

# International Prenuptial Agreements

## Part I: Considerations for International Prenuptial Agreements

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This article has been prepared by Chaninat & Leeds, a lawfirm in Bangkok with [Thailand lawyers](#).

Thailand is a popular travel destination and like other travel destinations around the world, people of different nationalities come, meet, and fall in love. As a result, there are many marriages between non-Thai and nationals of other countries or between Thai and foreign nationals. A person planning marriage who has assets or income he/she is seeking to protect and who intends to marry in Thailand should be aware of the laws and practices surrounding prenuptial agreements in both Thailand and their home country in order to adequately protect their assets, plan for legal obstacles and lower potential litigation risks in the case of divorce.

### Issues of Multinational Law

The issues surrounding a prenuptial agreement in an international context are often oversimplified. Unfortunately, attorneys promising services in international prenuptial agreements often have little or no experience in actually litigating divorce cases, let alone international divorce cases. As a result, it is important to hire an attorney that has actual multinational jurisdiction and courtroom experience (involving family court issues) in order to understand both the legal issues and practicalities of using a prenuptial agreement in the context of a divorce case that has international considerations. You would not hire a doctor that has just graduated from a medical school correspondence course and has never actually picked up a scalpel; you would want to hire an experienced surgeon that has actually performed operations on patients with a similar condition. Similarly, one should hire an attorney to draft a prenuptial agreement that has actually been involved in divorce cases in an international setting.

### Choice of Venue and Choice of Law

Two common clauses in most contracts, including prenuptial agreements, are the choice of venue and the choice of law clause. In most modern legal jurisdictions, persons have freedom to contract to a great degree and must specify which law one would like to apply as well as state their preference as to which forum they would like to use. In the legal context, the word "forum" means the jurisdiction of the court where the case will be heard and decided.

Laws pertaining to commercial contracts (contracts that deal with issues of business) are different from the laws that apply to family law contracts. With regard to commercial contracts, most jurisdictions honor the principle of freedom of contract. Freedom of contract

means that most agreements that do not expressly violate laws, or are objectionable and are not against general principles of morality, would be honored. This is because business relationships are voluntary relationships between adults and do not generally enter the realm of morality, health, or public interest. On the other hand, family law contracts are treated in a special manner because governments believe that they have a special duty to protect certain sensitive areas, such as domestic issues and, in particular, issues involved in raising children. The freedom of contract principle, which is honored in commercial contracts, is not a factor as significant in family law contracts (including prenuptial agreements).

Therefore, there are certain basic principles of family law that are reserved for decisions by the court and cannot be altered by private agreement.

### **Forum Shopping**

“Forum shopping” is the practice of searching for a jurisdiction with the most favorable law to begin a lawsuit. Although the best crafted prenuptial agreement may state a specific forum, this fact may not prevent an aggrieved spouse that is anticipating a divorce to file in a different forum. The divorce may also be allowed in that different forum despite the fact that it is in express contravention of that particular choice of forum clause as stated in the agreement. In domestic matters such as divorce, especially when children are involved, courts will be more likely to disregard choice of forum clauses if they believe they have jurisdiction of the case. Again, this practice will be more tolerated in family law and divorce cases than in commercial matters.

### **Conflict of Law**

The legal area of Conflict of Laws is little understood and rarely used by domestic attorneys handling international prenuptial agreements. This is rather unfortunate. Conflict of Law is a particularly useful area of law for clients preferring a certain country’s laws to govern their case. A conflict of law arises when two countries who are interested in the case have laws that conflict with one another. Conflict of Law principles determines which nation’s laws will apply to a case. Each jurisdiction has its own Conflict of Law principles that are found in statutory law and case law. For international prenuptial agreements, Conflict of Law rules will decide which country’s laws will apply to the prenuptial agreement. This decision is critical because the court’s choice to apply one country’s laws rather than another can invalidate a prenuptial agreement. Therefore, it is wise to hire family law attorney’s that are well versed in the Conflict of Law principles of the jurisdiction reviewing the international prenuptial agreement.

### **Recent Developments**

The rocky terrain of international prenuptial agreements is constantly changing. Recently, many countries have adopted legislation which specifically addresses the issues that plague international prenuptial agreements. For example, Thailand passed the Act on Conflict of Laws B.E. 248. The Act aims to address the conflict of law issues of international prenuptial agreements. For example, there is a section on how to determine which country’s law will govern the effects of the prenuptial agreement. There is a separate section for deciding which country’s laws will govern the capacity of the agreement. Other countries have followed Thailand’s lead. The Hague Convention on the Law Applicable to Matrimonial Property Regimes of 1978 drafted provisions which addressed the problems of international prenuptial

agreements. The provisions designated which country's laws would govern the validity and enforcement of the international prenuptial agreement. The Hague Convention was signed and implemented by five countries: Austria, France, Luxemborg, Netherlands, and Portugal.

In a similar fashion, Australia recently passed the Family Law Act in 1975. The Act states that a prenuptial agreement will be valid in Australia if and only if the agreement meets the Australian validity requirements (e.g. must be signed by all parties). Recently the United Kingdom experienced a rather significant policy change towards international prenuptial agreements. The United Kingdom's Supreme Court recognized the validity of an international prenuptial agreement for the first time. In *Radmacher v. Granatino*, the Supreme Court upheld a prenuptial agreement between a German heiress, Katrin Radmacher and her French ex-husband, Nicolas Granatino. Couples who are interested in signing prenuptial agreements should seek vigilant legal counsel who is up to date with all recent international prenuptial agreement laws.

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