

Jurisdictions and the pre-nuptial agreement: do it right

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If you are going to do it, take the time to do it right. That's the message coming from the courts about executing pre-nuptial agreements, particularly those that have a cross-jurisdictional element.

In the case of *IPEKÇI v McConnell (2019) EWFC 19*, Mostyn J was damning about a pre-nuptial agreement which sought to apply the law of the state of New York but which (among other things) had not been executed in accordance with the requirements of New York law.

"...it would be wholly unjust to attribute weight to this agreement when under the law that parties elected it would be afforded no weight", observed the Judge.

While there were other reasons for the pre-nuptial agreement not to be upheld in *IPEKÇI* (not least that it was manifestly unfair and it was only negotiated a few weeks before the wedding) a distinguishing feature was that the husband had not been advised by counsel familiar with the governing law and jurisdiction of the agreement. In fact, not only had the lawyer the husband was told to instruct acted for the wife in her previous divorce, but also he practiced English law and was not qualified to advise on the law of New York.

This is not the first time a cross-jurisdictional conundrum has undermined a pre-nuptial agreement of course. In *Brack v Brack [2018] EWCA Civ 2862* for instance the court had to debate the validity of three prorogation clauses (ie a clause by which the parties choose which court will have jurisdiction over a future dispute) in three separately executed pre-nuptial agreements.

One of the questions in the case was whether, as the agreements said, the City Court of Stockholm, Sweden should have jurisdiction to resolve any disputes arising out of separation. The Court of Appeal ultimately found the prorogation clause in one of the agreements invalid.

So a similar point arises: where there are cross-jurisdictional issues in pre-nuptial agreements particular care must be taken. But what are the practical steps for this?

First, speak with local counsel early. If they consider particular wording is necessary in the agreement, or there are certain documents that need to be completed, eg authenticated certificates complying with local laws, it is better to be aware of this from the off so that this is factored in throughout the negotiations.

Second, think about the pragmatics of execution. It goes without saying that it would be infuriating to spend considerable time and money agreeing the document only to realise the document will not be valid in a country you intend to live because, for example, you have not signed it in the correct way.

Third, timing. Planning the wedding will be stressful enough but a sure fire way to make this worse is if an agreement which you hoped would take a few weeks to tie up takes months because of the need to involve foreign counsel and to comply with a variety of jurisdictional considerations.

Hopefully the majority of people who enter pre-nuptial agreements will never have cause to look at them again once they're signed. But, among the range of things to consider – not least, of course, in an English agreement that it is 'fair' – be sure you don't overlook any cross-jurisdictional complications.

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