

Hong Kong Court of Final Appeal Upholds Landmark Forum Case Involving Nuptial Agreements

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Withers are delighted to have taken the lead in a ground-breaking case in Hong Kong concerning prenuptial and separation agreements. “There is no question that more and more clients will be seeking the financial security that a pre-nuptial or separation agreement can provide as a result of the CFA case in which we succeeded for our client in Hong Kong”, said **Sharon Ser**, Partner at Withers, “and now we can offer them greater certainty of them being upheld in court”.

The Court of Final Appeal, the highest Court in Hong Kong, unanimously decided to uphold the Court of Appeal’s decision in the case of *SPH v SA* on June 9. The case involved a question as to whether the case could be heard in Hong Kong but also looked specifically at what weight should be given to the parties’ election in their pre-nuptial or post-nuptial agreements to have their marriage governed by the laws of a particular country. The case is very much a landmark decision in terms of how the family courts in Hong Kong are likely to consider prenuptial agreements in other cases.

*Background

*In this case the Husband and the Wife were born in Germany and both are German nationals. The Wife is also a permanent resident of Hong Kong. The parties met in Hong Kong in 2005 and married there in 2008. They both conducted business and paid income tax in Hong Kong. Prior to their marriage, the parties executed a prenuptial agreement which, importantly, provided that their marriage was to be governed by German law in Germany. The parties’ marriage was a short one and they separated in 2010. Following their separation, they executed in Germany a separation agreement which effectively discharged the prenuptial agreement and set out each of their rights and liabilities. In October 2010, the Wife issued divorce proceedings in Hong Kong and, in November 2010, the Husband applied to court for a stay of the Hong Kong proceedings on the grounds that Germany would be the more appropriate jurisdiction in which to have the case heard.

The Judge at first instance held that Germany was clearly and distinctly the more natural and appropriate forum for the case. In reaching his decision, the Judge placed considerable weight on the prenuptial and post separation agreements executed by the parties. He concluded that the balance of fairness would be achieved by staying the proceedings in favour of Germany, but without prejudice to the Wife’s right to apply for financial provision in Hong Kong following a divorce in Germany. The Wife appealed. The Court of Appeal allowed the Wife’s appeal on the ground that the Husband failed to meet the burden of proving that Germany was distinctly the more suitable and appropriate forum in which to hear the case. The Husband then appealed to the Court of Final Appeal and, in November 2013, his leave to appeal was granted.

Following a one day hearing on 12 May 2014, the five Justices of the Court of Final Appeal unanimously upheld the Court of Appeal’s decision in favour of the Wife.

The Court recognized that the issues before the court had a wide significance involving the impact of agreements to vary the parties’ matrimonial property rights under foreign law and separation agreements which purported to restrict the wife’s rights to claim maintenance. As the Court said, ‘this is an opportune occasion to consider whether *Radmacher v Granatino* represents the law in Hong Kong.’ The court unanimously decided that it did.

Radmacher v Granatino is an English Supreme Court case from 2010 in which the court gave clear guidance as to how the English court would deal with pre nuptial and post nuptial agreements. It was held that the court should give effect to an agreement which is freely entered into by both parties with a full understanding of its implications unless in the circumstances it would not be fair to hold the parties to their agreement. Previously in Hong Kong such agreements were not enforceable, but could be taken into account as one of the circumstances of the case.

The Court did have a word of qualification in respect of agreements reached in some civil law countries: the agreement may only be to adjust the matrimonial property regime in a civil law country rather than made in anticipation of divorce. The Court of Final Appeal said that, although a *Radmacher* type of prenuptial agreement should be upheld in Hong Kong, not all prenuptial agreements may be if they involve an adjustment to a contractual matrimonial property regime and that this remained a grey area both in England and in Hong Kong.

Sharon Ser, Partner and Head of the Family Law team at Withers, successfully represented the wife in the case and commented:

‘We are delighted that the landmark English case of *Radmacher* has been fully endorsed by the highest court in Hong Kong and further that the we now have clarification that prenuptial agreements and separation agreements should be treated in a similar way, bringing the treatment of prenuptial agreements in line with an earlier ruling of the Court of Appeal. Given the truly international nature of Hong Kong we anticipate there will be a growing number of ‘forum shopping’ cases in the region and, inevitably, these will often involve both pre and post nuptial agreements as they become increasingly used and recognised around the world. This is certainly an area practitioners will need to be able to advise upon.