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RESEARCH ESSAY

SHOULD PRE-NUP TIAL AGREEMENTS BE RECOGNISED AND ENFORCEABLE IN HONG KONG? IF SO, HOW?

February 2014

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<tr>
<td>CFC</td>
<td>California Family Code (USA)</td>
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<tr>
<td>CGSA</td>
<td>Connecticut General Statutes Annotated (USA)</td>
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<td>FLA</td>
<td>Family Law Act 1975 (Australia)</td>
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<td>HK/HK/</td>
<td>Hong Kong/Hong Kong Special Administrative Region</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>LCEW</td>
<td>Law Commission of England and Wales</td>
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<td>MPPO</td>
<td>Matrimonial Proceedings &amp; Property Ordinance (HK)</td>
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<td>Post-nup(s)</td>
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<td>PRC</td>
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<td>Pre-nup(s)</td>
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<td>UK</td>
<td>The United Kingdom</td>
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<td>UPAA</td>
<td>Uniform Pre-marital Agreement Act 1983 (USA)</td>
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<td>US/USA</td>
<td>The United States of America</td>
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1. Preface
Marriage is an important milestone of our lives. Traditionally, it highlights the “unity” between a man and a woman, marking an everlasting combination.

While English common law conventionally construed pre-nups against “public interest”, lately the English courts adopt a more open approach as to the position of pre-nups as manifested through a string of cases – K v K, NA v MA, Crossley v Crossley and the landmark case of Radmacher v Granatino. We can note that pre-nups are gradually given greater weight by courts when it comes to matters of ancillary relief.

Although it was penned that the Radmacher case would be persuasive rather than binding on HK courts in Hewitt’s Family Law and Practice in Hong Kong published in 2011, there are recent instances in HK considering Radmacher, namely 2011’s WLMLA v WWKP and 2013’s SA v SPH. Especially pinpointed in the latter case, HK as an “international city” regularly addresses foreign law issues, one of which would undeniably be matrimonial causes involving pre-nups.

Local-wise, the crude divorce rate in HKSAR rose from 2002’s 1.9% to 2012’s 3.0%, revealing a higher proportion of couples opting out of marriages. In the meantime, the total number of matrimonial causes surged from 2002’s 15,233 to 2012’s 19,164 with an uninterrupted rising trend over the decade. With an eye on the rises above, are pre-nups a panacea to reduce conflicts upon nullity of the marriage and in turn encourage marriages?

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1 H Wang, Cong Shenfen Dao Qiyue (Falü Chubanshe, PRC 2009) 4.
2 Hyman v Hyman [1929] AC 601; Bennett v Bennett [1952] 1 KB 249, 262 (Lord Denning): “it is in the public interest that the wife and children of a divorced husband should not be left dependent on public assistance or on charity when he has the means to support them”.
3 [2003] 1 FLR 120.
4 [2007] 1 FLR 1760.
5 [2008] 1 FLR 1467.
6 [2010] 3 WLR 1367.
7 [2011] HKCU 155, [35].
8 [2013] 2 HKC 130, [14]-[21].
9 Ibid [30].
11 Ibid.
12 LCEW, Marital Property Agreement: A Consultation Paper (Law Com CP No 198, 2011) [5.20].
These all shed a light on the possibility of reforming our current laws on the regulation of pre-nups. Shall we take a step ahead to recognise pre-nups statutorily; or simply follow the *Radmacher* approach.\textsuperscript{13}

\textsuperscript{13} T Toh, ‘Pre-nups and the Case for Reform: Is It Worth It?’ in *Hong Kong Lawyers* (Sweet & Maxwell, HK September 2011).
2. What are “Pre-nups”?  
2.1. Definition  
Pre-nups are also commonly known as “ante-nuptial” or “pre-marital” agreement or settlement.\(^\text{14}\)  
Along with post-nups, nuptial agreements generally *purport to predetermine the rights and obligations of the parties to a marriage in the event the marriage fails and an application for financial relief is made.*\(^\text{15}\)  
While for pre-nup, it is an agreement or disposition  
(i) made prior to and in contemplation of the marriage; and  
(ii) which makes provisions to govern the rights and obligations of the parties upon the dissolution of the marriage.\(^\text{16}\)  
Concerning the actual content of a pre-nup, it can regulate the conduct of a marriage,\(^\text{17}\) stipulate the future benefits of the husband, wife or their children,\(^\text{18}\) and the distribution of assets upon its termination,\(^\text{19}\) to name a few.  

2.2. Historical Development  
Pre-nups are not recent innovations. They have long been established as *ketubah* in Judaism. Couples create *ketubah* prior their wedding to show the parties’ initial collaboration and cooperation with each other.\(^\text{20}\) Contents of a *ketubah* include requirements as to food, clothing, sex and also the wife’s support in case of divorce or death.  

\(^\text{15}\) J Brown and A Lynn, ‘Nuptial Agreements’ in P Hewitt (eds), *Family Law and Practice in Hong Kong* (Sweet & Maxwell, HK 2011).  
\(^\text{16}\) ibid.  
\(^\text{19}\) Aylward (n 17).  
3. Positions of Pre-nups and Relevant Laws in Different Jurisdictions

3.1. Introduction
This chapter aims to compare positions of pre-nups in different jurisdictions vis-à-vis that of HKSAR. The following jurisdictions are chosen largely in line with the “triangular comparison” approach which proposes the comparison among the subject matter (HKSAR), similar legal institutions (other common law jurisdictions) and systems with similarities in non-legal context (eg PRC). Continental Europe’s position will also be briefly discussed towards the end of this chapter.

In brief, jurisdictions where marital property regime exists and pre-nups are enforceable include Austria, Australia, Belgium, the Czech Republic, Denmark, Estonia, France, Germany, Greece, the Netherlands, Norway, Portugal, PRC, South Africa, Spain, USA, etc. In contrast, jurisdictions where neither marital property regime nor pre-nups is recognised include England and Wales, Guernsey, HK, Ireland, Isle of Man and Scotland.

3.2. HKSAR
Current Position
There is a well-established history of enforcement of separation agreement but there have been to date no reported cases in HK in which pre- or post-nuptial agreement has been enforced to the letter of the agreement.

HK’s position maintains that agreements providing for a separation to take place between husband and wife at some future are void due to policy reasons. These include a covenant in a settlement before marriage to make provision for a spouse or a condition for the cesser of his interests in the event of separation.

Additionally, an agreement made between the parties to the marriage cannot oust the jurisdiction of the court in granting

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22 A Lynn, ‘Has the Pre-nup Finally Come of Age?’ in Hong Kong Lawyers (Sweet & Maxwell, HK January 2011).
23 A Scully-Hill, ‘Radmacher in Hong Kong: Choosing between Autonomy and Equal Sharing’ 41 HKLJ 785.
orders in cases of nullity of marriage, divorce and judicial separation and cannot deprive a spouse from making a further application.\textsuperscript{25}

Whilst, concerning the current general law on ancillary relief, \textit{LKW v DD},\textsuperscript{26} following \textit{White v White} in England,\textsuperscript{27} Ribeiro acknowledged that “needs”, “compensation” and “equal sharing” are the three guiding principles.

\textbf{Future Position}

Doubt arises as to whether \textit{Radmacher} applies in HK. Some acknowledge that the modern judicial attitude in this case may now be commonplace and may one day be applied in HK courts.\textsuperscript{28} This view can be reinforced by the consideration of this case by the Family Court and Court of Appeal respectively in 2011’s \textit{WLMLA v WWKP} \textsuperscript{29} and 2013’s \textit{SA v SPH}.\textsuperscript{30}

\textbf{3.3. England and Wales}

\textbf{Current Position – \textit{Radmacher} case}

The majority held that there should be a presumption of effect in the pre-nup:

\begin{quote}
the court should give effect to a nuptial agreement that is freely entered into by each party in full appreciation of its implications unless in the circumstances it would not be fair to hold the parties to their agreement\textsuperscript{31}
\end{quote}

Lady Hale, who dissented the presumption of effect, opined that the test adopted by majority as an instance of the Court usurping its judicial function and straying into the legislative role.\textsuperscript{32}

All in all, \textit{Radmacher} establishes that pre-nups would be given a recognised weight in ancillary relief proceedings, rather than given “binding” power or “enforceability”. More remarkably, couples, who enter into pre-nups, from then on are granted

\begin{footnotesize}
\begin{enumerate}
\item[26] [2010] HKCFA 70.
\item[27] [2000] UKHL 54.
\item[28] \textit{Halsbury} (n 20).
\item[29] \textit{WLMLA} (n 7) [35].
\item[30] \textit{SA} (n 8) [14]-[21].
\item[31] \textit{Radmacher} (n 6) [75].
\item[32] \textit{ibid} [169].
\end{enumerate}
\end{footnotesize}
greater autonomy in the sense that their understanding of “fairness” may prevail over the “fairness” understood as equal treatment in the White case:

Thus it is in relation to the third strand, sharing, that the court will be most likely to make an order in the terms of the nuptial agreement in place of the order that it would otherwise have made.33

Recent Cases and Future Position
Since Radmacher, however, the treatment of pre-nups has not been consistent. Instead, it was weighed on a case-to-case basis with reference to the specific facts of each case.34

In Z v Z (No 2),35 the parties had entered a pre-nup in France. It was upheld to the extent that the “needs” (instead of the “sharing”) principle was applied upon generous interpretation. This led to the applicant receiving 40% of assets.

In V v V,36 “needs” principle was once again applied. However, a Mesher order was awarded and hence the husband was rendered a charge back of one-third to show the pre-nup and the fact that this was a short marriage.

In stark contrast, in B v S,37 the pre-nup was not given weight on the grounds that the parties had entered it without “full appreciation of its implications.”

Notwithstanding, recent years witness an increasing number of couples choosing to enter into pre-nups by using, for example, Precedents for separation, pre-marriage and pre-civil partnership (Resolution) and Consensus (Class Legal).38

LCEW also published Marital Property Agreements – A Consultation Paper so as to address the financial consequences of divorce or dissolution and propose models for qualifying nuptial agreements.39

33 Radmacher (n 6) [82].
35 [2011] EWHC 2878 (Fam).
36 [2011] EWHC 3230 (Fam).
37 [2012] EWHC 265 (Fam).
38 Duffield (n 34).
39 LCEW (n 12) [1.16].
3.4. **Australia**

Australians have been able to make binding financial agreements about their property before, after and during marriage since the Family Law Amendment Bill 2000 made changes to the FLA. The need for these amendments arose as there was a call for greater legal certainty for couples entering into pre-nups and also to bring married couples rights in line with those individuals in *de facto* relationships had enjoyed for years.\(^{40}\)

Following the 2000 amendment, Pt VIII of the FLA was inserted, resulting in pre-nups becoming enforceable under the rubric of “financial agreements”.\(^{41}\)

3.5. **USA**

Currently in USA, approximately 5% of marrying couples have signed pre-nuptial agreements and this is expected to reach 20% in the near future. All fifty States recognise the validity of pre-marital agreements with over half the states adopting the UPAA.

3.6. **PRC**

PRC Marriage Law 1980, art 9 provided that agreement between husband and wife prior to the wedding outlining the assets to be jointly or partially owned by each party is legally binding.

Under the current PRC Marriage Law 2001, a property regime that recognises pre-nups is laid down in arts 17-19.

3.7. **Continental Europe**

Several civil-law European countries have recognised pre-nups in the following manners:

Austria, France,\(^{42}\) Luxembourg and Portugal are parties to the Hague Convention on the Law Applicable to Matrimonial Property Regimes.

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\(^{40}\) J Mok, ‘Pre-nuptial Agreement: To Have or not to Have’ in *Hong Kong Lawyers* (Sweet & Maxwell, HK March 2007).

\(^{41}\) FLA, s 90B (as amended).

\(^{42}\) France has also enacted a piece of domestic legislation: Civil Code, art 1387.
Whereas, Belgium, Denmark, Germany, Greece, the Netherlands, Norway, Spain, Sweden and Switzerland enacted their own legislation on the enforceability of pre-nups.

3.8. Interim Conclusion
Compared with other common law jurisdictions (England and Wales, Australia and USA), HK law on pre-nups remains undeveloped. Amidst the convergence of laws in common law and civil law jurisdictions in this realm, it is worth, at this juncture, considering a reform of HK law so as to keep pace with other parts of the world.
4. General Pluses and Minuses of Pre-nups

4.1. Pluses

Ideally, the significance of a pre-nup can be highlighted by its breaking of the shackles of conventional marriage, allowing husbands and wives to represent two autonomous individuals before the marriage to enter a committed relationship on their own terms, paving the way for egalitarianism.\(^{43}\)

Apart from that, there are some practicable benefits of having a pre-nup: to foster negotiation and mutual communication, to realise both parties’ expectations, to preclude potentially disastrous mismatches,\(^{44}\) to lay down mechanisms for problem-resolution in the future without resorting to the legal system.\(^{45}\)

Besides, pre-nups render high autonomy for both parties of the marriage in the sense that they leave more room for parties to manage their own affairs, especially finance. Whereas, the autonomy is minimal where the law does not construe pre-nups as binding but applies the principle of “equal sharing”.\(^{46}\)

Financially, if pre-nups are drafted soundly as to the distribution of assets, they can save money since parties can concentrate on other unresolved issues on ancillary relief principles, eg non-matrimonial property.\(^{47}\)

In this regard, LCEW stated that pre-nups can encourage marriages in the sense that the “damage” to individual assets upon divorce can be minimised.\(^ {48}\)

In short, advantages of pre-nups can be summarised by the “4 C’s” model:\(^ {49}\)
- Control over the course and conduct of the relationship;
- Choice as to the nature of the relationship;
- Conflict in the future can be reduced; and

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\(^{44}\) Ibid.
\(^{46}\) Toh (n 13).
\(^{47}\) See eg Jones v Jones [2011] EWCA Civ 41.
\(^{48}\) LCEW (n 12).
\(^{49}\) Aylward (n 17) 116. See also Felberg and Smyth, ‘Binding Prenuptial Agreements in Australia: The First Year’ (2002) 16 IJLPF 127.
- Cost of any future dissolution of the marriage can be reduced.

4.2. Minuses
From the outset, as expounded in the old common law perspective, pre-nups undermine the concepts of “sanctity of marriage” and “life-long union” since they induce parties to segregate.\(^{50}\)

Moreover, some fear that a woman in amity with her partner before the marriage would not be able to protect herself in such negotiation when all “providential considerations are likely to be merged into a confiding attachment or suppressed from an honourable instinct and sentiment of delicacy”.\(^{51}\)

Furthermore, as opposed to the aforementioned advantage of the provision of a “choice”, Atwood in 1992 found in a research that 84.6% of the reported cases of challenging the validity of pre-nups were initiated by women,\(^{52}\) reflecting that pre-nups may not necessarily be a free “choice” for some women to govern their marriages.

Worse still, pre-nups may give rise to the phenomenon of “Black Widow”,\(^{53}\) where dissolution of a marriage on the wife’s part is induced due to the generous provision, which is set out in the pre-nup, the wife is entitled upon the divorce. This may in turn be deemed as a commercial enterprise,\(^{54}\) an incentive to litigate.

\(^{50}\) N v N [1999] 2 FLR 745, 752A.
\(^{51}\) Stilley v Folger 14 Ohio 610, 614 (1846).
\(^{53}\) Dnes, The Division of Marital Assets Following Divorce With Particular Reference to Pensions (Lord Chancellor’s Department, Research Series No. 7/97 1997).
\(^{54}\) Aylward (n 17) 120.
5. Should Pre-nups be Recognised and Enforced in HK?

5.1. No?

5.1.1. Inauspicious Implication
Looking from a customary perspective, Chinese society deems the mention of divorce before or at the time of a marriage a “taboo”, perceiving that this would eventually turn out to be the final result.

5.1.2. Gender Stereotype
Chinese traditionally portray a powerful figure for men, who are supposed to be the financial mainstay of the family, and a weak one for women, who are supposed to be dealing with domestic matters. In this sense, one may argue that the recognition of pre-nups would radically upset this stereotype with in mind the rise of women’s bargaining power.

5.1.3. Family-oriented
In HK and Chinese context, great wealth is family wealth rather than that held directly by an individual. Thus the concept of “matrimonial property”, the individual retention of which might be enhanced by pre-nups, may be of less relevance in HK.

5.2. Yes?

5.2.1. A New Era
We should not be held back by the old concepts in this vast-changing era, referring to an American judgment on pre-nup:

\[ \text{[t]here can be no doubt that the institution of marriage is the foundation of the familial and social structure...but we cannot bind ourselves to the concept...held by our ancestors...has greatly eroded...} \]

As aforementioned, divorces are now ubiquitous and matrimonial causes are burgeoning in HK. In this regard, pre-nups should be recognised for parties to separate amicably with a pre-planned mechanism without bringing the conflict to a court.

55 Toh (n 13).
56 Scully-Hill (n 23).
Apart from that, modern marriages involve substantial investments. Not only are these significant financial investments, but also one party may sacrifice his/her career so as to care for children of the marriage as pinpointed in the principle of “compensation”.\(^{58}\) Evidently, marriage involves a degree of risk-analysis and pre-nups furnish an appropriate forum to engage in this by themselves as opposed to the court’s intervention into these personal matters.\(^{59}\)

While marriage is transposed from “status” to “contract”, reasons for recognising pre-nups are more substantiated. As mentioned, entrance into marriage entails risk-analysis. Where marriage now is a revocable contract, the possibility of divorce fuels the need for this risk analysis because

…a radical change in the rules for ending marriage inevitably affects the rules for marriage itself and the intentions and expectations of those who enter it.\(^{60}\)

5.2.2. International Legal Centre
As mentioned in the Preface, HK would expect more foreign pre-nups to be brought before its courts. The recent \(SA v SPH\)\(^{61}\) case is almost a “re-enactment” of \(Radmacher\) where a German pre-nup and a separation agreement were entailed. \(ML v YJ\)\(^{62}\) is also another illustration of parallel divorce proceedings in HK and Shenzhen.

In view of this kind of cross-jurisdictional cases, HK’s law in this realm may need to be further developed so as to keep abreast with other jurisdictions, rendering it sufficient capacity to deal with pre-nups procedurally and substantively.

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58 Radmacher (n 6) [81-82].
59 Aylward (n 17) 76.
61 SA (n 8).
5.2.3. **Upsurge of Middle Class**

The expansion of the professional middle class implies that wealth is accumulated by greater number of individuals. Bearing in mind that their assets would not be so huge that justify trust structure or company, pre-nups may render them an option to do away with the potential high cost incurred by the divorce.  

63 Scully-Hill (n 23).

5.2.4. **Wide Application**

Where pre-nups may be “demonised” by individuals for being associated only with the lives of the rich, it has been proven that they are equally useful for the poor and the not so rich and famous, especially for those entering a second marriage.  

64 See eg the pop-song by Kanye West, ‘Gold Digger’ in *Late Registration* (Roc-A-Fella Records 2005).

65 Aylward (n 17).


5.3. **Effectiveness and feasibility of the arrangements on pre-nups in other jurisdictions**

Indeed, it was found that 25% of all marriages in the Netherlands contain a pre-nup; where in USA, 5% of all marriages and 20% of remarriages are based on pre-nups.

5.4. **Interim Conclusion**

As revealed from the above pros-and-cons list, the pluses far outweigh the minuses. A regime for recognising and enforcing pre-nups is possible in HK.
6. If So, How?
6.1. Legislation?
As analysed by legal scholars, one predominant reason for the only dissent in *Radmacher* case is that pre-nups are enforceable in other jurisdictions due to the legislature’s decision but not in UK due to the government’s silence on this point, rendering no legislative intent for the enforceability for pre-nups to be taken into account.

Hence, a way to recognise and make pre-nups enforceable in HK is to resort to the enactment of a new piece of legislation or amendment of the current MPPO.

The following suggestions are mostly formulated vis-à-vis LCEW’s Consultation Paper and the relevant legislation on pre-nups in Australia and USA.

6.1.1. Formalities
Qualities of a Valid Contract
In order for pre-nups to be recognised and enforceable as contracts, there should be components of a contract: an agreement where the parties have the “intention to be legally bound”, and “consideration”.

Concerning “intention to be legally bound”, adopting the standards in *Radmacher* and *SA v SPH*, both “choice of law” and “choice of exclusive jurisdiction” must be set out in pre-nups.

In Writing and Signing
The agreement should be set out in the form of a deed.

This requirement is to allow the parol evidence rule to apply consistently and to enable parties to transfer lands.

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69 LCEW (n 12) [6.10].
70 *Radmacher* (n 6) [108].
71 *SA* (n 8) [32].
72 LCEW (n 12) [6.16].
Adequate Financial Disclosure
LCEW’s paper suggests that the level of financial disclosure should be “full and frank”, requiring a detailed financial statement listing all the assets of each party, their current level of income, future inheritances or interests held in trust.\(^3\)

Ideal though the above suggestion seems, there may be practical difficulty in adopting this in reality. Failure to disclose a piece of information fraudulently, negligently or even innocently will equally render a pre-nup unenforceable, causing great restraint on the execution of such pre-nups. This is also the case for unexpected inheritance.

It may be more pragmatic to adopt the level of “adequate disclosure” stipulated in the USA’s UPAA.\(^4\) Although not all the 50 states adopt such standard (eg California\(^5\) and New Jersey\(^6\) require “full disclosure”), it is possible for HK to consider UPAA’s lower threshold. Under this test, “adequate” disclosure of material financial information would suffice.\(^7\)

The rationale behind this is that where parties have lived or coped with each other for a substantial period of time before the signature of the pre-nup, they should have been aware of each other’s financial condition.\(^8\)

Independent Legal Advice
LCEW also recommended that the receipt of legal advice should be a prerequisite to the enforceability of a pre-nup.\(^9\)

However, it would be more appropriate to introduce the concept of “independent” legal advice/counsel (but not a “mere opportunity”\(^10\)) from the law in California\(^11\) or

\(^3\) LCEW (n 12) [64].
\(^4\) UPAA, § 6 (a)(2)(i).
\(^5\) CFC, § 1615(a)(2)(A) (West 2009).
\(^7\) See eg Robinson v Robinson, 2010 WL 5030120 ( Ala App).
\(^8\) See eg Donovan v Donovan, 1999 WL 1499141 (Va Cir Ct).
\(^9\) LCEW (n 12) [65]-[66].
\(^10\) See eg CGSA, § 46b-36g(a)(4) (West 2008).
\(^11\) CFC, § 1612(c) (West 2009).
Australia. An illustration would be the financially stronger party render financial assistance to the weaker one for the consultation of a lawyer who is chosen by the weaker party voluntarily in the absence of vitiating factors (to be discussed below).

The benefit of such stipulation is that conflict of interest brought about by one single legal practitioner representing both parties can be minimised. Furthermore, obligations, rights and alternatives can be explained to each party with less bias.

Timing Requirements – “Cooling-off Period”
Given the emotional nature of a relationship, pre-nups should not be entered too soon before the wedding ceremony so that ample time should be given to both parties to think twice and review the details of the clauses before such important decision is to be made.

The “cooling-off period” here can be likened to the one for long term insurance policies, because both contracts impact the future to a great extent. Therefore the duration should be at least 21 days.

When does the court have the jurisdiction to interfere?
When vitiating factor(s) (eg misrepresentation, duress, undue influence) appear(s) in the pre-nup, the court shall have the jurisdiction to set it aside and render it unenforceable.

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82 FLA, s 90G.
83 LCEW (n 12) [67]-[68].
85 See eg UPAA, § 6 (c); FLA, s 90K(1).
6.1.2. Content

Range of property excluded from distribution upon divorce

Unless there is a substantial reform, where currently HK family law handles property division and maintenance separately (as opposed to the treatment in Europe and some states in US), properties to be allocated on pre-nups should be restricted to those inherited, gifted and pre-acquired.

Keeping Spousal Maintenance as a Spousal Obligation

While LCEW proposed that where a pre-nup contains any limitation or elimination on spousal and child maintenance, it may be void and thus unenforceable. This position can also be found in US law. The court may be allowed to interfere especially where “the right to child support is adversely affected”

When does the court have the jurisdiction to interfere?

First, when it comes to matters dealing with the custody of children and their support, the court should always retain jurisdiction to override the agreement based on the best interest of children.

A demonstration would be the occurrence of a “material change in circumstances relating to the care, welfare and development of a child of the marriage and, as a result of the change, the child or, if the applicant has caring responsibility for the child, a party to the agreement will suffer hardship if the court does not set the agreement aside”.

On top of that, it may be justified for the court to intervene where pre-nups do not purport to meet the basic strand of “fairness”, ie “needs”. Despite the

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86 Toh (n 13).
87 UPAA, § 6 (b): If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.
88 UPAA, § 3(b).
89 Luppino (n 14) 107.
90 FLA s 90K(1)(d).
91 LCEW (n 12) (79)-(82).
general provision of autonomy to the parties, a partner's "needs", the bed-rock of ancillary relief, should be safeguarded irrespective of a harsh clause which attempts to leave a financially insolvent spouse dependent on social welfare.

6.1.3. Possible Mandatory Pre-marital Mediation or Consultation in "Cooling-off Period"
During the "cooling-off period", non-legal advice can be required to be given to both parties as to the prevailing socio-economic status of men and women in terms of comparable levels of pay, chances for promotion, responsibility for childcare and socio-economic status after divorce. The information revealed would serve to inform the parties of the likely impact of their marriage and potential divorce on their current and future financial security.\textsuperscript{92}

\textsuperscript{92} Scully-Hill (n 23).
6.2. Marriage as Partnership – an Alternative

Apart from discussing possibility of allowing pre-nups in the current context (marriage as contract), it may be conducive to introduce another form of marriage – partnership – into HK.

Under the “community property” system, there is a presumption of “equal division of marital property.” Spouses are partners who each makes a set of meaningful, although perhaps different, contributions to the marital enterprise. Non-financial contributions are said to be fully credited, so that a spouse who stays at home to manage the household or who furnishes child care provides as valuable resources to the family as has the spouse who provides income from employment. Therefore, each spouse is entitled to share in the marital estate because each participates in its acquisition.

This partnership mechanism may be desirable to parties which genuinely wish to have “fifty-fifty division” of property upon divorce, thus facilitating a pre-nup regime in which the court looks for the other strands of “fairness” (ie “compensation” and “sharing”), in contrary to the current contractual mode of marriage which favours a pre-nup regime focusing solely on “needs”.

6.3. Interim Conclusion

In a nutshell, under the current form of marriage, parties should be given more autonomy as to the pre-nup’s construction and structure so long as “needs” of the parties are met. Whilst, an alternative form of marriage – partnership – may be launched and pre-nups under such marriage should adhere to the principle of “no formulation can eliminate all needs for judicial discretion”.

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93 This can be seen in USA (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington, etc), Germany, Austria, Greece, Switzerland, etc.
94 ALI Principles, § 4.09(1).
97 ALI Principles, § 4.09.
7. Conclusion
In a modern society, “democracy” in the context of family means family autonomy – family matters should be self-determined by constituent family members. Such notion is a universal value-orientation as reflected in ICCPR, art 17. The rationale behind is that every individual has the right to crave for their “ideal” mode of living. Thus, there is no “fixed” or “best” mode of living to be adopted by a family. Pre-nups are good manifestation of such autonomy. Accordingly, they should be recognised and enforceable subject to further consultation with different stakeholders in HK community (eg religious bodies embracing strong family values) and the legislature.

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