

Marriage Contracts in the UAE: To Prenup or not to Prenup?

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Introduction

Prenuptial agreements or premarital agreements have become common practice as a legal tool to regulate how assets between future spouses should be divided in the event of divorce. Such agreements may include a wide variety of issues, *inter alia*, spousal support, assets including real estate and money or the residence of the family post-divorce.

In addition, there are postnuptial agreements that are primarily the same as prenuptial agreements but entered into upon conclusion of the marriage.

This article seeks to answer the question regarding the status, applicability and enforceability of prenuptial agreements under UAE Federal law No. 28 of 2005 regarding Personal Status ('Personal Status Law') or within the broader UAE legal framework. To answer this question, it is necessary to make a distinction between non-Muslims, Muslim expats and UAE nationals and examine the legal remedies available to each of them.

Non-Muslims

In general, prenuptial and postnuptial agreements would be permissible particularly if the national laws of the contracting parties provide for matrimonial distribution upon dissolution of the marriage and/or permits enforceability of these types of agreements.

However, it is important to make a distinction between assets located in the UAE and those abroad. With respect to UAE assets, Article 1(2) of the Personal Status Law states that

"The provisions of this law shall apply to the citizens of the United Arab Emirates unless the non-Muslims of them are subject to special provisions applicable to their sect and denomination, its provisions shall also apply to foreigners as long as none of them insists on applying his law."

Further, Article 5 states that "The state courts shall be competent to try personal status actions initiated against citizens or foreigners having a domicile, residence or workplace in the state."

In view of the above, pre/post-nuptial agreements between foreigners which satisfy the criteria set out in Article 5 shall be enforceable in accordance with the governing law set out therein, even with respect to UAE assets.

With respect to assets located outside the UAE, the enforceability of the agreements shall be subject to the law that prevails where those properties are situated.

Muslim Expats

It is necessary to distinguish between an expat of Muslim faith seeking to enforce a prenuptial Agreement: (a) within the context of divorce proceedings taking place within the UAE; and (b) once the divorce has been finalised outside of the UAE.

For divorce proceedings initiated within the UAE, the Personal Status Law shall apply and the prenuptial agreement shall be treated in the same manner as for UAE nationals (for further information on this point we refer you to the section below) In the event the prenuptial agreement is being enforced post conclusion of the divorce outside of the UAE, it will be regarded as a case of enforcing a contractual agreement and thus subject to UAE Law No. 5 of 1985 regarding Civil Transactions.

UAE Nationals

Islamic Shari'a does not recognise the principle of matrimonial property but rather the autonomous financial status of the spouses. Therefore, all properties established or acquired by either of the spouses during the marriage is and remains the sole property of that spouse with no rights or claim to ownership by the other spouse.

Having said this, Shari'a does permit entry into agreements relating to marriage between spouses in order to govern their rights and obligations provided that they do not contradict Islamic Shari'a. This principle has been codified in Article 20 of the Personal Status Law, which provides for the inclusion of written conditions in the official marriage certificate without limitation as to the scope of the conditions.

The explanatory memorandum issued with the Personal Status Law has stated in reference to Article 20 that contracts to codify parties' best interests and a marriage contract is no different from any other form of contract. Hence, the inclusion of certain conditions is permissible. However, there is a difference of opinion between Shari'a scholars as to the scope of the conditions; some widen the scope and others limit it, albeit all agree on the overarching principle that the conditions should not contradict Islamic Shari'a.

The explanatory memorandum further provides that the draftsmen of the Personal Status Law have adopted the views of the Islamic scholar, 'Ahmed Ibn Hanbal' which embrace a very wide scope in order to strike the right balance between public and private interests. Such a trend would accommodate the contemporary developments in modern society and recognises the need for parties to protect their interests keeping in mind their respective personal circumstances. In this way, marriage contracts can assist in providing greater clarity and transparency, saving time and money in the event of divorce and setting out exactly how assets are to be dealt with, thereby avoiding future potential differences at the outset of a marriage.

The above explanation opens the door for the inclusion of any conditions, even those that aim to regulate property rights between the spouses, provided that they do not contradict the overarching conditions set out in Article 20 para. 1/2/3 of the Personal Status Law.

There is limited case law regarding marriage contract conditions related to property but one important precedent is Dubai's Court of Cassation Case No. 2 of 2010, where a wife sought a divorce on the grounds of harm and pleaded that the continuation of the marriage was impossible. She further sought to enforce a postnuptial agreement pursuant to which her husband had promised her a house in the UAE registered in her name. The court in its decision dated 28 September 2010 granted her the divorce, but as to the postnuptial agreement it held that since the pledge/condition to buy her a house was not written into the marriage certificate, it fell outside the scope of Article 20 of the Personal Status Law. Accordingly the court would need to interpret the written agreement in accordance with the Civil Transactions Law. It is worth noting that the court turned down the wife's request not because it was written in a separate agreement

after the marriage took place but because the wording of the agreement did not meet the requirements specified by the Civil Transactions Law, namely that the basic tenet of a contract, i.e. offer and acceptance, was not present in the agreement.

This judgment indicates that if the condition had been set out in the marriage certificate or if the terms had fulfilled the requirements of the Civil Transactions Law, the court would have enforced the contract.

The advantage of having the property conditions spelled out in the official marriage contract rather than a separate agreement is that the terms can be said to have been agreed upon and accepted by both parties to the marriage without the need for any further legalities to be fulfilled. In the case of a postnuptial agreement, as in the case referred to above, one must abide by the Civil Transactions Law in order to ensure all of the requisite formalities and legal requirements are met. Another factor to bear in mind is that personal status courts' proceedings tend to be faster than civil court proceedings, particularly when one considers that in personal status cases, the court of cassation must rule directly in cases before it whereas in civil court process, the court of cassation can refer the case back to the court of appeal.

In view of the above, one can conclude that a marriage contract (akin to a prenuptial agreement) entered into between spouses pursuant to which matrimonial assets or money/alimony is dealt with or alternatively where one spouse undertakes to transfer certain assets to the other upon divorce is very likely to be upheld by the personal status courts.

Furthermore, pre/post-nuptial agreements are of particular relevance when it comes to properties based outside the UAE and in countries that acknowledge and enforce this kind of agreement, provided that basic conditions, such as financial disclosure and separate legal counselling, are satisfied. Having an agreement that regulates such properties is of the utmost importance especially where the wife is a foreign national. In many cases, if the wife in question is a foreign national she would be in a position to undertake proceedings against these properties in the event of a divorce.

In conclusion, regulating and safeguarding rights vis-à-vis matrimonial assets and/or other conditions are important for any marriage and even more so in the event of a divorce in order to ensure a smooth and fair transition and conclusion for the parties involved.

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