Financial agreements in international family litigation

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Until recently, agreements between the parties had only a limited effect in family law, because of the dominance of policy concerns. Party agreement in family law is increasingly regarded as legitimate and effective, both in local and in international contexts. Reflecting this change, the Australian Family Law Act now provides for the enforcement of financial agreements between de facto and married spouses. This article investigates the application of those provisions in international cases, suggesting that they should not automatically be applied, but rather that they should be subject to the application of choice-of-law rules.

Introduction

Giving effect to party agreements is increasingly being promoted as a desirable solution to many problems in private international law. International family litigation is no exception to this development.1 Until recently there was considerable scepticism about the suitability of private ordering to resolve international family law problems, because of the primacy of protective policy concerns in family law.2 This scepticism has recently been replaced by an enthusiasm for private ordering which, it is suggested, offers significant benefits to parties and to the state, relative to alternative methods of resolving disputes.3 This enthusiasm manifests itself most explicitly in the context of financial agreements,4 but other aspects of international family disputes are regarded as being appropriately determined by agreements of the parties.5

In Australia, financial agreements have been enforceable for more than a

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2 Jayme, ibid, at 2.

3 Mr Williams, Family Law Amendment Bill, Second Reading, House of Representatives, Hansard, 22 September 1999, pp 10,152–4; Bix, above n 1.

4 Financial agreements is the term applied in the Australian legislation, referring to property agreements made at any time — before, during, or after, the marriage or de facto relationship; Family Law Act 1975 (Cth) ss 90B (before marriage), 90UB (before de facto relationship), 90C (during marriage), 90UC (during de facto relationship) 90D (after the marriage has been dissolved), 90UD (after the de facto relationship has broken down). The focus of the discussion in this article is on the Australian law, and so ‘financial agreement’ is the term which I mainly use. The terms antenuptial, prenuptial, postnuptial, nuptial, and marital property agreements are commonly used in other legal systems. For the purpose of the discussion in this article, there is no significant difference between these terms.

5 See especially the recent EU Council regulation no 1259/2010 of 20 December 2010
decade. This changed the law significantly. The Family Law Act does not clearly stipulate what effect financial agreements should have in international cases. This article addresses this issue, which is likely to become more important in practice, with the recognition of the enforceability of financial agreements in Australia and in many other countries, and with the increasing mobility of the population. The analysis in this article essentially accepts the assumption on which the Australian legislation is based, that agreements are a suitable mechanism for dealing with family property matters, although it suggests that to the extent that this assumption is based on analogising family agreements to commercial agreements, it is a weak basis for the law.

The article is presented in three parts. In Part I, the traditional treatment of local financial agreements in England and Australia is described and compared with the traditional treatment of international financial agreements. This part includes a discussion of the recent decision of the UK Supreme Court in *Radmacher v Granatino*, which concerned the effect of a foreign prenuptial agreement in litigation in England. Part II outlines and analyses the impact of the provisions of the Family Law Act in relation to the enforcement of financial agreements in international family property disputes in Australia. Part III is a conclusion.

I The traditional treatment of family property agreements

A The effect of local financial agreements

Local financial agreements refer to agreements between the parties as to their property rights and entitlement to maintenance, usually on the breakdown of their relationship, where all aspects of the relationship are confined to a single country. They can be made before the relationship formally commences, during the relationship, or after the relationship has broken down. They almost always operate to exclude the outcome that would apply in litigation if there were no agreement between the parties. Until recently, the position in England and Australia was that local financial agreements between married people had a limited effect. They were unenforceable as contracts, and ineffective to oust the courts' jurisdiction to determine property and maintenance disputes. This implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, which permits express choices of governing law in matters of divorce and legal separation, with some limitations.

6 The parties have always had some capacity to agree as to the outcome of property disputes, by the use of consent orders. However, consent orders are always subject to court approval, and are in that sense unlike financial agreements under Australian legislation, which are enforceable in that they oust the court's jurisdiction to make orders relating to maintenance and adjustment of property interests: Family Law Act 1975 (Cth) ss 71A(1), 90SA(1).

7 See below nn 57, 58, 61.


9 This was for want of the requisite intention to be contractually bound. For critical discussion, see M Keyes and K Burns, 'Contract and the Family: Whither Intention?' (2002) 26 MULR 577. This issue, while obviously related, is beyond the scope of this article.

10 *In the Marriage of Hannema* (1981) 7 Fam LR 542; 54 FLR 79.
position has been radically altered by legislation in Australia, and more gradually modified by case law in England.

Local prenuptial agreements were unenforceable at common law, as being contrary to public policy. They were regarded as incompatible with the obligations of a married couple to cohabit, because they were seen to create an incentive to separate. They also implicate a policy concern that if inadequate provision is made for one party in the agreement, the public welfare system will be left to bear the cost of supporting that party. Financial agreements made during the course of a marriage were for similar reasons unenforceable. Agreements made after separation (separation agreements) were, after some early equivocation, held to be enforceable. In 1929, Lord Atkin noted that ‘a perusal of some of the cases in the matrimonial courts seems to suggest that at times [separation agreements] are still looked at askance and enforced grudgingly’. He insisted that, instead, ‘agreements for separation are formed, construed and dissolved and to be enforced on precisely the same principles as any respectable commercial agreement’. The analogy to commercial agreements is repeatedly and commonly drawn in the law and commentary, and has strongly influenced the development of the law.

Although enforceable, separation agreements were ineffective to oust the court’s statutory jurisdiction to consider whether to make an award of maintenance or an adjustment of property rights. That is to say that the legislation which permitted the courts to award ancillary property relief was regarded as applying with mandatory effect. The English and Australian legislation gave courts a discretion in making such orders; any agreement between the parties was regarded as a factor in the exercise of the court’s discretion. The courts sometimes exercised their discretion by effectively upholding the parties’ agreement. Several English judges have drawn attention to the profound contradiction in the law. In Pounds v Pounds, Hoffmann LJ stated that the law in England represented:

the worst of both worlds. The agreement may be held to be binding, but whether it will be can be determined only after litigation and may involve, as in this case, examining the quality of the advice which was given to the party who wishes to resile. . . . In our attempt to achieve finely ground justice by attributing weight but

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13 Hyman v Hyman [1929] AC 601 at 608 and 628–9; (1929) 98 LJP 81; [1929] All ER Rep 245; Galbraith v Galbraith (1962) 3 FLR 482 at 489; 80 WN (NSW) 551.
14 Hyman v Hyman [1929] AC 601 at 625–6; (1929) 98 LJP 81; [1929] All ER Rep 245 (emphasis added).
15 Ibid, at AC 629; In the Marriage of Hannema (1981) 7 Fam LR 542 at 548; 54 FLR 79.
16 Ibid, at AC 609.
not too much weight to the agreement of the parties, we have created uncertainty
and, in this case and no doubt others, added to the cost and pain of litigation.\textsuperscript{18}

Rix LJ similarly noted that ‘pre-nuptial agreements are at one and the same
time both unenforceable and invalid as being against public policy and matters
which the court is prepared to take into account (and possibly decisively) for
the purposes of its [statutory] discretion’.\textsuperscript{19}

Parts VIIIA and VIIIAB of the Family Law Act radically changed the law:
these Parts require the enforcement of financial agreements between married
and de facto spouses,\textsuperscript{20} whenever concluded. There has been no equivalent
change to English legislation, although legislative reform now seems likely. In
recent cases the English courts have tended to place greater weight on
financial agreements,\textsuperscript{21} and the England and Wales Law Commission’s recent
consultation paper on Marital Property Agreements cautiously favours the use
of financial agreements.\textsuperscript{22}

B Foreign financial agreements

Private international law has long recognised foreign marital property
agreements as effective, but only for some issues. The parties’ agreement may
address one of three possible issues that arise in international property
disputes. First, the parties may choose the governing law of their financial
agreement, which may be either forum or foreign law. Second, the parties may
agree as to their entitlement to property, often by contracting that each party
retains their own property acquired before or during the relationship. Third,
the parties may agree as to the division of property or entitlement to
maintenance if their relationship ends; this is usually done by waiving their
rights to claim an adjustment of existing rights, and maintenance. The second
and third types of choice are effectively choices of law, too, but rather than
operating as a choice of the whole regime of a particular legal system, they
choose specific substantive outcomes.

\textsuperscript{18} Pounds v Pounds \cite{Pounds} [1994] 4 All ER 777 at 792; [1994] 1 WLR 1535; [1994] 1 Fam Law R
775; [1994] NLJR 459.
\textsuperscript{19} Radmacher v Granatino \cite{Radmacher} [2009] EWCA Civ 649 at [64].
\textsuperscript{20} Following the referral of powers by the states and territories, the Family Law Act now
contains similar provisions which require the enforcement of agreements between de facto
partners: Family Law Act 1975 (Cth) Pt VIIIAB. The focus of the analysis in this article is
the treatment of agreements between married persons, and the entitlements of de facto
spouses is directly addressed only in the context of the specific nexus requirements of the
Family Law Act 1975 (see below at Pt IIA(1)). For detailed discussion of the legislation
relevant to de facto partners, see Hon Justice G Watts, ‘The de facto relationships
legislation’ \cite{Watts} (2009) 23 AJFL 122, especially at 130–2, 139–43.
\textsuperscript{21} See the cases referred to in Radmacher v Granatino \cite{Radmacher} [2011] 1 AC 534; [2011] 1 All ER 373;
[2010] 3 WLR 1367; [2010] UKSC 42 at [37]–[48]. The Law Commission referred to
‘something of a sea-change in the [English] courts’ approach to marital property agreements,
from a position of deep suspicion to one where agreements are treated with respect’: Law
Commission, \textit{Marital Property Agreements: A Consultation Paper}, Consultation Paper
No 198 \cite{LawCommission} (2011), at <http://www.justice.gov.uk/lawcommission/docs/cp198_
\textsuperscript{22} Law Commission, \textit{ibid}. At the time of writing, in July 2011, the Law Commission aimed to
report in 2012.
(1) Choice of law

In international litigation, the forum court decides the parties’ rights and obligations by applying the governing law. This refers to all of the substantive law of a particular legal system, which may be the law of the forum, or the law of a foreign country. That law resolves the actual issues in dispute — for example, the effect to be given to the financial agreement. The governing law is identified by the forum’s choice of law rules. For most issues in family law, the law of the forum applies, but for some issues in family property disputes, the choice of law rule allows the parties to select the governing law by agreement. Relevantly, at common law, the parties can choose the law which determines their existing property rights, but they cannot choose the law which determines their entitlement to an adjustment of those rights, or entitlement to maintenance.23

(2) Determining existing entitlements to property

The parties are able to choose the governing law which will determine their existing entitlements to property. Entitlement to property is determined by application of the same choice of law rule as applies to international contract disputes, although the rule is conventionally expressed differently.24 This choice of law rule requires the court to determine whether the parties have expressly or impliedly chosen the law which governs their entitlement to property. If there is no effective choice, the governing law is that with the closest and most real connection to the parties and their relationship.25 Although the parties’ agreement as to choice of law is important in determining their existing entitlements, this would always be subject to the forum’s public policy.26 If the governing law permits the parties to make

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23 In the Marriage of Hannema (1981) 7 Fam LR 542; 54 FLR 79.
24 For matrimonial property, the rule is normally expressed in terms of a presumption in favour of the law of the matrimonial domicile, which can be displaced by an express or implied choice of law: Re Egerton’s Will Trusts [1956] Ch 593 at 607.
25 The law which is presumptively applied is the law of the marital domicile on the grounds that it represents the parties’ implied intentions (De Nicolas v Curlier [1900] AC 21 at 37, 41; Murakami v Wervadi (2010) 268 ALR 377; [2010] NSWCA 7; BC201000540 at [98], [121], [126]) or that it is the legal system with the closest and most real connection to the contract. At common law, this was the place of the husband’s domicile, because of the wife’s lack of capacity to acquire a domicile independently of her husband: Re Egerton’s Will Trusts [1956] Ch 593. There is widespread support for the proposition that the common law rule should now be changed, so that if the parties do not share a domicile as a married couple, the law with the closest connection to the parties and their relationship should be applied: L Collins (Ed), Dicey, Morris & Collins on the Conflict of Laws, 14th ed, Thomson, Sweet & Maxwell, London, 2006, p 1283 (Dicey, Morris & Collins); T Hartley, in J J Fawcett (Ed), Reform and Development of Private International Law: Essays in Honour of Sir Peter North, Oxford University Press, Oxford, 2008, pp 1294–5. This view is supported by M Davies, A S Bell and P L G Brereton, Nygh’s Conflict of Laws in Australia, 8th ed, LexisNexis Butterworths, Sydney, 2010, p 558.
26 De Nicolas v Curlier [1900] AC 21 at 45. The courts always retain a discretion to disapply foreign law which conflicts with the public policy of the forum. The discretion is applied only rarely: Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5) [2002] 2 AC 883; [2002] 3 All ER 209; [2002] 2 WLR 1353; [2002] UKHL 19 at [16].
agreements as to their entitlement to property, then those agreements are effective, as long as the requirements of the governing law are met.\(^{27}\)

There are very few cases about the effect of foreign financial agreements, and within those cases little justification of the common law’s recognition of financial agreements. The issue arose in the recent NSW Court of Appeal decision in *Murakami v Wiryadi*, in which the court held that the parties impliedly agreed that the law of their matrimonial domicile should govern their rights to property. Chief Justice Spigelman, with whom McColl and Young JJA agreed, went into considerable detail in justifying that conclusion. His Honour referred to ‘contemporary policy and principle’ in favour of recognising agreements made in the context of marriage,\(^{28}\) citing in particular recent changes in domestic contract law about the requirement of establishing the requisite intention to be contractually bound in non-commercial transactions.\(^{29}\) His Honour also referred to the parties’ reasonable expectations as a justification for finding that there was an implied agreement that the law of their matrimonial domicile would govern their entitlement to property.\(^{30}\) Spigelman CJ asserted that ‘a matrimonial contract ought to be enforceable in accordance with the same principles as a contract between arms’ length commercial parties’.\(^{31}\)

(3) Adjustment of property rights and maintenance

Traditionally, the parties were not able to choose the governing law for disputes about adjustment of property rights or maintenance. According to the cases and commentary, this is because the adjustment of property entitlements, like most other issues in international family law, is determined exclusively according to the law of the forum.\(^{32}\) It would be more consistent with the treatment of this issue in the cases, and more analytically useful, to say that statutory provisions relevant to ancillary relief were applied with an internationally mandatory effect.\(^{33}\) Consequently, any choice of law was ineffective, and any specific provision dealing with adjustment of rights and maintenance was unenforceable.

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31 Ibid, at [123].
33 The concept of the mandatory rule is far better known to civil law systems than to common law systems. The recognition and application of the concept in common law systems is largely due to the development of private international law within the European community. An internationally mandatory rule is a rule which is intended to have effect in international cases, notwithstanding the usual choice of law rule, and irrespective of the parties’ intentions. For discussion, see M Keyes, ‘Statutes, Choice of Law, and the Role of Forum Choice’ (2008) 4 Journal of Private International Law 1 at 5–8. Rules relating to
Although the parties’ agreement cannot displace the application of the law of the forum, as in purely local cases, it may be taken into account in the exercise of the court’s discretion. Recent cases increasingly give weight to the parties’ agreement, in international as well as local property disputes. This is demonstrated in the recent UK Supreme Court decision in *Radmacher v Granatino*, discussed in detail below. There is a perception that choice of law provisions are uncommon in financial agreements; whether this is empirically so is not clear, but it does seem from recent cases that choice of law clauses are now not uncommon. *Radmacher v Granatino* shows the kind of effect that might be given to a choice of foreign law, in the exercise of the court’s discretion.

(4) Jurisdiction in international family matters

The jurisdictional rules in international family litigation play a crucial and often decisive role, because of the prominence of forum law in choice of law. Historically, the court was only competent in family matters if the parties were domiciled in the forum. The application of forum law could then be justified on the basis that it was also the law of the matrimonial domicile. The Australian jurisdictional rules have been significantly modified, so that the courts are competent in a much wider range of cases, but there has been no corresponding correction to the choice of law rule. This renders the choice of law rule, requiring application of the law of the forum in most cases, much more problematic.

In Australia, the court’s jurisdiction is determined by rules of jurisdictional competence, which are very broad. The main limitation on those broad rules is the principle of forum non conveniens, according to which the court may stay proceedings if it is a clearly inappropriate forum. In property proceedings, the court is jurisdictionally competent if either party is an Australian citizen, ordinarily resident in, or present in Australia at the time proceedings are initiated. This is subject to the court’s discretionary power to decline to exercise jurisdiction if the respondent can persuade the court that

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34 There were choice of law agreements in *Radmacher v Granatino* [2011] AC 534; [2011] 1 All ER 373; [2010] 3 WLR 1367; [2010] UKSC 42 and in *Murphy v Murphy* [2009] FMCAIan 270; BC200903018.


37 Ibid, at 44–56.

38 Family Law Act 1975 (Cth) s 39(4). There is also an open question in family proceedings as to the court’s subject-matter competence to deal with issues concerning title to and possession of foreign land. At common law, the courts lack jurisdiction over such issues: *British South Africa Co v Companhia de Moçambique* [1893] AC 602; [1891–4] All ER Rep 640; *Dagi v BHP Co Ltd* (No 2) [1997] 1 VR 426; BC3903959. In 2002, the High Court ‘reserved for further consideration in an appropriate case’ the status of the rule: *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491; 187 ALR 1; [2002] HCA 10; BC200200802 at [76]. The WA Court of Appeal noted that reservation and held that until it was resolved, the *Moçambique* rule should continue to be held to be good law in Australia: *Singh v Singh* (2009) 253 ALR 575; [2009] WASCA 53; BC200901039 at [21]. There is some uncertainty as to the applicability of the rule in international family matters because of Family Law Act 1975 (Cth) s 31(2) which states that the jurisdiction of the Family Court
it is a clearly inappropriate forum. In a majority of cases, the court refuses to stay proceedings on this basis. These jurisdictional rules are particularly weak: it is easy to invoke the court’s jurisdiction, and it is unlikely that the court will decline jurisdiction. This makes it undesirable simply to apply the law of the forum. I suggest below that one implication of this is that the provisions of the Family Law Act should not necessarily be applied to determine the effect of financial agreements in international cases.

(5) Radmacher v Granatino

In England, financial agreements entered into before marriage are not regulated by legislation, despite recent suggestions that giving them a higher status in family property litigation would be desirable. In Radmacher v Granatino, a decision handed down in October 2010, the UK Supreme Court was required to determine the effect to be given in English litigation to a prenuptial agreement in an international property dispute. The wife, Ms Radmacher, was German, and the husband, Mr Granatino, was French. The parties met in 1997, when they were living in London. They were married in 1998, in England and in Switzerland. Thereafter they mainly lived in London. They separated in 2006, and the wife moved with the two children of the marriage, first to Germany, and then to Monaco. The dispute between the parties was as to the effect to be given, in property proceedings in England, to a prenuptial agreement entered into in Germany on 1 August 1998, 4 months before their marriage. The wife was from an extremely wealthy family, and her family had insisted that the husband enter into such an agreement. The agreement was drafted by a German notary associated with the wife’s family; her parents were involved in instructing the notary and in the drafting of the agreement. The agreement was written in German, a language which the husband did not speak. The German notary advised the wife that she should have the agreement translated into English, and that the husband should be encouraged to seek independent legal advice, but neither of these things was done. At the time the parties married, the husband was working for an investment bank but, in 2003, he quit his position and commenced an academic career.

Under the agreement, the parties agreed to maintain separate ownership of their property, and to waive ‘to the fullest extent permitted by law’ any claim for maintenance that either might have against the other in the event of their...
divorce. The husband claimed in English proceedings for ancillary relief. At first instance, Baron J gave little weight to the agreement. The Court of Appeal reversed that decision, holding that the agreement should have been given ‘decisive weight’. The husband’s appeal to the Supreme Court was rejected. The majority held that nuptial agreements should all be treated in the same way, irrespective of when they were entered, and stated the principle in the following terms:

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. The reason given by the majority was that ‘there should be respect for individual autonomy … It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best’. The court reaffirmed that the parties were not able to oust the jurisdiction of the court, but stated that financial agreements should be given ‘appropriate weight’ in the exercise of the courts’ statutory discretion. They stated that it was necessary that ‘each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end’. While it was desirable that each party had legal advice, and that full disclosure of each party’s assets be made, neither of these was essential. The majority stated that ‘if it is clear that a party is fully aware of the implications of an ante-nuptial agreement and indifferent to detailed particulars of the other party’s assets, there is no need to accord the agreement reduced weight because he or she is unaware of those particulars’. The determinative factor for the majority was the parties’ intention that the agreement was effective.

The foreign factors in Radmacher v Granatino were of limited relevance to the decision, because the governing law for the relevant issue is forum law. The agreement included an express choice of German law as the governing law of the agreement. The trial judge accepted that the choice of German law would have been enforced in litigation in some countries, including Germany, with the effect that the parties’ agreement as to property would have been fully enforced. According to the majority in the Supreme Court, the only significance of the express choice of German law was that it supported the conclusion that the parties intended that the agreement should be effective, because the agreement was effective in German law, and the parties had been

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42 Her Honour held that the agreement was a factor which was relevant in the exercise of her discretion: [2008] EWHC 1532 (Fam) at [139]. Members of the Court of Appeal stated that, substantively, Baron J gave the agreement very little weight: [2009] EWCA Civ 649 at [36], [38], [42]–[43], [79], [149].
43 [2009] EWCA Civ 649 at [81], [149].
46 Ibid, at [2].
47 Ibid, at [69].
48 Ibid, at [69].
49 Ibid, at [69]–[70].
50 Ibid, at [74], [108] per majority, [182]–[183] per Lady Hale.
advised of that. The facts as found by the trial judge do not unambiguously support that conclusion. Baron J found that the German notary emphasised to the parties that the choice of German law clause would be enforced in Germany and some other countries, but not in others. He inserted a reference to this advice in the terms of the agreement, stating that the agreement would not necessarily be effective in other legal systems, and advised them to take legal advice in other legal systems as to the effect of the agreement.51

*Radmacher v Granatino* continued a line of English cases in which the courts have placed increasing emphasis on the parties’ agreement. The husband’s professional background as an investment banker no doubt counted heavily against him.52 It is rather concerning that the majority dismissed as irrelevant the lack of full disclosure and the lack of legal advice, especially given the trial judge’s finding that the husband “was eager to comply [with the wife’s request to sign the pre-nuptial agreement] because (a) he did not want the wife to be disinherited (b) he wanted to marry her and (c) he could not perceive of circumstances where he would wish to make a claim”.53

*Radmacher v Granatino* did not change the English law. The Supreme Court reiterated that the court’s decision whether to enforce an agreement was discretionary, and that the decision would “necessarily depend upon the facts of the particular case, and it would not be desirable to lay down rules that would fetter the flexibility that the court requires to reach a fair result”.54 This gives the parties and their lawyers the ‘worst of both worlds’, to repeat Hoffmann LJ’s words. While the Supreme Court gave decisive effect to the agreement, it essentially treated that agreement as if it were local, ignoring the international aspects of the dispute.

*Radmacher v Granatino* highlights the importance of the forum in which proceedings are commenced, and shows how it may determine the outcome. The trial judge awarded the husband more than £5 million for himself, whereas he would have received nothing for himself in proceedings in Germany or France, where the agreement would have been enforced.55 Notwithstanding the foreign factors, England was certainly the most appropriate forum for the determination of the dispute, because it was the legal system with which the parties’ relationship had the closest and most real connection.56 The application of English law in this case, despite the parties’ express choice of German law, illustrates the shortcomings of the English choice of law rule, rather than any problem with the jurisdictional rules.

**C Justifications for enforcing financial agreements**

Many of the justifications in favour of upholding private agreements in the context of family law are familiar from the commercial context: cost savings

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51 *NG v KR* [2008] EWHC 1532 (Fam) at [40]–[42].
53 *NG v KR* [2008] EWHC 1532 (Fam) at [23]. The husband’s evidence was that the wife told him that she would be disinherited if she did not insist that her fiancé enter into the prenuptial agreement: ibid, at [22].
to the parties and the state,\textsuperscript{57} consumer sovereignty,\textsuperscript{58} upholding the parties’ reasonable expectations,\textsuperscript{59} preventing forum shopping,\textsuperscript{60} and relative certainty and predictability,\textsuperscript{61} especially where the outcome of litigation depends on the exercise of a discretion.\textsuperscript{62} The social acceptance of gender equality is also referred to as a ground for upholding family agreements.\textsuperscript{63} It is surprising that there has been relatively limited discussion of the remaining role of protective policy and how it should be reconciled with the policy in favour of upholding agreements in the context of both local and international agreements. This is a familiar problem from international contracting, where there is significant literature dealing with the proper limits to autonomy.

\section*{III International financial agreements in Australia}

Since 2000, the Family Law Act has provided that financial agreements between married couples are capable of displacing what are thereby rendered default rules for determining the adjustment of property interests in Australian litigation.\textsuperscript{64} Very similar provisions now also apply to agreements made between de facto spouses.\textsuperscript{65} The legislation stipulates minimal safeguards: the agreement must be in writing and signed by the parties,\textsuperscript{66} and the parties must receive independent legal advice about the agreement.\textsuperscript{67} The latter requirement has been the subject of several amendments, in response to

\begin{itemize}
  \item Mr Williams, Family Law Amendment Bill, Second Reading, House of Representatives, \textit{Hansard}, 22 September 1999, pp 10,152, 10,154; Mnookin and Kornhauser, ibid, pp 956–7; Bix, above n 1, at 262; Jayme, above n 1, at 1–2.
  \item \textit{Murakami v Wiryadi} (2010) 268 ALR 377; [2010] NSWCA 7; BC201000540 at [118]–[119], [121].
  \item EU Council regulation no 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, Preamble, paras (9) and (15).
  \item \textit{MacLeod v MacLeod} [2010] 1 AC 298; [2009] 1 All ER 851; [2009] 3 WLR 437; [2008] UKPC 64 at [40]; Bix, above n 1, at 263.
  \item A Philip, ‘Hague Draft Convention on Matrimonial Property’ (1976) 24 \textit{American Jnl of Comparative Law} 307 at 309. Cf Brod, who suggests that the ‘trend toward abandoning the protective aspects of premarital agreement law appears to be the result of a distorted or idealized perception by lawmakers that women have achieved de facto equality with men’: G Frommer Brod, ‘Premarital Agreements and Gender Justice’ (1994) 6 \textit{Yale Jnl of Law and Feminism} 229 at 253.
  \item Family Law Act 1975 (Cth) s 71A(1).
  \item Family Law Act 1975 (Cth) Pt VIIIAB Div 4 s 90SA(1).
  \item Family Law Act 1975 (Cth) ss 90G(1)(a), 90UJ(1)(a). This is a mandatory requirement.
  \item Family Law Act 1975 (Cth) ss 90G(1)(b), 90UJ(1)(b). Both parties must receive a statement from the practitioner who provided the advice, stating that the advice was provided: ss 90G(1)(c), (ca), 90UJ(1)(c), (ca). Following amendments made in 2009, these requirements are no longer mandatory, if the court finds that ‘it would be unjust and inequitable if the agreement were not binding’: ss 90G(1A)(c), 90UJ(1A)(c).
\end{itemize}
concerns raised by legal practitioners about the extent of the responsibility placed on them by the requirement of legal advice. These concerns were raised in several cases in which the courts insisted upon strict compliance with the legislative requirements, especially the requirement of legal advice. Judges are clearly reluctant to allow the parties to oust the courts’ jurisdiction, although this is unambiguously the intended effect of the legislation. The legislation also sets out the grounds on which a financial agreement can be avoided.

As explained above, the law was traditionally ambivalent toward agreements in family property matters. A similar ambivalence can be discerned in the cases concerning the enforcement of financial agreements. This persistent ambivalence clearly indicates that agreement may not a wholly suitable means of resolving family property disputes. At least, it seems clear that the analogy to commercial contracts is inapt. A better analogue would be to contracts involving important policy concerns, where those concerns are explicitly addressed, such as consumer contracts.

A The effect of international financial agreements in Australia

The increasing mobility of the population makes it more likely that couples will move during the course of their relationship. Many countries now recognise the parties’ ability to enter into binding financial agreements, imposing various conditions to enforcement. While broadly similar, there are differences in these conditions. This diversity raises the question of the international effect of financial agreements. The following discussion addresses the effect that international financial agreements should be given in litigation in the Australian courts. This discussion assumes that the court is jurisdictionally competent, and that the court has determined that it should exercise that jurisdiction, rather than decline to exercise jurisdiction on the basis that it is a clearly inappropriate forum.

70 Family Law Act 1975 (Cth) ss 90K(1), 90UM(1). The grounds specific to family financial agreements include non-disclosure of ‘a material matter’ which amounts to fraud (ss 90K(1)(a), 90UM(1)(a)); and a material change in circumstances relating to the care, welfare and development of a child of the marriage which would result in hardship to a party to the agreement if the agreement is enforced (ss 90K(1)(d), 90UM(1)(g)). For detailed discussion, see P Parkinson, ‘Setting aside financial agreements’ (2001) 15 AJFL 1.
71 See above Part IA.
74 The jurisdictional rules are briefly explained above Part IIB(4). The Australian courts will be competent in any case in which the applicant can be present in Australia at the time of
(1) Financial agreements between de facto partners

Division 4 of Pt VIIIAB of the Family Law Act, permitting the enforcement of financial agreements between de facto partners, specifically provides that its provisions are only applicable where the parties to the financial agreement have some connection to an Australian state or territory. The relevant requirement is that the de facto couple must be ordinarily resident in an Australian state or territory at the time of making the agreement. That requirement would probably be applied with mandatory effect in litigation in Australia; its effect in litigation in foreign courts, where one party relied on the Family Law Act to support enforcement of the agreement, is less certain.

This leaves open the question of the effect of an agreement between de facto spouses which falls outside the scope of the legislation. An example given in the Family Law Act suggests that in such a case, state or territory law would be applicable. Legislation in all Australian states and territories continues to permit enforcement of financial agreements made between de facto spouses, though to the extent of any inconsistency, the Commonwealth legislation prevails. One of the circumstances in which the state and territory legislation may be applied is where the nexus requirements of Pt VIIIAB are not met. However, this depends on whether the state and territory legislation is held to be applicable. The scope of application of the state and territory legislation is unclear; the provisions dealing with the parties’ ability to conclude a binding financial agreement generally do not impose any requirement of nexus.

initiating proceedings, as long as the property in dispute is not only foreign land. Australian courts are unlikely to grant a stay of proceedings.

75 Family Law Act 1975 (Cth) s 90UA. Requirements of geographical nexus also apply to other provisions of Pt VIIIAB, dealing with financial aspects of de facto relationships: ss 90SD (relevant to maintenance) and 90SK (relevant to property). This reflects the limited jurisdiction of the Commonwealth to regulate de facto relationships, which is founded upon a referral by the states and territories. Notes to the legislation make it clear that this requirement is not based on any assumption that the states’ and territories’ jurisdiction to regulate de facto relationships is similarly limited. Some of the states have limited constitutional authority to legislate. Some state constitutions require that legislation must be for the peace, welfare and good government of the state (eg, Constitution Act 1902 (NSW) s 5). This has been held to impose a requirement of geographical nexus, but that requirement is weak, requiring only a ‘remote or general connection — between the subject matter of the legislation and the state’: Pearce v Florenca (1976) 135 CLR 507 at 518; 9 ALR 289; 50 ALJR 670; BC7600046, endorsed in Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1 at 14; 82 ALR 43; 62 ALJR 645; BC8802651.

76 Family Law Act 1975 (Cth) s 90RC(3), Example 1, suggests that if the relevant nexus requirement imposed by the Act is not satisfied, then state or territory law is applicable. Most of the state and territory legislation does not clearly apply in such cases. The Queensland legislation, unusually, states that the relevant part of the legislation ‘continues to apply if the Commonwealth Act [the Family Law Act] does not apply’: Property Law Act 1974 (Qld) s 255A(3). That legislation also provides that the relevant part ‘applies to all de facto relationships other than relationships that ended before the commencement of this section’: Property Law Act 1974 (Qld) s 257(1). Despite the lack of any limitation in this legislation, it is unlikely that it would be applied to relationships that had no connection at all with Queensland (see the discussion at text accompanying n 81). For a detailed discussion of the issue of the application of generally worded legislation in international civil cases, see Keyes, above n 33.

77 Eg, Property (Relationships) Act 1984 (NSW) Pt 4; Property Act 1974 (Qld) Pt 19 Div 3; Relationships Act 2003 (Tas) Pt 6; Relationships Act 2008 (Vic) Pt 3.2.

78 In a minority of jurisdictions, there are some nexus requirements which apply to specific
application of generally worded legislation in international litigation is complex and unsettled. There are two competing methods for determining the scope of application of generally worded legislation in international cases. The first is to apply the relevant choice of law rule, and then to apply the legislation if it forms part of the governing law. In the case of a financial agreement, the applicable choice of law rule should be the contract choice of law rule, which permits the parties expressly or impliedly to choose the governing law. In the absence of choice, the choice of law rule selects the law of the country with the closest and most real connection to the agreement. If the legislation in question is from the country which supplies the governing law, then it should be applied. This method is invariably used when the legislation is foreign; but is not always used when the legislation is that of the forum.

The second method of determining whether the relevant state and territory legislation applies is for the courts to imply into the legislation some criterion of operation, by a process of statutory interpretation. For example, in C v B, the Queensland Court of Appeal held that the provision of the Queensland Property Law Act which permits the court to make an order adjusting de facto partners' interests in property was by implication limited to cases in which the parties had lived together in Queensland in a de facto relationship. This method is common, but has been criticised on the basis that parliament usually had no intention as to the scope of application of the legislation, and therefore a search for legislative intention is purely fictional. It has also been criticised as inappropriately forum-centric.

According to the second method, some limitation to the scope of application of the statute is almost certain to be imposed, and the courts often craft that requirement by reference to the facts of the case. The courts are likely to find that the legislation is applicable, especially if the claimant has relied on a claim created by forum legislation. In the context of financial agreements, it is more likely that the agreement would be raised by way of defence to a claim made under forum legislation, for example, for maintenance or adjustment to property interests. Such a defence would probably not be effective to deny relief for a claim under forum legislation.

issues. For example, in New South Wales, the court's ability to make an order relating to the adjustment of financial interests is limited to cases where the parties were both resident in New South Wales at the time of making the application for that relief, and either both parties resided in New South Wales for at least one third of the duration of their relationship, or the applicant has made substantial financial or non-financial contributions in New South Wales to the relationship: Property (Relationships) Act 1984 (NSW) ss 15, 20(1).

79 See generally Keyes, above n 33, at 10–25.
80 As explained above, there is a precedent for this in the context of marital property agreements, relating to the parties' ability to determine their existing entitlements to property: see above Part II B(2).
81 [2007] 1 Qd R 212 at [24].
82 Dicey, Morris & Collins, above n 25, p 17.
83 Keyes, above n 33, at 19. This criticism is more significant where the jurisdictional rules are weak.
84 This raises very complex questions of characterisation, because the claim under forum legislation would not be characterised as contractual, whereas the defence under a foreign
(2) Financial agreements between married partners

The provisions of the Family Law Act which establish the enforceability of financial agreements between married couples do not explicitly indicate what effect they should be given in a case with international elements. The question as to their effect in such cases is therefore open. Unlike the provisions relevant to financial agreements between de facto spouses, Pt VIIIA does not include any nexus requirements. This raises the same issues as to the scope of operation of generally worded legislation as are addressed immediately above. There is very little case law which considers the scope of operation of the Family Law Act in international property disputes. The two relevant cases are consistent with the first method described above, and it is submitted that this is the correct approach.

In *Murphy v Murphy*, the parties entered into a financial agreement before marriage. The agreement contained an express choice of Australian and Queensland law. The husband obtained advice from an Australian lawyer, and then proposed marriage to the wife in the Philippines, but said he would only marry her if she signed the financial agreement. On his lawyer’s advice, he provided her with a copy of the agreement, and an unsigned certificate of legal advice, and then accompanied her to a lawyer’s office in the Philippines, where the certificate of legal advice was signed by a lawyer. The wife denied that she was given legal advice as required by s 90G of the Family Law Act, and on that basis challenged the enforceability of the agreement. Coates FM stated that the reference to the party receiving legal advice as to their rights foregone as a consequence of entering into the financial agreement in s 90G of the Family Law Act ‘must refer to those interests which arise, exist or occur under the governing jurisdiction of the agreement, which in this case was stated to be the Commonwealth of Australia and Queensland’. This contemplates that the parties might choose foreign law as the governing law; and that in such a case, the legal advice in question would have to relate to the consequences of that choice according to that foreign law. Coates FM found that the term ‘legal practitioner’ in s 90G should be interpreted to mean a person qualified to practice in Australia, and therefore that the requirement was not met. Coates FM’s earlier statement appears to accept that it might be otherwise if the parties had expressly stipulated that foreign law was the financial agreement would be characterised as contractual. The characterisation of the claim would probably dominate the characterisation of the defence, and therefore, the foreign agreement may not be effective.

85 This is consistent with *In the Marriage of Hannema* (1981) 7 Fam LR 542 at 549; 54 FLR 79, where Nygh J noted the:

well established principle of statutory interpretation that whenever parliament refers to contractual obligations, or as in the present case, seeks to make enforceable certain agreements hitherto not enforceable at common law [in that case, referring to registered maintenance agreements under s 86(1) of the Family Law Act 1975 (Cth)], it might be taken to have intended to affect only those relationships which are governed by the law of the forum.

86 [2009] FMCAFam 270.

87 The choice of Queensland law was meaningless but not sufficient to render the clause void for uncertainty. Care should of course be taken in drafting choice of law agreements, to ensure that they are meaningful and certain.

88 [2009] FMCAFam 270; BC200903018 at [58].
governing law, in which case, the relevant legal advice should be that of a practitioner from the relevant foreign legal system.

In *Ruane v Bachmann-Ruane*, the parties entered into a financial agreement which they intended to take effect according to the Pt VIII A provisions of the Family Law Act. As in *Murphy v Murphy*, this should be treated as an express choice of Australian law as the governing law, although this highly significant factor was not referred to by Cronin J in his interpretation of the applicability of the legislative requirements. Both parties stated in the agreement that they had received independent legal advice, but the husband had been advised by an English lawyer. Cronin J held that the requirement of legal advice in s 90G meant that the advice had to have been given by an Australian legal practitioner. This conclusion was supported by the definition of ‘lawyer’ in s 4 of the Family Law Act. Cronin J’s view was that it was necessary that the parties be advised by Australian lawyers, because the effect of the financial agreement was not only to displace the application of the default rules of Australian law relative to property distribution, which required practical expertise in Australian law, but also to exclude the parties’ access to the courts. His Honour therefore thought that the legal practitioner who gave the advice must be a local practitioner for reasons of accountability, and the need to protect the public.

In both *Murphy v Murphy* and *Bachmann v Ruane-Bachmann*, the parties expressly chose Australian law as the governing law of their agreement. The interpretation of the requirement of advice in these cases should be limited to that circumstance. The cases can be taken to establish that the legislation applies if the parties expressly chose Australian law. By extension of that reasoning, if there is no express choice of Australian law, the legislation should apply if the parties impliedly chose Australian law as the governing law of the agreement, and if there was no effective choice, if Australia is the legal system with the closest and most real connection to the agreement. If Australian law is not the governing law of the agreement, then the Australian legislation should be held to be inapplicable to the financial agreement. What effect should then be given to the agreement? There are two possible answers to that question: first, the default Australian legislation could be applied, as the law of the forum — effectively, treating the parties’ agreement as one factor relevant to the court’s discretion. Second, the court might inquire further into whether it was appropriate to enforce the foreign financial agreement. The second is more consistent with the reforms requiring enforcement of local financial agreements.

It is also preferable because the application of forum law is otherwise controlled only by the jurisdiction rules, which for the

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89 [2009] FamCA 1101; BC200951025.
90 This section defines lawyer to mean ‘a person enrolled as a legal practitioner of: (a) a federal court; or (b) the supreme court of a state or territory’.
91 [2009] FamCA 1101 at [76] and [77], approving *Murphy v Murphy* [2009] FMCAfam 270; BC200903018.
92 [2009] FamCA 1101 at [78]–[82].
93 As explained above, if the agreement was raised by way of defence to a claim for maintenance or adjustment of property interests under the Family Law Act, it is likely that the defence based on the foreign financial agreement would be ineffective, because of characterisation: see above n 84. It is submitted that this outcome would be wrong in principle, for the reasons explained in the text following this footnote.
reasons explained above are inadequate to this task.\textsuperscript{94} 

Given that the current Australian policy permits the parties to make enforceable financial agreements, a foreign financial agreement which is not governed by Australian law should be recognised in Australian litigation.\textsuperscript{95} As Australian law permits local parties to make binding agreements, similar respect should be given to foreign agreements; the justifications for enforcement of financial agreements referred to above are equally applicable. Indeed, the enforcement of financial agreements is more likely to create certainty and predictability in international than in local situations. Enforcing mutual agreements is consistent with preventing forum shopping, a factor which has been significant in the development of choice of law in Australia in other areas of law,\textsuperscript{96} and which is especially important in the context of family law, because of the shortcomings of the current jurisdictional rules.\textsuperscript{97} Such a development is consistent with the common law’s recognition of the parties’ ability to make enforceable agreements as to existing entitlements to property.\textsuperscript{98} Consequently, the provisions of the Family Law Act should be interpreted so as not to apply to foreign financial agreements. Rather, the governing law of the agreement should be determined by reference to the parties’ expressed or implied intentions, or to the law which has the closest and most real connection to the agreement. The enforceability requirements of the governing law of the agreement should be applied.

B Comparing English recommendations

The England and Wales Law Commission, in its recent consultation paper on Marital Property Agreements, specifically considered what effect should be given to international financial agreements. The commission, while cautiously suggesting that local marital property agreements should be made enforceable in England and Wales, took the view that foreign marital property agreements that did not meet the proposed requirements of local marital property agreements should remain merely one factor relevant to the exercise of the court’s discretion.\textsuperscript{99} They did suggest that the court in taking into account all the relevant circumstances, should consider the applicable foreign law, and

\textsuperscript{94} Part IIB(4).
\textsuperscript{95} An alternative means of doing so might be by reference to Family Law Act 1975 (Cth) s 90G(1A). It could be argued that a financial agreement made in another country should come within the definition of financial agreement in this subsection. An exploration of this issue is beyond the scope of this article.
\textsuperscript{96} This is especially so in the area of multistate torts: Neilson v Overseas Projects Corporation of Victoria (2005) 223 CLR 331; 221 ALR 213; [2005] HCA 54; BC200507308 at [13], [89]–[91], [172], [173], [197], [199], [271]; Regie Nationale des Usines Renault SA v Zhang (2002) 210 CLR 491; 187 ALR 1; [2002] HCA 10; BC200200802 at [196]; John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503; 172 ALR 625; [2000] HCA 36; BC200003351 at [17], [44], [64].
\textsuperscript{97} See above Part IIB(4).
\textsuperscript{98} See above Part IIB(2).
\textsuperscript{99} Law Commission, above n 21, pp 132–3.
stated that this ‘would not be a revolutionary change’. The commission cited no compelling reason for giving foreign agreements a lesser standing than local agreements.

III Conclusion

The use of agreements has recently become prominent in the area of international family law. This article has identified some of the inconsistencies and contradictions in the way that party agreement is treated in family property law. These include the persistent concern of judges with the suitability of agreement, reflected in the common law’s ambivalence toward financial agreements, and Australian judges’ continuing concern to limit attempts to oust the court’s jurisdiction. Consideration should be given to refining the treatment of family property agreements to take account of legitimate policy concerns, by comparison to the regulation of non-commercial contracts, rather than by continuing to compare family agreements to commercial agreements. Such refinement should place the law on a sounder foundation.

It must be acknowledged that financial agreements are likely to be used more frequently, both in local and international situations. Another potential inconsistency in the treatment of party agreement arises from the lack of clarity in the Family Law Act about the effect of foreign financial agreements. There is no good reason to discriminate against foreign agreements. Consistently with the recognition of party agreement in the Family Law Act, foreign financial agreements should be enforced in accordance with their governing law.

100 Ibid, pp 133–4.