Le même mais différent

Izzy Walsh and Floriane Laruelle compare the contrat de mariage *with prenuptial agreements*

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Approximately 165,000 French citizens live in the UK (*Population of the United Kingdom by Country of Birth and Nationality*, ONS, 2015), and 157,000 British citizens in France (*What information is there on British migrants living in Europe?*, ONS, January 2017). These statistics mean that it is ever more important to have a basic understanding of how each legal system works and to be able to navigate between the two.

This article will consider the French variant of the prenuptial agreement, *le contrat de mariage*, the approach to such agreements in France, the approach to prenuptial agreements by the courts of England and Wales, and the relative parallels (or indeed otherwise) between the two types of agreements to be drawn.

Anecdotally, there has been a significant increase in the popularity of prenuptial agreements in the years following the decision in *Radmacher (formerly Granatino) v Granatino* [2010]). So, too, there has been an increase in marital agreements between French and English nationals, no doubt in part as a result of the change in attitude of the courts of England and Wales towards prenuptial agreements, but in part, too, as a result of the changing face of the population of London and the UK more generally.

The *contrat de mariage*

In one sense, the question to consider is not what a *contrat de mariage* is, but what it is not. If there is one *faux ami* to remember, it is this: the *contrat de mariage* is not the French equivalent to the English prenuptial agreement, it does not cover the same range of issues, nor does it have the same scope, or the same degree of enforceability.

The *contrat de mariage* sets the ground rules for each civil marriage that takes place in France and its role is to create the legal context for the parties' life as a couple by obliging them to elect the matrimonial property regime that will apply to them. It deals with the parties' ownership of assets during the marriage, and division of those assets on divorce. Essentially, the *contrat de mariage* disregards the notion of needs or fairness by adopting a purely contractual approach.

That is not to say that the French court will overlook the question of needs: that balance can be redressed by the judge granting spousal compensation or child maintenance. The *contrat de mariage* itself does not, however, deal with maintenance. That is a matter which remains the responsibility of the French court. As a matter of public policy any attempt by the parties to agree maintenance in advance would be rejected by the court.

The autonomy of the individual and the freedom to make their own agreement on marriage is the driving principle behind the concept of the *contrat de mariage*. The French Civil Code makes provision for four principal regimes dealing with the division of assets that a couple can choose to apply in their original form, or which they can personalise.

A matrimonial property regime will apply to every civil marriage in France and where a couple has not actively chosen a regime, the default regime of community of property will apply. Such a regime can, effectively, come into being without the couple knowing about it, which may be a particularly relevant factor where enforcement is sought in England.

French regimes

Community of property (default regime)

Under the default regime of community of property, each party to the marriage retains any property they acquired

prior to the marriage, or was gifted to them or inherited by them during the marriage, and that property will not fall to be divided by the court in the event of the breakdown of the marriage. Before, during and after the marriage the spouse to whom that property belongs can, under normal circumstances, administer it and dispose of it on his or her own. In contrast everything acquired during the marriage will be divided equally even if it has been purchased in sole names or funded by just one of the parties. This regime may be suitable in more straightforward cases, but may be inappropriate and very risky for certain individuals such as sole traders. The only means of changing the regime to a more appropriate regime is by concluding a marriage contract.

Universal community of property

This takes the default regime one step further by bringing almost all property into the matrimonial pot. When a couple chooses this regime, they agree that all of their assets will be owned jointly regardless of the nature of the asset, when it was acquired (before or after the marriage) or even how it was acquired (eg purchased jointly, donated to one party or inherited by one party). Specific items such as damages for personal injuries or personal clothing are still excluded.

Separation of property

Each spouse administers and has control (in terms of enjoyment and disposition) of their own assets during the marriage. There is no automatic joint ownership of any assets and therefore nothing to be divided on divorce. On divorce each spouse retains the assets in their sole names. Assets in their joint names are divided according to the proportions agreed at the time of acquisition. This regime is assumed by the French court to be the English approach to the distribution of assets upon divorce, and is often applied in cases with English aspects.

Participation in the marital acquest (*régime de participation aux acquêts*)

This regime is very common in practice. It is a fusion of separation of property and community of property. The court will calculate the increase in wealth of each party during the marriage and these gains will be shared equally. For example, if one spouse increased his or her wealth more than the other during the marriage he or she will become a debtor to the other for the difference.

Approach of the French courts to the *contrat de mariage*

The French court has no discretion to strike down a *contrat de mariage* simply on the basis of it being unfair or unjust, and as a result, the formalities for it to be considered a binding contract are much stricter than in England. For a *contrat de mariage* to be valid:

- it must take place prior to the marriage, although there is no specific requirement regarding timing prior to the celebration of the marriage; and
- it must also be concluded before a notary (*notaire*), who has a duty to inform both parties about the risks and consequences of the agreement: this is to ensure that both parties are given the opportunity to understand the significance and scope of what they are signing and it is as near as the French system gets to the English courts' requirement of fairness.

These conditions are the closest the French system gets to requiring independent legal advice, because unlike English law, French law recognises the impartiality of the *notaire*. The parties are not required to obtain independent legal advice for the *contrat* to be enforceable in France. Nevertheless, in more complex circumstances, the parties may still wish to have independent advice.

If these formalities are not met, the parties will be deemed to have elected the default regime.

Enforcing a *contrat de mariage* in England and Wales

The decision in *Radmacher* established that a prenuptial agreement can be given decisive weight in the courts of England and Wales. While the following are not absolute requirements for the court in this jurisdiction to uphold a prenuptial agreement, they are considered to be safeguards in the majority of cases:

- full and frank financial disclosure;
- independent legal advice; and
- a period of 21 days between the execution of the agreement and the celebration of the marriage.

In addition, it must not be unfair to hold the parties to the agreement in all of the circumstances of the case.

The Law Commission proposed the introduction of qualifying nuptial agreements in its report *Matrimonial Property, Needs and Agreements* (Law Com No 343), ie that prenuptial agreements should be legally binding if they satisfy certain conditions based on the *Radmacher* principles. However, those proposals are still being considered by the government.

Where a prenuptial agreement is concluded in a language foreign to one or other of the parties, as a further precaution the contract should be translated into that party's mother tongue, and an interpreter should be present when the parties sign the contract. *Radmacher* was distinguished on its facts in this respect, but it is nonetheless considered desirable.

When it comes to enforcement of a *contrat de mariage* in this jurisdiction, the courts have seemed inclined to apply the test as in *Radmacher* just as it would for a prenuptial agreement, ie by giving decisive weight to such an agreement providing the court considers that the parties entered into the agreement freely and with a full appreciation of the implications.

In *Z v Z (No2)* [2011], for example, Moor J found that the *contrat de mariage* should be upheld as 'there is no dispute that the agreement was entered by both parties freely and with full understanding of its implications'. In that case, however, the parties had lived in England for just one year prior to divorce. In *Y v Y* [2014], in contrast, the parties had lived in England for most of their married life. The *contrat de mariage* was set aside as Roberts J found that the wife did not have a full understanding of the legal implications flowing from a divorce. It was of particular significance that the agreement was signed just 48 hours before the marriage itself. Additionally, having concluded the *contrat de mariage* before a *notaire*, the parties were deemed not to have received independent legal advice before signing the agreement. While a *notaire* is considered impartial under French law, it does not satisfy the English court's requirements of independence.

In each of these cases the parties had actively sought to agree the arrangement of their finances on a breakdown of the marriage. *Y v Y* in particular highlights that parties concluding an agreement in

France under the supervision of a *notaire* would do well to instruct independent legal advisers, as well as undertake full disclosure of their finances. It is very difficult to reconcile the English requirements for a prenuptial agreement with the approach under French law to *contrats de mariage*. That makes it all the more important to ensure that parties concluding any French *contrat* seek advice regarding the validity of their agreement under English law.

It seems very unlikely that the *Radmacher* criteria would be fulfilled in a case where the default regime applies and no formalities have been met, although this will depend upon the specific facts of each case.

Enforcing a prenuptial agreement in France

The French courts will, in principle, recognise an English prenuptial agreement. However, thereafter it is not entirely straightforward. The first step for the French court is to identify which clauses deal with capital division (and which matrimonial property regime they apply) and which clauses deal with maintenance or other associated provisions such as school fees. That can be a complex exercise, especially if the agreement makes provision for capitalisation of maintenance or deals with the transfer of one asset in particular to meet the needs of a party.

The Court of Justice of the European Communities decision in *Van den Boogard v Laumen* [1997] provides clear guidance on what qualifies as 'matrimonial property regime' provision and what qualifies as 'maintenance' provision. It states that if the provision 'is designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount' then it will be a maintenance provision. On the other hand if the stipulation 'is solely concerned with dividing property between the spouses' it will be a matrimonial regime provision.

Given the different approach of the French court to these provisions, if it is foreseeable that the matter could end up in front of a French judge, it is advisable to emphasise any needs elements in the agreement so that any such provision is clearly identifiable as a maintenance provision. On the other hand, the prenuptial agreement should state clearly when it is dealing with capital.

Once the court has identified the nature of the different provisions, it will apply the relevant EU/international private law legislation to identify the competent jurisdiction for each type of provision. If the competent jurisdiction is France, the French judge will then have to consider which law is applicable to each provision pursuant to Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions, and cooperation in matters relating to maintenance obligations (the EU Maintenance Regulation) or the Protocol on the Law Applicable to Maintenance Obligations at The Hague on 23 November 2007 (2007 Hague Protocol). This provides for the parties to designate in their *contrat de mariage* which member state will have jurisdiction to hear the matter, which they can do at any stage of the marriage, and in default of such agreement, the court will decide which is the applicable law.

Comparisons

It is clear that the purpose of both English prenuptial agreements and French marriage contracts is to bring certainty in the case of divorce. The judicial concepts that they rely on are, however, fundamentally different. This is because these two countries have very different cultural approaches to matrimonial law. While the roots of the French matrimonial system are found in the ancient and traditional laws concerning property rights and contracts, which are themselves concerned with matters such as safeguarding family heritage, the English system seems to adopt a much more practical approach, concerning itself as it does with matters such as the needs of each party, and basic principles of fairness.

The first consequence of this distinction is that, unlike the English prenuptial agreement, the French marriage contract not only determines ownership on divorce but also during the marriage. At any given time during the marriage, the marriage contract is in force and will be the instrument of reference to deal with questions of ownership between the parties. Another notable difference is that a *contrat de mariage* is not discretionary in France – it is 100% legally binding on the parties (providing it has the correct formalities). The English court, by contrast, retains its discretion in determining the enforceability of a prenuptial agreement, or indeed a *contrat de mariage*.

From the point of view of formalities, to be legally binding in France the *contrat* has to be made and signed in front of a *notaire*, whereas in England there are not, strictly speaking, any legal requirements, although the circumstances in which the agreement was made are highly relevant to the weight that the court will give the agreement, and should not be ignored when concluding one.

While an English prenuptial agreement may contain maintenance and capital provisions that are indistinguishable from one another, the French *contrat de mariage* deals with capital but not maintenance. As a result, when drafting a prenuptial agreement that may end up in front of a French judge it is advisable to clarify which is which.

Unlike English law, French law recognises the impartiality of the *notaire*. Therefore the parties are not required to instruct separate lawyers when concluding a *contrat de mariage* for it to be enforceable in France, as one *notaire* can assist both parties. Nevertheless it is not unusual for each party to have their own lawyer to advise them of the implications of the *contrat*.

Conclusion

To sum up, while both forms of agreement are similar in purpose they are very different in practice, and significant care should be taken in trying to draw any direct comparison. There has been debate in the past in England and Wales over the possible introduction of a matrimonial property regime, with a view to further unifying European family law, but this never led to any concrete proposals. This is probably due to the deeply rooted systemic and cultural differences between the two countries and the difference between a prenuptial agreement and a *contrat de mariage* is yet another example illustrating this. ■

Radmacher (formerly Granatino) v Granatino
[2010] UKSC 42
Van den Boogaard v Laumen
[1997] EUECJ C-220/95
Y v Y
[2014] EWHC 2920 (Fam)
Z v Z (No2)
[2011] EWHC 2878 (Fam)