

# Strategies for premarital agreements

As our business relationships take us across international borders, our personal relationships follow suit. Cross-border marriages are becoming more common in Thailand. Foreign citizens marry Thai citizens and either reside in Thailand or relocate with their spouses back to their country of origin. Alternatively, foreign citizens marry elsewhere and then expatriate to Thailand.

In Thailand, a man and a woman are not legally married unless their marriage is registered with the appropriate government office. However, there is an exception for couples married abroad. If your marriage conforms to the rules of the country where it takes place, Thailand will recognise it. Recognition of foreign marriages is generally universal.

However, issues arise when the laws of different countries conflict. In Canada, same-sex marriages are recognised as legal. But other nations including the United States and Thailand are unlikely to recognise these legally performed marriages from Canada.

Conflicts of law are a prominent issue when planning for international premarital agreements. As a result, the planning involved is not dissimilar to the planning of any international agreement: the first question is where the agreement will need to be enforced.

Just because two people marry in Thailand does not mean that the agreement should be drafted to meet the requirements of Thai law. Since a premarital agreement is not enforced until the parties divorce, it should be prepared to comply with the law of the nation where divorce proceedings will likely take place. Often, this will be the country where the parties maintain their principal assets. Divorce proceedings must normally be brought in the country where the parties reside. This is the law in nearly all nations and cannot be varied by agreement of the parties.

A foreigner taking a Thai spouse to reside outside of Thailand should therefore arrange a premarital agreement to meet the legal requirements of the couple's intended foreign residence. This requires preparation by foreign counsel. In many cases, the Thai spouse must also be afforded independent legal representation in order to make the agreement binding in the foreign

jurisdiction. Optimally, the Thai spouse should be simultaneously provided with both Thai and foreign counsel familiar with the laws of the foreign residence before signing. This is to ensure against any future objections that the Thai spouse was not afforded adequate legal counsel, which can render the premarital agreement void in certain jurisdictions such as Canada and the United States.

When foreign couples married abroad expatriate to Thailand, they often do not realise that by abandoning their residence abroad they also abandon their right to bring a divorce proceeding there. Having established residence in Thailand, even a foreign couple married abroad can initiate an action for divorce here. This can create confusion when premarital agreements drawn up in a foreign country are sought to be enforced in Thailand.

Normally, Thai law will only recognise premarital agreements if they are registered at the time of marriage with the appropriate government office. Furthermore, under Thai law, premarital agreements executed in Thailand cannot provide for foreign law to apply. Choice of law provisions that are commonly enforced by Thai courts in business contracts are expressly forbidden in Thai premarital agreements.

However, Thailand's Conflict of Laws Act expressly provides that for agreements executed outside Thailand, Thai courts shall determine validity according to the law of the nation where the agreement is executed. Premarital agreements validly entered into in a foreign nation will be treated as valid in Thailand.

While overall validity is determined according to the country of execution, Thailand's Conflict of Laws Act makes a distinction when addressing the substantive law to be applied in enforcing the terms contained within the agreement. More precisely, for premarital agreements executed abroad, the agreement terms must follow the law of the married couple's nationality provided they are both of the same nationality. If not, then the agreement shall be governed by the law "to which the parties intended or may be presumed to have intended to submit themselves". As a final alternative, Thai courts will apply the law of the couple's first matrimonial domicile.

However, even here exceptions will

apply. Where real estate is concerned, the law of the country where the immovable property is located applies.

An improperly crafted premarital agreement can result in significant cost — both emotional and financial. When further complicated by international law, the assistance of experienced counsel is strongly recommended.

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