



A deal's a deal...or is it? - The key differences between English nuptial agreements and French marital contracts

06 April 2021

Emilie Helm, a dual French and English national and Senior Associate in the Family Department at Payne Hicks Beach provides clarity on the differences between English nuptial agreements and French marital contracts and what Anglo-French couples should be doing to protect their assets on marriage.

In England, many couples are now choosing to enter into a prenuptial agreement and consider it an essential part of their marriage planning. Although such agreements are still not legally binding in this jurisdiction, provided they have complied with the criteria set out below, couples should expect to be bound by them.

In France (and continental Europe), which is a civil law rather than a common law country like England, the situation is different. The very act of marriage creates a property regime. Couples must elect a matrimonial property regime to govern their assets and failure to do so will result in the couple having a default regime imposed upon them.

Given the differences in approach to the division of assets on divorce between England and France, it is vital that Anglo-French couples, or those with connections with either country, give careful consideration to the steps they may need to take should they wish to marry in one country but later live in another as, in this jurisdiction, a French marital contract would not be enforceable in the same way that it would on divorce in France.

In this article, I therefore set out the key differences between an English nuptial agreement (be it prenuptial or postnuptial) and a French marital contract, as well as some of the important questions Anglo-French couples should be considering before entering into them.

What is a French marital contract and how does it work?

In France, any couple wishing to marry must elect a matrimonial property regime to govern their assets. If a couple fail to do so, they will have a default regime imposed upon them.

These property regimes provide a structure for the organisation and division of a couple's assets. They set out how the assets should be treated on a divorce, as well as in circumstances of insolvency or death. The most common regimes can be summarised as follows:

- *Separation de biens* – in this regime, pre-acquired assets and liabilities are regarded as separate property. Assets acquired during the marriage are also considered to be separate

unless the spouses purchase the asset together. In those circumstances, ownership is proportioned by virtue of their respective contributions.

- *Communauté de biens* – in this regime, assets and liabilities acquired before and during the marriage are considered joint.
- *Communauté de biens réduite aux acquets* – in this regime assets and liabilities acquired prior to the marriage are considered separate but those assets and liabilities acquired during the marriage are considered joint unless the parties expressly choose otherwise.
- *Participation aux acquets* – this is an interesting regime which sits between *la separation de biens* and *communauté de biens*. Essentially, the liabilities and assets of the couple remain their separate property on divorce but they share jointly in any increase in value of those assets which has accumulated during the marriage.

What are the differences between the requirements for entering into a French marital contract compared to an English nuptial agreement?

French marital contracts are usually prepared and signed before a notary who acts for both parties. They are often signed in the days leading up to the wedding. The process forms a standard part of the marriage planning and tends to be very informal.

In England, where such contracts are not legally enforceable, the Supreme Court formulated a three part test in the landmark case of *Radmacher and Granatino* as follows:

“The Court should give effect to a nuptial agreement 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.”

In practice, this means that any couple entering into a prenuptial agreement should adhere to the following guidelines:

- 1 Ensure that there is no duress, or unconscionable pressure or significant imbalance in negotiating power;
- 2 Ensure that each party has all of the information which is material to his or her decision to sign the agreement. The presence of disclosure and independent legal advice tend to be persuasive that this has been achieved but not necessary;
- 3 Ensure the agreement is fair. There are many different strands to the concept of fairness but, in summary, the agreement must not leave one party in a predicament of real need whilst the other enjoys a sufficiency or more.

It is not possible to oust the jurisdiction of the English Court, which retains its discretion to uphold or reject a nuptial agreement. However, if these safeguards are met, then the couple should expect to be held to the terms of their agreement.

Can both English prenuptial agreements and French marital contracts deal with spousal maintenance?

No, a French marital contract cannot deal with spousal maintenance but, in limited circumstances, it can include clauses to choose the law applicable to those maintenance obligations.

However, an English prenuptial agreement can deal with spousal maintenance obligations provided that they are fair at the time of divorce and meet the needs of the spouse in question.

Will France recognise and uphold an English Nuptial agreement?

In France, a Judge in the context of divorce or a solicitor in the context of succession will apply the terms set out in a French marital contract.

However, the situation is more complicated when dealing with an international agreement.

The difficulty that the French Courts have with English nuptial agreements is that they usually deal not only with the division of assets but also with spousal maintenance obligations, the latter of which is not permitted in French marital contracts. In the past, French courts have taken English nuptial agreement into account provided those agreements deal very clearly with the assets of the spouses rather than with any obligations which could be categorised as “maintenance”. The interpretation of English nuptial agreements by French Judges will very much depend on the drafting of the relevant clauses within them, which is why legal advice must be sought from the outset when choosing to enter into such an agreement.

Will England recognise and uphold a French Nuptial Agreement?

No, not automatically. As previously stated, it is not possible to oust the jurisdiction of the Court.

In the past, English courts have been cautious about foreign marital contracts in general and not just those which are French. The reason is that these agreements tend to be much less formal than English prenuptial agreements. Most couples enter into them in the days preceding the wedding, without taking independent legal advice and often without seeing any disclosure.

However, the recent case of *Versteegh v Versteegh* [2018] has made it easier for foreign marital contracts to be upheld in England as the Court recognises that these informalities are commonplace. In other words, if the procedural standards which apply to the country in which the agreement is drafted are met the agreement should be upheld i.e. the lack of formality does not automatically mean that either party misunderstood the implications of the agreement. That said, it is still important that those wishing to rely upon a foreign marital agreement show that both parties fully understood the implications of entering into the agreement and that each had all of the information material to their decision. In those circumstances, the court is likely to give effect to the agreement unless it would lead to unfairness.

Ultimately, each case will very much depend upon its own particular facts and so there can never be any guarantees that a simple French marital contract will be enforced in England as it would in France in the context of a divorce.

What steps should Anglo-French couples take?

Anglo-French couples should give careful thought as to where they will want to live after their marriage and where their assets are located. They should then take specialist advice in each of the jurisdictions which may be relevant to them. Depending on the requirements and intentions of the parties, it may be that they need to have a document drafted by a specialist in each jurisdiction which reflects the terms of their agreement. This is known as a mirror agreement. It can be tricky to achieve parity in a mirror agreement given the different requirements and rules that apply to each country and the different manner in which each country deals with financial claims on divorce. Once again, this is why it is imperative to seek specialist advice at an early stage as some of these issues can be dealt with by drafting specific clauses. This is all the more important since Brexit. However, the full implications of Brexit remain unclear as there may be changes to the law which affect certain clauses within a nuptial agreement. Time will tell.

For more information on this, please do not hesitate to contact Emilie Helm, a Senior Associate in the Family department at Payne Hicks Beach who is a dual French and English national and can provide advice in both languages by email or telephone on 020 7465 4300.
