Case Note

PRENUPTIAL AGREEMENTS AND FOREIGN MATRIMONIAL AGREEMENTS: *TQ V TR*[1]

The recent case of *TQ v TR* recognized a foreign prenuptial agreement and gave effect to it. This note discusses the conflict of law rules applicable to the determination of the validity of a foreign prenuptial contract. It further examines the considerations the court should take into account when deciding whether to give effect to a prenuptial agreement between spouses.

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I. Introduction

1 Today, many agreements made between spouses in the throes of divorce are routinely recognized and enforced as consent orders. Postnuptial agreements made in contemplation of divorce have been recognised and enforced by the courts.[2] Sections 49 and 50 of the Women's Charter[3] exemplify the unique approach taken with respect to family disputes. Section 50 provides that the Family Court is to give consideration to the possibility of a harmonious resolution of the matter and may refer the parties for mediation. Since such settlement through mediation is powerfully encouraged in family proceedings, the law must correspondingly respect the parties' autonomy to make postnuptial agreements in contemplation of divorce. While these postnuptial agreements are encouraged, the law has not necessarily taken the same approach with respect to prenuptial agreements. The courts in England were previously reluctant to enforce prenuptial agreements which sought to provide for matters upon divorce. It was thought that such agreements which attempted to oust the jurisdiction of the court over matters in which the state was very much interested was contrary to public policy.[4] Prenuptial agreements which contemplate divorce even before the marriage begins may be perceived as undermining the institution of

1 [2007] SGHC 106.
2 See *Wee Ah Lian v Teo Siak Weng* [1992] 1 SLR 688; *Tan Siew Eng (alias Tan Siew Eng Irene) v Ng Meng Hin* [2003] 3 SLR 474.
3 Cap 353, 1997 Ed.
4 *Hyman v Hyman* [1929] AC 601.

marriage. However, more recent cases in England have given recognition to prenuptial agreements.[5] The recent local High Court decision of *TQ v TR*[6] is interesting because it upheld and gave effect to a prenuptial agreement made 16 years earlier.

II. *TQ v TR*

2 In line with England's modern developments, the High Court decision of *TQ v TR*[7] has recognized that a prenuptial agreement is valid and effective. In this case, the wife was a Swedish national and the husband a Dutch national. The parties met in London in 1988 and were married in 1991 in the Netherlands. Just a few weeks before the marriage, they executed a prenuptial agreement before a notary public in the Netherlands. The agreement provided that there was to be no community of marital property and each was to keep his or her own assets in the event of a divorce.

3 The parties lived in London after the marriage until 1997 when the family moved to Singapore. A divorce decree nisi was granted in 2005. The parties had three children, whose custody, care and control was contested. The court ordered joint custody and awarded care and control of the children to the wife and access to the husband. The court further ordered that the husband pays $1200 a month as maintenance to each of the children and a lump sum maintenance of $150,000 to the wife.

4 On the issue of division of matrimonial assets, the court considered that:

> The main issue is whether the prenuptial agreement should be enforced. If that agreement is enforced, the petitioner will receive nothing by way of a division of the matrimonial assets. The prenuptial agreement was executed under Dutch law and the preliminary question I need to determine is the place of domicile of the parties. The law of the domicile, a concept that may be growing outdated, determines the issue of matrimonial assets.

5 The court then proceeded to determine the parties' domicile and held:

5 See *M v M (Financial Provision: Pre-nuptial Agreement)* [2002] 1 FLR 654 and *K v K (Ancillary Relief: Prenuptial Agreement)* [2003] 1 F L R 120. See also Gareth Miller, "Pre-nuptial Agreements in English law" PCB 2003, 6, 415-426.

6 *Supra* n 1.

7 *Ibid.*

> I am thus of the view that the petitioner's domicile is not that of the Netherlands. That being so, I may still consider whether this court ought to give effect to the prenuptial agreement as a document between the parties that ought to be enforced irrespective of where their domicile might be.

6 It then set out the provisions in s 112 of the Women's Charter and held that:

> This court is entitled therefore to take into account the prenuptial agreement and give effect to it if the circumstances permit. In this case, the parties entered into the agreement voluntarily, as mature adults, and in the presence of a notary public who had explained the content and effect of it to the petitioner. And since the maintenance of the petitioner and the children has been provided as ordered above, I am of the view that the prenuptial agreement should be upheld and take effect accordingly. There will be no order for the division of assets.

7 Thus, the court upheld the prenuptial agreement and made no order for the division of matrimonial assets. From what little the court had described of the prenuptial agreement, the effect of this seems to be that each party had no claim on the other's assets, and each kept whatever had been acquired in their names at the time of divorce. If the prenuptial agreement only provided for the manner of holding of property during marriage and not in the event of a divorce, then it should not have any relevance or effect on the court's powers to divide the assets at all. It is assumed in this note, in reliance on the court's interpretation in its judgment, that the prenuptial agreement had indeed provided for the event of divorce.

III. Choice of law governing matrimonial property agreements

8 The court held that:

> The prenuptial agreement was executed under Dutch law and the preliminary question I need to determine is the place of domicile of the parties. The law of the domicile, a concept that may be growing outdated, determines the issue of matrimonial assets.

9 This part of the judgment is difficult to follow. It may suggest one of the following. First, that a matrimonial property agreement is governed by the law of the parties' domicile, rather than the "proper law of the contract". Alternatively, the court may have assumed the agreement to be valid and then held the view that whether such a valid agreement ought to be enforced depends on the law of the parties' domicile.

A. The law of the parties' domicile

10 Private International Law gives parties much autonomy to choose the law governing their contract. This is the case even for matrimonial property contracts.[8] The first task of the court faced with a contract should have been to determine whether it is valid in accordance with the rules of conflict of laws. The law which governs a foreign contract is the "proper law" of the contract, which is "the system of law by reference to which the contract was made, that is the law chosen by the parties or that with which the transaction had its closest and most real connection".[9] The proper law governs the contract's validity, interpretation, effect and discharge.[10] If the parties had expressly selected a choice of law, that choice is given effect. In the absence of an express choice, the second stage is for the court to infer an implied choice of the parties by ascertaining the intentions of the parties from the language, terms and nature of the contract. Only where such an implied choice is absent will the court proceed to the third stage of examining objective connections, where the proper law is determined by ascertaining the system of law with which the transaction had the closest and most real connection.[11] In the present case, it may be that there was no express or implied choice of law and thus, domicile becomes relevant as an objective connection relevant to determining the system with which the transaction had the closest and most real connection. If this is the case, then the court's reference to domicile may be an oblique application of the proper law. However, this is unlikely, since the court was searching for the current domiciles of the parties instead of their domiciles at the time the agreement was made. This is further discussed below.

B. The proper law of the foreign prenuptial contract

11 In this case, the court recognized and gave effect to the prenuptial agreement. It may be read to have assumed the prenuptial agreement to be valid in accordance with the rules of conflict of laws, although it did not explain how it reached this position.

8 Tan Yock Lin, *Conflicts Issues in Family and Succession Law* (Butterworths Asia 1993) at p 275 cites *Grutten v Digby* (1862) 31 Beav 561 and *Viditz v O'Hagan* [1899] 2 Ch 569. See also p 276.

9 Morris and McClean, *Morris: The Conflict of Laws* (Sweet & Maxwell, 5th Ed, 2000) at p 321.

10 See *Dicey & Morris: The Conflict of Laws* (Collins, Briggs, Hill, McClean, Morse eds), (Sweet & Maxwell,13th Ed, 2000) at para 32-007.

11 See Privy Council decision in *Bonython v Commonwealth of Australia* [1951] AC 201, *Amin Rasheed Shipping Corp v Kuwait Insurance* [1984] AC 50.

12 If it had applied the proper law, the court should have attempted to ascertain the express or implied choice of the parties. In the absence of such a choice, the court could have sought objective connecting factors, such as the parties' domiciles, as discussed above. It should have determined what the parties' domicile was in 1991, when the prenuptial agreement was made. However, the court determined that the wife was not domiciled in the Netherlands at the time of the divorce as it observed that the wife "might have spoken of returning to the Netherlands with the family, but she was entitled to change her mind", reflecting on her current circumstances rather than those at the time of making the prenuptial agreement in the Netherlands. There is no evidence that the court applied any factors relevant to determining the proper law of the agreement.

13 The Netherlands is probably the parties' domicile at the time of marriage. A matrimonial property agreement executed in the parties' domicile, with no indication of the parties' chosen choice of governing law, is likely to be governed by the law of their domicile.[12] If Dutch law applies, it is likely that the agreement is valid, as the agreement was executed by two adults before a notary public in the Netherlands. The court's assumption of validity is probably consistent with the result of applying the proper law in this case.

C. Which law governs the parties' rights to the matrimonial assets?

14 The court held:

> I am thus of the view that the petitioner's domicile is not that of the Netherlands. That being so, I may still consider whether this court ought to give effect to the prenuptial agreement as a document between the parties that ought to be enforced irrespective of where their domicile might be.

15 This gives a clue on how the court in fact viewed the relevance of the law of the parties' domicile. It suggests that the court might have thought that the prenuptial agreement would be recognized and given effect if the law of the Netherlands as the parties' domiciliary law was applicable. The court ultimately relied on s 112 of the Women's Charter to justify giving effect to the agreement even though the Netherlands was found not to be the parties' domicile.

12 Tan Yock Lin, *supra* n 8, at p 275.

16 In the absence of an agreement, the matrimonial domicile of parties determines their rights to matrimonial property. For example, whether the community of matrimonial property system or the separation of ownership system applies to the spouses is determined by their matrimonial domicile. Domicile governs the effects of marriage, of which the holding of property is one. However, where there is an agreement, the proprietary incidents of marriage may be altered. Thus, if the agreement is valid, the *lex fori* gives effect to the agreement in accordance with the proper law. It is not necessary or relevant at this stage what the domiciles of the parties are.

17 Here, there is an agreement, which is probably valid. In such a case, the law of the domicile of the parties yields to the parties' agreement in accordance with the proper law. However, whether the agreement ought to be given effect depends on the forum's application of the Women's Charter.

IV. Forum's application of Women's Charter

18 When parties seek matrimonial relief in Singapore such as a divorce, the court has jurisdiction over the parties in making orders dissolving the marriage and granting orders relating to the custody of children, division of matrimonial assets and maintenance. The jurisdiction and powers in s 112 of the Women's Charter are ancillary to the courts' divorce jurisdiction.[13] Thus if the court has jurisdiction to grant the divorce, it can exercise its powers under s 112 to order a just and equitable division of the parties' assets. The court has the jurisdiction to override the parties' agreements in accordance with s 112 as long as it had jurisdiction to grant the divorce.[14]

A. Recent trend is to uphold parties' agreements as consent orders

19 It has been argued elsewhere[15] that the modern trend is that the courts will give effect to agreements made by spouses by incorporation of the terms in consent orders. In *Tan Siew Eng @ Tan Siew Eng Irene (m.w.) v Ng Meng Hin*,[16] the High Court made an order following the terms of the Settlement Agreement which had been extensively negotiated by the

13 See *Ng Sui Wah Novina v Chandra Michael Setiawan* [1992] 2 SLR 839 at [26].
14 Tan Yock Lin, *supra* n 8, at 289-291.
15 Debbie Ong, "When Spouses Agree" (2006) 18 SAcLJ 97.
16 *Supra* n 2.

parties, although subsequently repudiated. Despite the repudiation, the agreement still gave the best indication of what was a just and equitable division particularly when there is a lack of full disclosure of the assets, which makes the task of division tremendously difficult for the court. The focus of the court is to reach what is fair rather than to apply the technical rules of contract law.

20 However this respect for the parties' autonomy is balanced against the court's commitment to the public interest of ensuring that fundamental family obligations are fulfilled and financially weaker family members adequately protected. In *Wee Ah Lian v Teo Siak Weng*,[17] the Court of Appeal ultimately gave effect to the parties' agreement but cautioned that even if parties have reached a prior agreement, the court will, in the exercise of its discretion under s 112 decide whether it ought to uphold the settlement. The court held in *Wee Ah Lian* that:

> it is incumbent on the court to see that these provisions of the section are not violated when ordering a division of matrimonial assets following the granting of a decree of divorce, and the same would apply where the court's intervention is sought notwithstanding that the parties may have reached an agreement before seeking the court's intervention.

21 Thus while the modern policy "favours the making of private agreements,…traditionally the law has been reluctant to view the financial consequences of marriage breakdown as a purely private concern".[18] The Women's Charter attempts to uphold both policies of supporting private agreements and giving the court some power over the matter; s 112 provides in sub-s 2(e) that the court should take into account "any agreement between the parties with respect to the ownership and division of the matrimonial assets made in contemplation of divorce."[19]

22 *Tan Siew Eng* and *Wee Ah Lian* demonstrate the valuable relationship between marital property agreements and the scheme in s 112. An agreement is a helpful indication and guide on what is a just and equitable division under s 112. Following the terms of the agreement upholds the spouses' autonomy to make their own arrangements. Further,

17 *Ibid*.

18 Cretney, Masson and Bailey-Harris, *Principles of Family Law* (Sweet & Maxwell, 7th Ed, 2002) at p 321.

19 See the similar approach in England: Lowe and Douglas, *Bromley's Family Law*, (Oxford University Press, 10th Ed, 2006) at pp 1012-1014.

the marital property agreement is treated differently from other agreements. In general, a contract which is technically invalid cannot be enforced. However, when a court exercising its powers under s 112 considers a contract between spouses providing for division of matrimonial assets, it may still give effect to the terms of an invalid contract if it is satisfied that they reflect a just and equitable arrangement. But this is not to say that agreements will always be given effect. In a converse situation, a valid property contract made between spouses may not be given effect if the terms are not just and equitable under the scheme in s 112. This is discussed below.

B. Agreements made between spouses: Prenuptial and postnuptial

23 The cases prior to *TQ v TR* in Singapore have involved postnuptial agreements, in particular, agreements made in contemplation of divorce or during divorce proceedings. But should prenuptial agreements be similarly treated? It has been suggested that:

> Suppose a couple made such a pre-nuptial agreement, entered into marriage and lived together as husband wife, should their pre-nuptial agreement be disregarded if indeed they wished to divorce 3 years into the marriage? An agreement made a few years prior to divorce is a fairly recent agreement which could indicate the fairest way of dealing with the spouses' financial issues. The focus of the court may no longer be whether the agreement is a pre-nuptial or post-nuptial agreement, but whether the agreement is sufficiently recent to reflect the current circumstances of the parties.[20]

24 *TQ v TR* supports this proposition that prenuptial agreements can be valid, effective and useful. However, the case involved a prenuptial agreement made sixteen years earlier. Unfortunately, it was given effect without considering whether or not it reflects current circumstances or violates the broad scheme of s 112. It would have been a much stronger judgment if the agreement had been enforced only after taking these considerations into account. It has been argued elsewhere that this approach of upholding the contract and declining to make an order under s 112, an approach used in *Wong Kam Fong Anne* v *Ang Ann Liang*,[21] may suggest that the private interests of the spouses to contract freely could play a more important role than the public interests of

20 Debbie Ong, *supra* n 15 at 113.

21 [1993] 2 SLR 192. In this case, the parties made a settlement agreement some years before the divorce proceedings which stated that the wife was the legal and beneficial owner of the matrimonial home. The court gave effect to the agreement and declined to use its powers under s 112.

ensuring that the statutory principles in the Charter are not violated. For this reason, the stance in *Wong Kam Fong Ann* may no longer be indicative of the modern position.[22]

25 Mature parties who enter into a prenuptial agreement may be fully aware of what they are agreeing to. They may be educated, well-informed and economically independent adults. But the prenuptial agreement cannot be treated on the same footing as ordinary contracts. Parties to a prenuptial agreement uniquely enter into it without the ability to weigh the "risks" involved. It is impossible for these parties to calculate their future needs and the future children's needs. In fact, whether they will have children and how many children they will have cannot be known at the time of the agreement. Unlike other contracts where the risks can be more fully appreciated at the time of contract, the prenuptial agreement may bind parties in situations that are impossible to predict. No premarital marriage preparation course can fully convey to a couple the challenges that lay ahead in a marriage nor the pain that broken relationships can bring. The emotional costs of a divorce are high. A party may expect that both parties will discharge their responsibilities and will remain economic equals. For example, a wife may never have fully appreciated what she would have had to give up to raise the children because her husband fails to discharge his responsibilities to the family. She may end up economically disadvantaged by the marriage despite starting off with the optimistic assumption that both marriage partners will discharge their responsibilities and that she could remain an economic equal.

26 The Court of Appeal in *NK v NL*[23] explains that:

> The division of matrimonial assets under the Act is founded on the prevailing ideology of marriage as an equal co-operative partnership of efforts. The contributions of both spouses are equally recognised whether he or she concentrates on the economics or homemaking role, as both roles must be performed equally well if the marriage is to flourish. When the marriage breaks up, these contributions are translated into economic assets in the distribution according to s 112(2) of the Act.

27 Thus the scheme in s 112 involves an evaluation of all circumstances at the end, not the beginning, of the marriage. It takes into

22 *Supra* n 13 at 110-111.
23 [2007] SGCA 35 at para 20.

account the history and contributions of each party to the marriage and aims to divide the assets in a just and equitable manner.

28 Despite these concerns, the law can still uphold the parties' autonomy to a substantial extent. It need not treat all prenuptial agreements as invalid, but the law must reserve in the court the power to override any agreement which may not be fair and equitable in accordance with the provision in s 112 of the Women's Charter. But it does not follow that the court should interfere with or override every agreement made between spouses.

29 When parties divorce and wish to settle their financial affairs, a sensible approach is to give effect to all or some of the terms of the parties' agreement (whether prenuptial or postnuptial) as a consent order, provided the terms do not transgress the broad scheme in s 112 of the Women's Charter. Such agreements are not enforceable until they are approved by the court by incorporation of the terms into the consent order. Section 116 of the Charter on maintenance settlement employs the same technique; agreements in respect of capital sums in settlement of future claim to maintenance are not effective until approved by the court.[24] In determining whether an agreement violates the scheme in s 112, the court need not go into the details of the parties' specific circumstances or contributions nor consider all the factors in s 112(2). Where the terms appear broadly to be within the range of results that an application of s 112 may yield under the circumstances presented to the court, the court incorporates the agreement into a consent order of court. It should not be difficult for fairly negotiated agreements to fall within the scheme in s 112. The legal effect of the terms of an agreement incorporated into a consent order is derived from the court order and not from the contract. Non-compliance may result in committal proceedings rather than merely a breach of contract.

30 In England, the approach is demonstrated in *Xydhias v Xydhias*[25] which has held that:

> The only way of rendering the bargain enforceable, whether to ensure that the applicant obtains the agreed transfers and payments or whether to protect the respondent from future claims, is to convert the concluded agreement into an order of the court. … thereafter the rights

24 See *Chia Hock Hua v Chong Choo Je* [1995] 1 SLR 380 for an application of this provision. See also Debbie Ong, *supra* n 15 at 101-103.

25 [1999] 1 FLR 683. See also case comment on the case in Stephen M Cretney, "Contract Not Apt In Divorce Deal" [1999] 115 LQR 356-360.

> and obligations of the parties are determined by the order and not by any agreement which preceded it.

31 *Xydhias* was applied more recently in *Cox v Cox*[26] where the High Court held that:

> An agreement between the parties for the purpose of resolving finally between themselves their financial affairs upon divorce would not have amounted to a contract enforceable at law. This is because an order of the court is required to achieve that purpose: see *Xydhias v Xydhias* [1999] 2 All ER 386, especially at 394e to 396b per Thorpe L J. Hence, if the Divorce Agreement were otherwise a legally binding contract, it would be impugnable on this ground, which I shall call the "Xydhias flaw".

32 The reason for the *Xydhias* approach is that the court must retain the ultimate control over issues as important as these. Giving effect to the spouses' agreement as consent orders respects the private interests of the spouses while maintaining the public interest of ensuring that all such agreements come under the court's scrutiny.

33 This approach reflects the practice already adopted in respect of a large number of cases in the Family Court. Agreements reached during divorce proceedings, whether through mediation or otherwise, are routinely converted into consent orders supporting the exhortation in s 50 of the Charter which promotes the harmonious resolution of family disputes without resorting to court adjudication. These settlement agreements, usually made during divorce proceedings, will reflect the circumstances and needs of the parties at the time of breakdown. However, where the settlement agreement is made not during divorce proceedings but a few years earlier in contemplation of divorce, the court should be attentive to whether the agreement remains just and equitable under the circumstances contemplated by s 112. *A fortiori*, in a prenuptial agreement, the court should be alert to whether the terms are fair in the light of the history of the marriage and the current needs of the family members, including the children who were unlikely to have been born or contemplated at the time it was made.

V. Conclusion

34 With globalization comes an expected rise in marriages with foreign elements. Non-Singaporean families settling down in Singapore

26 [2006] EWHC 1077; [2006] BCC 890 (Ch D).

as well as international marriages between Singaporeans and non-Singaporeans will give rise to more challenging issues involving the conflict of laws. In *TQ v TR*, there were a few challenging issues. One involves the determination of the choice of law rules applicable to a foreign contract. Another is whether a prenuptial agreement should be recognized and given effect and if so, how they should be enforced in Singapore.

35 On the latter issue, it has been remarked in England that the "merits of binding prenuptial agreements as a means of enhancing predictability of outcome and encouraging private ordering are likely to return to the fore in the near future."[27]

36 *TQ v TR* is a progressive step for Singapore in supporting such "private ordering". It is suggested in this note that the law should balance the twin interests of encouraging private settlements and ensuring fairness at the end of marriage. Hopefully if couples are aware that the court retains the ultimate control over all agreements, they will attempt to negotiate agreements which are objectively fair to both parties. When agreements are not exceptionally unfair to one party, the law should give effect to them and in time, develop a record of cases which gives confidence that such private agreements will be upheld by the courts. While there is a possibility that a court may override some agreements, there should be sufficient confidence that the court will not interfere unnecessarily so that it remains worthwhile for parties to make agreements, whether prenuptial or postnuptial.

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27 Lowe and Douglas, *supra*, n 19 at 1014.