

Coronavirus: Foreign Marriage Contracts in Hong Kong – time to have a closer look

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I'm writing this at home on a wet Tuesday afternoon surrounded by my husband, my son, our domestic helper and the dog – 3 months ago I would have had the peace and quiet of my office. I suspect many of us here in Hong Kong are becoming increasingly familiar with working from home, whether as a result of the Coronavirus or because it is just something we started to do more often when the protests started to impact on our daily lives. On top of it all we cannot now go to the gym, the park, the cinema or easily enjoy a meal out in the company of friends.

Whatever the reason, we didn't expect to be spending so many days at home (cooped up with our spouse). There is no doubt that the current situation is placing significant pressure on relationships and cabin fever is starting to take hold. With the average Hong Kong apartment size less than 500 sq ft, tensions run high. And for those couples with children they have the added pressure of e-learning to contend with and trying to keep the children entertained when everything is shut. Let us not forget the increased risk of redundancy and pay freezes, all of which cause anxiety in a relationship.

For some, these difficult times give them reason to reflect on their circumstances and relationships. For many expats, the solution some months ago may simply have been to go back to their home country in the hope that everything would turn out alright. But with increasing border restrictions and the situation in Hong Kong right now looking better than most places, it seems that staying put might be best.

But in times of financial anxiety and nervousness about whether the marriage will last, there may be another matter that expats should be thinking about: whether their foreign marriage contract will be upheld in Hong Kong.

For many continental Europeans, at the time of their marriage they will have entered into a local marriage contract, with many choosing a marital regime of 'separate property', and signing the document before a notary the same day, or a few days prior to the wedding. If their marriage was to be dissolved in their home country, their marriage contract would be implemented more or less to the letter. There would be no invasion of property belonging to the other spouse, other than in limited circumstances by way of compensation. Assets brought into the marriage or from an external source such as an inheritance, and assets held in either party's sole name, would not be vulnerable to attack by the other spouse. These contracts offer good protection on divorce in the countries where they are signed.

Whilst such documents sound very much like pre-nuptial agreements, they aren't quite the same. Although Hong Kong has not (yet) seen many disputes involving pre-nuptial agreements before the Courts as is the case in other countries, such as in England, it is clear that the principles set out in the landmark 2010 English Supreme Court case of *Radmacher v. Granatino* apply in Hong Kong and that weight will be given to these agreements if it is shown that they are fair, there is an intention to be bound and there are no vitiating factors.

Here comes the main difficulty with foreign marriage contracts. In order for a pre-nuptial agreement to be given weight, the case-law tells us that both parties should have independent legal advice, there should be an absence of pressure or duress, the agreement should be signed a minimum of 28 days before the wedding and there should be an exchange of material financial information so that the financially weaker spouse is aware of the potential claims they may be giving up in the event of a future divorce.

Although it has become relatively common in Hong Kong for parties to waive the requirement for financial disclosure (despite the fact it is still advised), the real problem for many expats is that when they entered into their marriage contracts there was only one notary advising both parties, the 28 days requirement was most likely not met, and the contract could be perceived as unfair in circumstances where one party may, on its strict implementation, end up in a position of real financial need. There is much greater scope for the financially weaker spouse to argue it should not be upheld, and/or that they did not understand what they were signing up to.

To overcome these potential difficulties and the risk that the Court in Hong Kong will pay little or no weight to the marriage contract, a wealthy

spouse who entered into such an agreement would be advised to consider entering into a post-nuptial agreement here in Hong Kong, backed-up by some financial disclosure and with both parties having independent legal advice. With the wedding having taken place long ago, allegations of pressure or duress become obsolete.

It is essential to pick the right time to discuss these matters (it shouldn't be a trigger for divorce), but with many people looking at their wills and estate planning in the current climate, this might be one more thing to throw into the mix.

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