

Russia and CIS: prenuptial and postnuptial agreements to be binding in England

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In February 2014 the Law Commission of England and Wales published their proposals for the law on Qualifying Nuptial Agreements (QNAs), together with a draft Bill, to be put before Parliament at some point in the future.

For the first time in English legal history, prenuptial and postnuptial agreements will be absolutely binding. It is not yet clear when the new law will come into force and as yet the Government have not indicated whether they will endorse the proposals. In reality, the new law is unlikely to be brought before Parliament for another 1-2 years and therefore is unlikely to be in force for 3 years or so.

For Russian and CIS clients, it will be a great attraction to have a prenuptial and postnuptial agreement which is absolutely binding in England. At present the law is set out in our Supreme Court case of *Radmacher v Granatino* which makes clear that prenuptial agreements are not binding, and the same test applies for postnuptial agreements. However, the *Radmacher* test has helped to place greater weight on prenuptial agreements. If a prenuptial agreement is procedurally fair, and the terms are not unfair in the eyes of the Judge at the date of the divorce, then the couple will be held to the terms of the Agreement.

As a result of the Radmacher test, many foreign Agreements, including marriage contracts electing separation of assets, have carried significant weight on divorce in England.

For international couples, the problem with the new proposals and draft Bill is three-fold. The first is that the draft Bill says that the new law will only apply to Agreements entered into after the date on which the law comes into force. The second is that to satisfy the necessary criteria to be a Qualifying Nuptial Agreement, there has to have been advice from an English lawyer as to the effect of the Agreement under English law. The third is that the criteria required generally for the Agreement to be a Qualifying Nuptial Agreement are onerous. Detailed disclosure has to be given and the Report suggests that where a person is a beneficiary under a trust, then a copy of the trust deed and trust accounts will need to be disclosed. There is an absolute 28 day rule; the Agreement must be entered into 28 days before the wedding.

Moreover the Report specifically states that if a foreign couple move to England then it will be necessary for them to enter into an English law postnuptial agreement if they want to have an Agreement which is a Qualifying Nuptial Agreement and so is binding. If they only want to retain their foreign law prenuptial agreement or marriage contract then that will still be subject to the Radmacher test. In practice this would mean entering into an English law postnuptial agreement prior to the couple arriving in England, otherwise as soon as they arrive in England, the economically weaker spouse could file for a divorce with no binding prenuptial agreement in force.

This creates a dilemma for couples getting married now. If they believe that they may come to live in England then a foreign law agreement which they enter into now will not count as a Qualifying Nuptial Agreement. When they come to this country they will then need to enter into an English law postnuptial agreement. Nonetheless it is better to enter into a foreign law agreement now, prior to marriage and at least have some protection against claims on divorce under the Radmacher test.

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