⁴⁶ *Id.*

⁴⁷ Convention on the Recovery Abroad of Maintenance, 1957, available at http://treaties.un.org/Pages/DB.aspx?path=DB/MTDSGStatus/pageIntro_en.xml

⁴⁸ *Id.*

⁴⁹ *Id.* at art. 2.

⁵⁰ *Id.* at art. 3.

⁵¹ *Id.* at art. 3 (1).

⁵² *Id.* at art. 3 (4).

⁵³ *Id.* at art. 4 (3).

⁵⁴ The Convention on the Recovery Abroad of Maintenance.

⁵⁵ *Id.*

both this 1957 convention and the 2007 convention, then the 2007 convention should be applied.

*2. Hague Convention on the International Recovery of
Child Support and Other Forms of Family
Maintenance (2007)*

This treaty works to govern the enforcement of judicial decisions on child support and other forms of family maintenance internationally.⁵⁶ The convention is focused on maintenance for individuals under 21 years old and spousal support.⁵⁷ It allows contracting countries to extend this treaty to “any maintenance obligation arising from a family relationship, parentage, marriage or affinity, including in particular obligations in respect of vulnerable persons.”⁵⁸ This language only pertains when two contracting countries are involved and both have agreed to the increased scope.⁵⁹

Contracting states have certain procedural obligations to uphold under the terms of the treaty. Each member state must designate a “Central Authority to discharge the duties” of this treaty.⁶⁰ The functions of each Central Authority are to assist and facilitate the enforcement of judicial proceedings in regards to maintenance decisions.⁶¹ The Central Authorities should not be designated to make judicial decisions or “exercise powers that can be exercised only by judicial authorities” in any of the contracting states.⁶² An example of how the central authority works would be similar to that of the transmitting and receiving agencies from the previous treaty. The general functions of central authorities are to co-operate with other central authorities to find possible solutions to difficulties preventing enforcement of child support and maintenance orders.⁶³

⁵⁶ Convention on the International Recovery of Child Support and Other Forms of Family Maintenance art. 1, Nov. 23, 2007, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=131

⁵⁷ *Id.* at art. 2(1)(a).

⁵⁸ *Id.* at art. 2(3).

⁵⁹ *Id.* at art. 2(1)(b).

⁶⁰ *Id.* at art. 4(1).

⁶¹ *Id.* at art. 6(2)(e).

⁶² *Id.* at art. 6(4).

⁶³ *Id.* at art. 5(a)-(b).

3. *Hague Convention on the Civil Aspects of International Child Abduction*

The primary intention of this treaty is to maintain child custody judgments in the event of a wrongful “removal” of a child to another country.⁶⁴ Some cases make it difficult to retrieve a child who has been abducted across international boundaries. These abductions often refer to situations in which a relative (usually a divorced parent) takes a child from the home that a court order deemed most suitable. The treaty does not provide that the child be returned to a parent, but that a child who is a “habitual resident” of a nation that is party to the treaty be returned to that nation.⁶⁵ Article 2 states that the contracting states “shall use the most expeditious procedures available” in regards to carrying out the objectives of the treaty within their boundaries.⁶⁶

While the treaty uses the term “habitual resident” to determine which country the child should be returned to, the treaty never defines the term. Instead, the treaty leaves it to the courts of contracting countries to interpret the terminology.⁶⁷ They are to interpret according to “the ordinary and natural meaning of the two words.”⁶⁸ A determination of the habitual residence is primarily factual, but courts refer to the analysis as a “mixed question of law and fact.”⁶⁹ The courts look at the shared intentions of the parties, the history of the children’s location, and the settled nature of the family prior to the facts of the current dispute to decide the child’s habitual residence.⁷⁰ There are ninety contracting states to this convention, including the United States, Canada, China, the United Kingdom, and Ireland.⁷¹

⁶⁴ Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89, *available at* http://www.hcch.net/index_en.php?act=conventions.status&cid=24

⁶⁵ *Id.*

⁶⁶ *Id.* at art. 2.

⁶⁷ *Mozes v. Mozes*, 239 F.3d 1067, 1071 (9th Cir. 2001).

⁶⁸ *Id.*

⁶⁹ *Id.* at 1073.

⁷⁰ *Id.* at 1076-1077.

⁷¹ Hague Convention on the Civil Aspects of International Child Abduction.

A recent example of this treaty in action can be seen in a 2010 Montana case.⁷² A mother petitioned for her daughter to be returned to her in Panama from the United States, had the petition denied, but went on to appeal the decision.⁷³ The husband was a college professor and the wife an exotic dancer in Panama.⁷⁴ The couple had a daughter and the father ran away with the daughter from the airport in Australia and left the mother there without a passport.⁷⁵ The District Court found that the daughter was a habitual resident of Panama and needed to be returned to her mother, despite the father's arguments of unsafe living conditions.⁷⁶ The case explains how the policy of the treaty is to deter parents from abducting children across international borders and will only depart from this policy for the sake of the child's welfare in extreme cases.⁷⁷

IV. Choice of Law in Settling Pre-Marital Agreement Disputes

Which legal system governs a pre-marital agreement is addressed under choice of law principles. The idea is to choose which legal precedents to follow ahead of future litigation and include this choice in a binding contract. One approach is that the law of the place having the most significant contacts with the parties and their dispute applies to their rights and duties under a contract.⁷⁸ This approach is also referred to as the "center of gravity" or the "grouping of contacts" theory.⁷⁹ A court may also decide that the parties have abandoned their choice of law in relation to their pre-marital agreement if the party has moved between legal systems.⁸⁰

In general, United States courts will acknowledge a choice of law term included in pre-marital agreements as long as the parties have some connection with the forum they choose, and

⁷² Cuellar v. Joyce, 596 F.3d 505 (9th Cir. 2010).

⁷³ *Id.* at 508.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 509.

⁷⁷ *Id.*

⁷⁸ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

⁷⁹ Auten v. Auten, 308 N.Y. 155, 160 (N.Y. 1954).

⁸⁰ Gustafson v. Jensen, 515 So. 2d 1298, 1301 (Fla. Dist. Ct. App. 1987).

this is even true for international choice of law decisions.⁸¹ This may not be the case if the choice of law varies greatly from the law of the jurisdiction in which it is being argued, especially if the requirements would make the pre-marital agreement unconscionable under U.S. law.⁸² While practicing attorneys can form pre-marital agreements with choice of law clauses and hope those clauses will be acknowledged, the uncertainty of interpretations makes it hard to guarantee the choice of law provision will be upheld.

V. Conclusion

As detailed throughout this article, there are many factors to consider when dealing with pre-marital agreements and family law issues at an international level. After comparing how the U.S. legal system handles various issues once international aspects are involved, one can see the weight courts give to international decisions. Quite often it appears that U.S. courts will uphold decisions made in foreign courts so long as the results do not drastically differ from the public policies of the forum state. Practicing attorneys can prepare for this, but mostly from a retroactive standpoint. While it may still be impossible to know what the future holds for families, attorneys should be able to plan for legal precedents with regard to these matters at the very least.

John Sill

⁸¹ *Alamir v. Callen*, 750 F. Supp. 2d 465 (S.D.N.Y. 2010).

⁸² *In re Estate of Davis*, 184 S.W.3d 231, 238 (Tenn. Ct. App. 2004).