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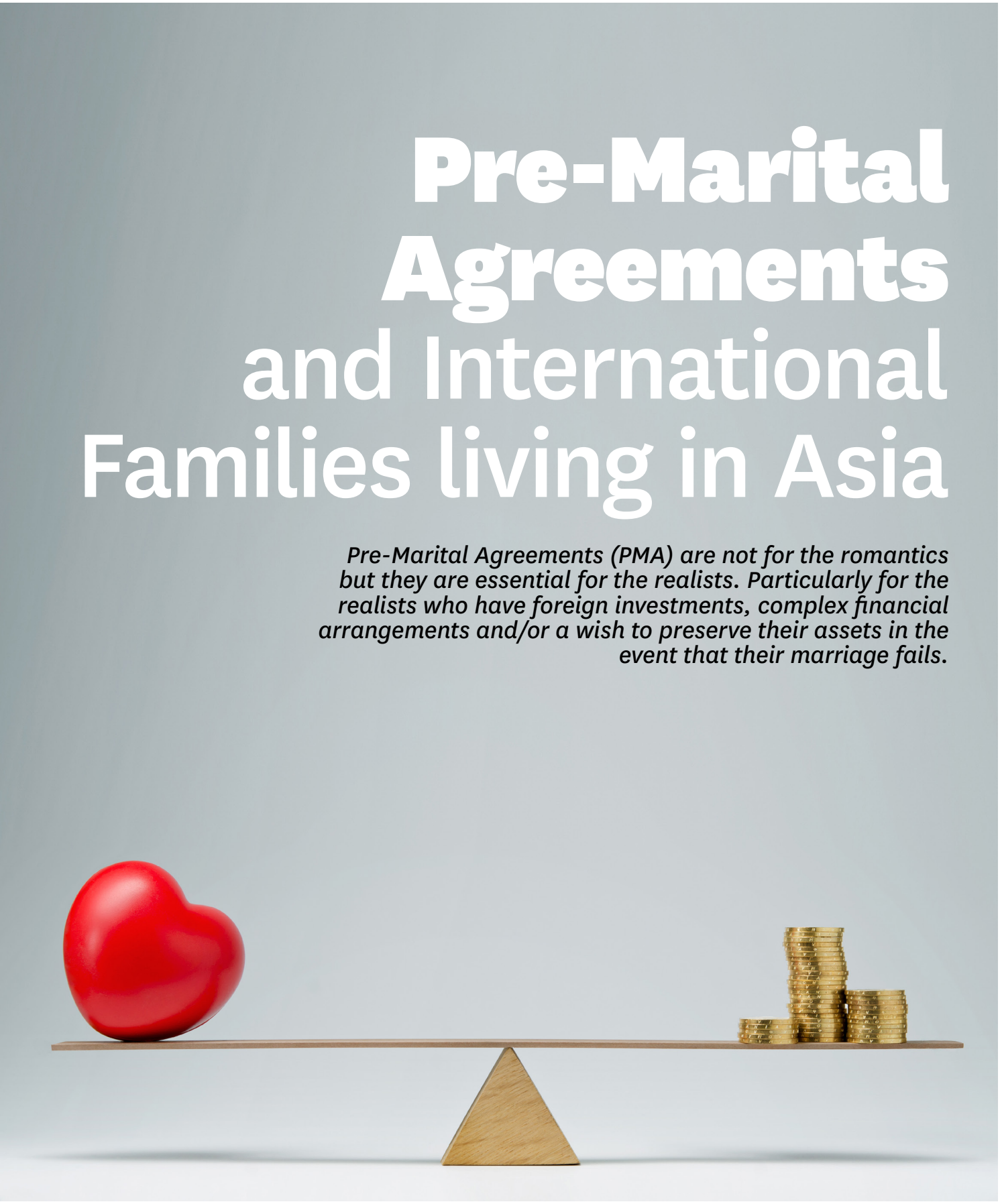
Pre-Marital Agreements and International Families living in Asia

Pre-Marital Agreements (PMA) are not for the romantics but they are essential for the realists. Particularly for the realists who have foreign investments, complex financial arrangements and/or a wish to preserve their assets in the event that their marriage fails.



BY:
Elizabeth Hicks
Bryan Cave Leighton Paisner
Ruben Sinha
Bryan Cave Leighton Paisner

PRE-MARITAL AGREEMENTS (PMA) ARE NOT FOR THE ROMANTICS BUT THEY ARE ESSENTIAL FOR THE REALISTS. Particularly for the realists who have foreign investments, complex financial arrangements and/or a wish to preserve their assets in the event that their marriage fails. According to some recent reports, around 85% of Asia's billionaires are first generation. Over the next 20 to 30 years, we are likely to witness substantial amounts of that wealth being transferred. Doesn't it therefore make sense to try and ensure that the transfer of any wealth is because you have thought about it and agreed it in advance rather than it being what the court has ordered following a lengthy and expensive contentious divorce?

A carefully and properly crafted international pre or post marital agreement can be used as an effective asset protection tool and, in the right circumstances, will be enforced by the courts in Hong Kong, Singapore, London and even China. However, there are many pitfalls, pressures and complex issues that need to be considered if a PMA is to prove effective.

A Summary Of The Court's Approach To PMA's

In Singapore, divorce is governed by the Women's Charter 1961. A PMA must not contravene any express provision of or legislative policy within the Women's Charter. In addition a PMA in Singapore is a contract and as such, general contractual provisions apply. The Court of Appeal upheld a PMA in the case of TQ -v -TR[1] but made it plain that each case is looked at on its own facts. In that case, the husband was Dutch and the Wife was Swedish and the PMA had been prepared under Dutch law. The couple had agreed that if they were to divorce it would be governed by Dutch law. The Court of Appeal in Singapore made it plain that any PMA must satisfy the requirements of basic legal contracts under Singaporean law. In other words, there must be consideration and there cannot be any misrepresentation, fraud, duress, unconscionability or undue influence. While the courts in Singapore are not bound to follow the terms of a PMA[2], provided that the above criteria are met, they will consider whether to do so. It is also apparent from TQ-v- TR that considerable weight was given to the fact that the parties were both foreigners and there is at least a suggestion that a foreign law agreement is more likely to be binding than a Singapore law agreement, especially if it does not provide for maintenance.

ELIZABETH HICKS
Bryan Cave Leighton Paisner

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While PMAs are not automatically legally binding in Hong Kong, two significant decisions (in London and Hong Kong)[3] have shown that the courts in Hong Kong have taken a significant step in that direction.

The Hong Kong Court of Final Appeal's decision in SPH v SA[4] fundamentally changed the landscape in respect of PMA's when it endorsed the principles and law established in the earlier UK Supreme Court decision of Radmacher v Granatino[5]. One word of warning however from the Court of Appeal in Hong Kong was that if a PMA merely deals with the election of separate property but does not go on to consider making provision for housing and income needs, it is unlikely to be binding.

In the case of Radmacher -v- Granatino the husband and wife married in London in 1998. The husband was French and the wife German. The wife came from an Ultra High Net Worth ("UHNW") family. They executed a PMA before a notary in Germany three months before the marriage at the

1 [2009] 2 SLR 961
2 In AOO v AON [2011] SGCA 51 the Court of Appeal subsequently confirmed 'such an agreement cannot oust the jurisdiction of the court'.
3 Hong Kong family law broadly follows that in England
4 [2014] 17 HKCFAR 364
5 [2010] UKSC 42

RUBEN SINHA
Bryan Cave Leighton Paisner

instigation of the wife. On the basis the PMA was signed, the wife was due to receive a further portion of her family's very considerable wealth. The PMA was subject to German law and provided that neither party was to acquire any benefit from the assets of the other during the marriage or on its termination. At the time, the husband was working as a banker in the City of London. He declined the opportunity to obtain his own independent legal advice on the PMA. The parties separated in October 2006 after 8 years of marriage with two daughters aged 7 and 4. By that point, the husband had left banking and moved into an academic role at a much reduced salary.

The High Court judge considered the existence of the PMA, but reduced the weight to be attached to it because of the circumstances in which it was signed (it was in German, there was no financial disclosure, it hadn't been translated into French and the husband didn't obtain independent legal advice). The husband was initially awarded a total of £5.56m (the Wife's wealth was in excess of £50m) to include a home in London and Germany and a capitalised maintenance fund of £2.335m which would give him an annual income of £100,000 for life.

The Court of Appeal and subsequently the Supreme Court significantly reduced the husband's award. Ultimately, the Supreme Court ordered that the husband's £2.5m London home should revert to the wife once their youngest daughter turns 22 and that his maintenance fund should be significantly reduced to provide him with an income until his responsibilities as a home-maker come to an end, instead of for life.

The Supreme Court established the core principle that a court should give effect to a PMA 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. Fairness is very much an elastic concept and, while the Supreme Court highlighted certain circumstances in which a PMA may be found to be unfair, it will always be fact and case specific. PMAs are not automatically binding in a contractual sense and parties cannot, with the use of one, oust the jurisdiction of the court. It remains the position that the court, not the PMA, will ultimately determine how a couple's assets and income should be divided on divorce. However a well drafted PMA is likely to be upheld provided that it is fair, meets the needs of both parties, is entered into at least 28 days before the marriage, both parties have their own lawyers and there is some disclosure.

"IN CHINA, THE DIVORCE RATE IS GROWING BUT IT APPEARS THAT PMA'S ARE STILL NOT WIDELY CONSIDERED THERE. ANY PROPERTY ACCUMULATED POST THE MARRIAGE IS DEEMED TO BE COMMON PROPERTY AND WILL BE DIVIDED EQUALLY BETWEEN A COUPLE ON A DIVORCE. "

In China, the divorce rate is growing but it appears that PMA's are still not widely considered there. Any property accumulated post the marriage is deemed to be common property and will be divided equally between a couple on a divorce. However there are often issues regarding what has been accumulated after the wedding and what happens, when for example, one of the couple's parents assist financially with buying a home. While PMA's are not common place, there is (an oblique) reference to them in the Marriage Law 2001. Article 19 refers to all income and capital being joint property unless the parties have agreed otherwise. A PMA will have the effect of a civil contract - the only stipulation is that it must be in writing. There have been two published interpretations to the Marriage Law 2001 which deal with PMA's. The first in 2001 dealt with a third party's knowledge of a PMA when considering the effect of the PMA on the repayment of a loan. It was held that it was for the husband and wife to show that the third party knew of the existence of the PMA. The second interpretation was in 2003 which dealt with the clarification of property that was subject to joint ownership and part of the PMA. These interpretations both show that the Courts in China will give consideration to the existence and terms of a PMA.

Choice Of Law In A PMA

It is important to remember that even if the parties agree the choice of law in a PMA, the Courts of that particular country still needs to have the jurisdiction to deal with the divorce and associated financial remedy proceedings.

In Hong Kong, the courts will be able to deal with the divorce provided that either of the parties is 1. Domiciled in Hong Kong at the date of the divorce petition; 2. Habitually resident there for 3 years before the date of the petition; or 3. Either party has a substantial connection with Hong Kong at the date of the petition. The courts have interpreted substantial connection very broadly, but there must be physical presence.[6]

In Singapore either of the parties have to be domiciled or habitually resident there for 3 years before starting divorce proceedings - there is no catch it all provision of a substantial connection.

In China the position is more complicated and will depend on whether both parties are Chinese citizens or one or both are foreigners. Essentially however either spouse must have been habitually resident in China for a year to start proceedings and in theory if the divorce is consensual it should be relatively straightforward. However, it seems that in 2018 some local authorities in China have insisted the divorcing couple complete a quiz before being granted a divorce and the higher the couple score, showing what they know about the other's likes and dislikes, the less likely it is that they will be granted a divorce.

In England and Wales, Regulation Brussels II bis currently applies. This means that to start divorce proceedings, either both parties are habitually resident there OR both were last habitually resident and one still lives there OR the respondent to the divorce is habitually resident there OR the applicant is habitually resident there and has resided there for 12 months before starting the process OR the applicant is habitually resident and resided there for 6 months before starting the process and has their domicile there OR they are both domiciled in England and Wales. The courts in England and Wales have drawn a distinction between being habitually resident or simply resident in a plethora of cases[7] and recently considered in detail what it means to acquire a domicile of choice.[8] AZS & another -v- AZR[9] is a Singapore case which clearly demonstrates the need to choose the governing or applicable law which should be applied in the event of a divorce. Under Singapore law, it is possible to choose the governing law which applies to a contract (eg a PMA). If no such law is expressly chosen, then the courts will imply the choice of law. If there is no implied choice then the courts will choose the system of law with the closest and more real connection to the contract. The case of AZS & another -v- AZR involved a French couple who had married in France and then moved to Singapore during the currency of their marriage. The PMA was French; it referred to the French Civil Code in some detail; the witnesses to it were

6 ZC v CN [2014] HKCA 389
7 See Marinos -v- Marinos [2007]EWHC 2047, Munro -v- Munro [2007] EWHC 3315, LK -V- K [2006] EWHC153, V-v- V [2011] EWHC 1190
8 Very recently in Kelly -v- Pyres [2018] EWCA Civ 1368 the Court of Appeal considered a couple who each had domiciles of origin outside of England and Wales and had lived extensively outside of England during their lives and during the marriage. It held that the wife had not acquired a domicile of choice in England as she had not shown that she had an intention to establish her domicile there (despite wanting to retire there) and had an emotional detachment to England, having never demonstrated a personal nexus to it having never chosen to spend time there.
9 [2013] 3SLR 700

French. There was a choice of law clause which referred to France. On the marriage breakdown the Wife issued divorce proceedings in Singapore and the Husband issued in France. The Singapore High Court concluded that the correct forum for the divorce was France. Where the divorce (and not the marriage) takes place can have a significant bearing on the financial outcome. Therefore it is worth considering the choice of law to be applied in the event of a divorce when drafting a PMA. At the very least the Court will consider it as evidence of both parties' intentions at the time the PMA was prepared.

Hong Kong (like England) is, compared with most other jurisdictions, still regarded as being very generous. The issue of jurisdiction and how that will be dealt with in a PMA is therefore always important. In the case of an UHNW client who is based in Hong Kong (or outside Hong Kong but with a substantial connection to Hong Kong) but perhaps also has connections and spends time living elsewhere, such as London or Singapore, it may be possible to agree an exclusive jurisdiction clause in the PMA. In those circumstances, if possible, the PMA should specify a jurisdiction in which the family courts are less generous than Hong Kong - such as Singapore. UHNW clients and families need to be aware of the issues around potential 'forum shopping'. A sudden or unexpected request by a spouse that the family moves 'temporarily' back to Hong Kong with the children from, say, Singapore could be the start of a carefully planned forum shopping strategy. Only four months of 'integration' of the children at school in Hong Kong could be enough to change their habitual residence to Hong Kong and, in the process, solidify the prospects of a divorce proceeding there.

Tips To Bear In Mind:
Planning ahead & Communications.

Anyone considering a PMA must understand that, in the event of a divorce in Hong Kong or England, the court will likely see the lawyers' files relating to the PMA (not just the agreement itself) and, also, communications directly between the parties. The paper trail is key if later on there are arguments about fraud, misrepresentation or pressure. At the outset, advisers will need to know about any conversations going on in the background. It is prudent to review all communications directly between parties which make any reference to the PMA. This could and should include emails, social media, text and WhatsApp messages. Advisers will need to look out for warning signs and, in particular, any evidence that one party is not genuinely prepared to sign the PMA.

There are a number of English cases[10] on the issue of undue pressure or duress and, time and again, a divorce petition is filed and the financially weaker party will assert duress or pressure in a bid to undermine the PMA. As referred to above, ideally a PMA should be signed at least 28 days before a marriage in order to avoid these types of arguments. Planning ahead is therefore key and it is never too early to start sensible discussions. If time is too short, consider a Post Marital Agreement instead.

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Legal advice & financial disclosure.

In Hong Kong and England and Wales, if a PMA is to be upheld, the parties will need to have entered into it with a full understanding of its implications. To that end, while not essential, it is preferable that both parties to a PMA obtain independent legal advice. When UHNW clients are involved, it is important that lawyers with experience of preparing international PMA's are instructed. It is equally important to ensure that, assuming one party has a lawyer, the other is at the very least also given the opportunity to obtain independent legal advice. If, having been given the opportunity, they choose not to do so that must be carefully recorded in the recitals of the PMA.

The recent Court of Appeal case in England of Versteegh -v Versteegh[11] concerned a Swedish couple who had married in Sweden with a Swedish PMA but moved to England the day after the wedding. The wife argued, inter alia, that the PMA should not be upheld as she was unaware that the implications of signing it when she was soon moving to England to live would be prejudicial to her. The Court did not accept this and said that simply because England operated a discretionary system when dealing with the division of property on divorce it did not mean that the wife could not understand the implications of the PMA. The Court of Appeal also reiterated that PMA's in England and Wales need to be fair and should ensure that needs are met.

There should be an exchange of financial disclosure for PMA's. Often, UHNW or high profile clients and their families may be reluctant to provide precise details and

10 Most recently KA v MA [2018] EWHC 499 (Fam) in which the wife unsuccessfully argued that she had been under undue pressure to sign a PMA
11 [2018] EWCA Civ 1050

values of, for example, substantial assets held within family trusts or companies. The way around this is to disclose the interest in broad terms and/or without specific reference to the value of the underlying assets. It is however then crucial that the PMA carefully records that the other party is satisfied with the disclosure which has been produced and will not in any way rely on the fact there had not been very specific disclosure in an attempt to undermine the PMA later on.

Proper financial provision.

A PMA which leaves a financially weaker spouse with very little (or nothing) is likely to be worthless. Suitable financial provision - which at the very least covers the weaker party's reasonable needs – should be included in any PMA. Without that, a PMA will almost certainly be considered unfair and, accordingly, afforded very little or no weight by a court.

The risks of entering into a PMA which does not make appropriate financial provision for the financially weaker spouse were highlighted in the English case of Luckwell v Limata[12] and echoed by the Court of Appeal in the recent decision of Versteegh -v Versteegh (as above).

It always pays to include sensible and responsible financial provision in a PMA and to ensure that the financially weaker party's needs are met. The case of SPH v SA (referred to above) does not provide guidance on what will constitute 'fair' or reasonable financial provision in this context. The long running and ongoing case of JEK v LCYP[13] which involves a New Jersey PMA may provide some further guidance.

What is becoming increasingly clear from both Radmacher and the subsequent line of English authorities is that fair and reasonable financial provision may not necessarily mean outright capital for the financially weaker spouse. As a result, UHNW clients and families will, at the outset, need to think carefully about how any capital provision should be structured and whether, for example, all or part of a payment should be held on trust which then reverts back upon a triggering event or at a later date.

Think internationally.

International marriages are increasingly common and it is essential that advisers consider jurisdictional issues. Establishing where parties will be living and where they have their connections and interests will be key. Lawyers preparing a PMA will probably want to consult with other foreign lawyers to ensure that in the event of a change in location, the PMA will still be upheld in a foreign country.

It is also important to remember that in certain jurisdictions (particularly those governed by civil law), couples can often elect a property law regime which will then govern their matrimonial and non-matrimonial property. In jurisdictions such as France and Germany, a couple can elect to treat their own inherited property as separate property in much the same way as a Hong Kong PMA would seek to define and protect those assets. If they then move to Hong Kong, their elected property regime can be harmonised within a Hong Kong PMA so their intentions are clear.

Confidentiality.

UHNW and high profile clients will be keen to ensure their PMA does not become another tabloid or social media story. This is likely to be the case, particularly when a PMA includes, for example, specific details regarding financial matters or detailed recitals outlining very personal reasons as to why the agreement is being entered into. While it is often overlooked, careful thought should be given to including a detailed confidentiality clause to ensure the terms of a PMA, any subsequent divorce and all financial details remain private.

Increasingly, clients are also including 'social media' clauses designed to prevent deliberate acts of humiliation. For example, the parties to a PMA may agree that, in the event the marriage breaks down, neither of them will post, tweet or otherwise share via social media, positive, negative, insulting or embarrassing content or images of the other. There is currently some debate as to the enforceability of these types of terms, but they should always be considered.

Conclusion

A carefully considered and meticulously drafted PMA will provide some certainty, reduce risk and, ultimately, is likely to ensure costly, acrimonious and stressful litigation is avoided in the event a marriage breaks down. If not done properly, a PMA is likely to be useless. For an international couple (whether because they are from different countries or move abroad during their lives), it is foolish not to consider a PMA, particularly when there is a financial imbalance between them.

Romantic? No.

Sensible and responsible asset protection? Absolutely. ■

12 [2014] EWHC 502 (Fam). The PMA provided for each party to retain their own assets but the Husband had only debts and no income and the Wife had assets of £6.74m which was the family home (gifted to her by her family during the marriage pursuant to a further agreement which the husband signed). The Wife received regular allowances from her wealthy family. The court provided for the matrimonial home to be sold and for the husband to receive £900k to meet his housing needs but on the basis the property is sold when the youngest child is 22 and he receives 55% of the equity to rehouse at that time. A PMA which provided for his needs would probably have been upheld and avoided huge legal fees.

13 [2015] 4 HKLRD 798 (Ruben Sinha the co-author is part of the team advising the husband)