Respecting Autonomy:
a study of prenuptial agreements and community of property

Faustus Tang, Cliff Lui

Introduction s

In most cases, when two persons plan to get married, they are only aware of the positive sides of their marriage. Although they may foresee the possibility that their marriage will end, they are usually reluctant to discuss any post-nuptial matters. Discussion of post-nuptial matters may be seen as a lack of confidence in their marriage or perhaps even as a sign of the lack of love and commitment (possibly the *very* basis of marriage!).

However, the harsh reality is that couples do get separated and divorced and financial arrangements have to be made after the marriage has broken down. Matrimonial litigation is one way to resolve the disputes, but this is often criticized as costly and ineffective. Therefore, private agreements between the parties may be more desirable.

In light of this context, this essay shall explore other options open to parties in Hong Kong which can resolve these financial disputes in a more harmonious manner out of court. In particular, it shall focus on post-nuptial agreements (reached by various means), prenuptial agreements and the community of property regime. After evaluating their strengths and weaknesses, some recommendations are made to improve the existing law relating to the financial arrangements between the parties after divorce.

Legal options open to parties in Hong Kong

Under ss4, 6 and 6A of the Matrimonial Proceedings and Property Ordinance (Cap. 192) ("MPPO"), upon the grant of a decree of divorce, nullity or separation[1], the court may make an order for: a) payments (periodic or lump sum; secured or otherwise); and b) transfer, settlement, sale or variation of property.

To exercise its powers under section 4, 6 or 6A, the court shall have regard to the conduct of the parties and all the circumstances of the case[2] which includes the parties' a) income, earning capacity, property and other financial resources; b) financial needs, obligations and responsibilities; c) ***standard of living*** before the breakdown of the marriage; d) age and the duration of marriage; e) physical or mental disability; f)

[1] It should be noted that the court may make similar orders in all these situations. Thus, in this context, the term "divorcing parties" will be used to cover parties in all three situations although, strictly speaking, in separation and nullity cases, the parties are not "divorcing" each other.

[2] S7(1) of MPPO.

contributions made to the welfare of the family; and g) in proceedings for divorce or nullity of marriage, the value of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.[3]

It should be noted that the factors listed in s7(1) of MPPO are not exhaustive of the "conduct of the parties" and "all the circumstances of the case." Thus, a matrimonial fault or a husband's attack on the wife may be taken into account.

Problems of Litigation

However, matrimonial litigation on property division after divorce can be a painful and time-consuming process. It will often result in bitterness, anger, hostility and resentment. In addition, litigation involves high costs (both emotional and financial). We should also notice that the results of matrimonial litigations are often unpredictable. For example, in the UK, although the court gradually moves from the principle of reasonable requirements to the principle of equality (but not equal division), what the "yardstick of equality"[4] will require is not always clear.[5]

Therefore, "the law encourages spouses to avoid bitterness after family breakdown and to settle their money and property matters amicably" out of court.[6]

Post-nuptial Agreements

A post-nuptial agreement is the agreement entered into by the parties after marriage has been dissolved regarding financial arrangements which include maintenance and division of property. However, we should bear one important point in mind; that is, post-nuptial agreements ***cannot*** oust the jurisdiction of the court because "the power of the court to make provision…[is] conferred not merely in the interests of the wife, but of the public.[7]

Effects of Post-nuptial Agreements

Parties can apply to the court to make their privately negotiated settlement into consent orders.

---

[3] This is one of the differences between divorce and separation cases. In *L v P* [2006] HKEC 256, the court has made deferred orders that a portion of the pension should be paid to the other party when it is due. Arguably, this arrangement is more "accurate" in assessing what the other party is entitled to get; however, this may not be desirable because the other party will not be paid until the pension is due.

[4] *White v White* [2000] 2 FLR 981.

[5] This is evidenced in the decisions in a number of so-called "post-White" cases; e.g. see *Cowan v Cowan* [2002] Fam. 97; *Miller v Miller & McFarlane v McFarlane* [2006] 2 WLR 1283.

[6] Athena Liu, Family Law for Hong Kong SAR (Hong Kong: Hong Kong U P, 2003), 421; *Minton v Minton* [1979] 1 All ER 79 at 87.

[7] *Hyman v Hyman* [1929] AC 601 at 614; quoted at Liu 421; s14(1) of MPPO.

In *Edgar v Edgar*, the court stated that a formal agreement properly and fairly arrived at with legal advice should be given effect, unless it would be unjust to do so.[8]

However, the court is not forced to make a consent order. It can still exercise discretion under s7(1) of MPPO.[9] The court can also make inquiries and require parties to give evidence before it decides whether to make an order.[10] If such an order is granted by the court, the legal effects of the terms shall stem not from the agreement itself but from the court order.[11]

Ways of obtaining Mutual Agreements: Family Mediation

To reduce the bitterness and costs associated with matrimonial litigations, family mediation has been introduced to facilitate the parties to reach mutual agreements. A pilot scheme on Family Mediation was launched in 2000. The scheme was generally welcomed because of its success in achieving its aims—to reduce costs and promote harmony.[12]

In mediation, the main functions of the mediator are to enhance communication between the parties, inform them of their rights, ensure that the mediation process is under control and to educate the parties who lack confidence in negotiating.[13]

Agreements reached during mediation can then be made into consent orders by application to the court.

Financial Dispute Resolution

It should be noted that not all divorcing or separating parties seek family mediation because they may not be aware of this option or they simply prefer litigation due to the hostility between the parties. However, as discussed above, matrimonial litigation is costly. Therefore, the Law Reform Commission recommended that matrimonial proceedings should be reformed such that "access to mediation services should be an integral part of the Family Court system."[14]

The resulting Financial Dispute Resolution mechanism ("FDR") places emphasis on the pre-trial conferences. In these conferences, a Support Services Coordinator ("SSC") is appointed to give counselling service to the parties. In the issues conference, the judge will define the issues and ask the parties whether they have considered mediation. In

---

[8] *Edgar v Edgar* [1980] 3 All ER 887 at 893.

[9] *Cho Fok Bo-ying v Cho Chi-biu* [1990] 2 HKC 269.

[10] *Tommey v Tommey* [1982] 3 All ER 385 at 390.

[11] *De Lasala v De Lasala* [1980] AC 546.

[12] This is evidenced by the fact that about 80% of the participants were satisfied with the service provided; see the Hong Kong Polytechnic University, Evaluation Study on the Pilot Scheme on Family Mediation: Final Report (2004).

[13] Hong Kong Law Reform Commission, Report on the Family Dispute Resolution Process (March 2003), para 1.16. The advantages of family mediation are discussed in para 1.18.

[14] Ibid, para 5.9; quoted in Sharon Melloy, "Family Law Crossroads: Where to From Here?" 33 *HKLJ* 289, at 298.

the settlement conference, the judge will clarify outstanding issues and encourage settlement.[15]

In many cases, being informed of the costs and having a better understanding of the contested issues, parties are likely to come to an agreement. If settlements are made, the judge can make consent orders based on the agreements. However, if agreements cannot be reached, the usual trial will take place.

When the Court will Interfere

As discussed above, the court will generally honour the agreement mutually and fairly reached by the parties. The mere fact that one party has stronger bargaining power is not enough for the court to interfere; instead, the party has to *exploit* that power.

In considering the questions of justice, the court will consider whether there is any "undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked."[16]

If agreements are made into consent orders, their variations are governed by s11 of MPPO. The court shall have power to vary or discharge the order or to suspend or revive any provision of such order.[17] In exercising these powers, the court shall have regard to all the circumstances[18] of the case, including the factors listed in s7(1) of MPPO.[19]

If the agreements are not made into consent orders, then any variations of them will be governed by s15 of MPPO. The court may vary, revoke or insert any financial arrangements into the agreement if a) there is a change in the circumstances[20] or b) the agreement does not contain proper financial arrangements with respect to any child of the family.[21]

---

[15] See note 4, Annex I.

[16] *Edgar v Edgar* at 893. However, in *Pound v Pound* [1994] 1 FLR 775 at 791, the *Edgar* principles is criticized as the "the worst of both worlds" because "the agreement may be held to be binding, but whether it will can be determined only after litigation" (also quoted at Liu 424). The objection is that the result of applying the principles is unpredictable. If the aim of having an agreement is to avoid litigation but litigation is required in order to determine whether the agreement is binding, then the aim of having an agreement is defeated. Although theoretically, there may be some circularity in the situation, it seems that having come to an agreement, *most* divorcing parties will honour it. In some cases, where there is dispute, litigation seems to be unavoidable, but we submit that this should not be a reason for dismissing the *Edgar* principles *all together*.

[17] S11(1) of MPPO.

[18] Conduct of the parties may be taken into consideration; e.g. the wife being assaulted, harassed and molested; *J (H.D.) v J (A.M.)* [1980] 1 WLR 124

[19] S11(7) of MPPO. In *N v N (consent order: variation)* [1993] 2 FLR 868, the wife's application for an extension of maintenance was rejected; but in *Richardson v Richardson (No 2)* [1996] 2 FLR 617, the court extends the maintenance for another five years.

[20] This may include the husband's increased earnings and wife's ill-health; *Gorman v Gorman* [1964] 3 All ER 739. But a change of circumstances is not sufficient for varying the agreement. The test is whether such a change will make it *unjust* to hold the parties to the agreement

[21] S15(2)(a) and (b) of MPPO.

Prenuptial Agreements

A prenuptial agreement is an agreement entered into *before* a marriage between the husband and wife purporting to make arrangements regarding the settlement of their financial assets. Traditionally, prenuptial agreements are *not* enforceable because they are contrary to public policy—that marriage is intended to be a union of two persons *for life*.[22]

Thus, in *F v F (Ancillary Relief: Substantial Assets)*[23], Thorpe J. stated that a pre-nuptial agreement must be "of very little significance" because division of matrimonial assets "cannot be much influenced by contractual terms."[24]

Objections to the Unenforceability of Prenuptial Agreements

However, this position concerning the status of prenuptial agreements seems to be unjustified and far from satisfactory. In the past, when divorce was not possible, when marriage was considered as the union of a man and a woman by God's will, it was fair to say that prenuptial agreements should not be enforced (indeed, without the mechanism for divorce, the agreements *could not* be enforced at all).

The fact is that the concept of marriage has evolved. It has gradually changed from being a status to being something akin to a contract or a partnership of equals. The significance of this change is that certain terms of the marriage contract should be negotiable between what are now two autonomous agents. Once divorce is possible, we do not see why enforcing prenuptial agreements is against public policy.[25]

We submit that divorce law is analogous to prenuptial agreements. Arguably, the existence of divorce law can also be contrary to public policy in the sense that it is inconsistent with the concept that marriage is *intended* to be a union of two persons for life. If divorce law is acceptable, prenuptial agreements should be as well.

It should be noted that marriage is ***intended*** to be for life. However, in fact, it is often ***not*** the case.[26] If divorce is possible, it is inevitable that disputes regarding financial matters have to be resolved after divorce. Therefore, the crucial question is what is the best way to resolve the disputes. As discussed earlier, litigation is not the most satisfactory way to do so. And to some extent, post-nuptial agreements can help. However, if that is the case, there is no reason why prenuptial agreements entered into by parties with proper legal advice should not be enforceable. It is clear that with the

---

[22] *Durant v Titley* (1819) 7 Price 577, Ex Ch; *Hindley v Marquis of Westmeath* (1827) 6 B & C 200; *Cocksedge v Cocksedge* (1844) 14 Sim 244.

[23] (1995) 2 F.L.R. 45.

[24] In *N v N (Jurisdiction: Pre-Nuptial Agreement)* (1999) 2 FLR 745, the court refused to enforce even a *portion* of a prenuptial agreement.

[25] Especially when the law encourages reconciliation rather than confrontation.

[26] From 1993 to 2003, the number of marriage has decreased by 40% but the number of divorce increased by 70%. In 2003, for every 100 marriages, there are 43 divorces; Hong Kong Council of Social Services, Views on Welfare Policy Agenda for 2004 and Beyond (November 2003), at 18.

aid of prenuptial agreements, the process of resolving financial disputes between the divorcing parties will be much easier.

Prenuptial Agreements in other Jurisdictions[27]

Prenuptial agreements are enforceable in many jurisdictions, for example, Australia[28], Canada[29] and New Zealand[30]. A prenuptial agreement may be set aside if it is procured by fraud, duress or undue influence (Australia) or if it results in unconscionable circumstances (Canada) or if causes serious injustice (New Zealand).

Gradual Change

In the UK, it seems that there is change in the court's attitude towards prenuptial agreements. The courts appear to accept that a prenuptial agreement can be a material consideration when determining what adjustments to make to the financial circumstances of the divorcing parties.[31]

Where there is no duress or undue influence and the agreement is reached with competent legal advice, the court is increasingly likely to uphold the terms of a prenuptial agreement.[32] Therefore, although strictly speaking, prenuptial agreements are still not enforceable as binding on the parties, they can have great evidential values. The existence of the agreements can be regarded as the "conduct of the parties" and thus be taken into consideration alongside the factors listed in s25(1) of the Matrimonial Act 1973 when the court exercises its power to make the appropriate orders.[33]

Potential Problems

However, there is a risk that the agreement may not be fairly and properly reached. As a response, we submit that the *Edgar* principles ought also apply in cases of prenuptial agreements. That is, the agreement will not be binding if it would be unjust to hold the parties to the terms of the agreement.[34]

The difficulties in assessing whether such agreements are properly entered into are similar to those met by considering post-nuptial agreements. Therefore, if post-nuptial agreements can be binding, we do not see why prenuptial agreements should be treated differently.

---

[27] For a more detailed of the comparison, see Jeremy Morley, "Prenuptial Agreements for International People."

[28] Family Law Amendment Act 2000.

[29] Family Law Reform Act 1978 (continued in the Family Law Act).

[30] Matrimonial Property Act 1976; the Property Relationships Amendment Act 2001 extends the applicability of prenuptial agreements to partners in de facto relationships and same sex relationships.

[31] *M v M (Pre-nuptial Agreement)* (2002) 1 FLR 654.

[32] *K v K* (2003) 1 FLR 120.

[33] The same can be said regarding the Hong Kong court's attitude towards the factors listed in s7(1) of MPPO.

[34] Because it is procured by unreasonable and unfair means discussed earlier or it is reached without independent legal advice.

Limitations

Adopting the recommendations made by the English Home Office Ministerial Group on the Family, we agree that safeguards for prenuptial agreements should be provided. In particular, a prenuptial agreement is not enforceable if a) it lays an obligation on a third party without consent; b) the parties did not receive competent legal advice; c) the agreement will cause significant injustice; and d) the parties did not fully disclose their property.[35]

In addition, since presence of a child will have significant impact on the financial arrangements made, any prenuptial agreements should ensure that the interests of a child will be properly protected (in particular, attention should be paid to their needs). And the court should have the power to insert any terms with respect to the caring of the child and his reasonable needs.[36]

Recommendations in Hong Kong

In light of the above discussion, we recommend that prenuptial agreements should be regarded as a relevant factor to be considered by the court alongside the factors listed in s7(1) of MPPO. This is similar to the present UK situation.

Further, we suggest that prenuptial agreements should not only be regarded as simply *another* factor. Instead, the court should give *considerable* weight to it, treating the agreement as a starting point in exercising its power to give orders. Similar arrangements can be made such that prenuptial agreements can also be made into consent orders.

As discussed above, safeguards are to be provided. That is, prenuptial agreements are enforceable only if they are reached freely by the parties with competent legal advice. If the agreements are procured by exploitation, duress, undue influence or other unreasonable means of pressure or if there is an important change of circumstances, then the court may alter the terms of the agreement. This ensures that formal (or procedural) justice is upheld.

Importantly, prenuptial agreements cannot oust the jurisdiction of the court all together. The court should retain the power to alter or set aside the agreements if it would be *unjust* to hold the parties to the agreements. The *ultimate* duty of the court is to ensure that financial arrangements are made in accordance with justice and fairness. This ensures that substantive justice is achieved.

---

[35] See Morley.

[36] This is in accordance with various Hong Kong legislation which aims at protecting the welfare of the child.

Community of Property

Community of property is a marital property regime that has its roots in civil law jurisdictions. It is also found in some common law jurisdictions. Community of property developed with a view to protect non-earning spouses, especially women. The question is whether it can or should apply in Hong Kong.

In a community property jurisdiction, most property acquired by either spouse during the marriage (usually excluding gifts or inheritances) becomes jointly owned by both spouses, divisible upon divorce, annulment or death. Joint ownership of a particular asset is automatically presumed by law in the absence of specific evidence pointing to a contrary conclusion. The community property system assumes that both spouses may contribute equally to the creation and operation of family wealth notwithstanding that their contributions may differ in nature.

Community of property regimes operate in myriad forms. In some jurisdictions, such as California, USA and France, a 50/50 division of community property is mandated by law, courts having limited leeway to change that; on the other end of the spectrum, such as Texas, USA, a divorce court may decree an "equitable distribution" of community property, which may result in an unequal division of such. Aside from the way community assets are divided, how 'community assets' are constituted may also differ.

As of the time of writing, Hong Kong follows England with private separation of property and remains a non-community property jurisdiction. Generally speaking, the property that each partner brings into the marriage or receives by gift, bequest or devise during marriage is private property and is not pooled together with other assets for equal distribution after marriage.

Comparative Study

In order to assess the suitability of a community of property regime in Hong Kong, it would be appropriate to study characteristics that 'community' jurisdictions have in common.

Opt-out

In almost all jurisdictions that follow a community of property regime, couples may choose to opt out through a prenuptial or post-nuptial agreement. Something akin to a contract. The contract must be made under the guidance of a notary and will detail the marital property system they wish to follow, for example, a separation of property regime or a universal community of property. According to empirical statistics, 20% of married couples opt out and those who do opt out tend to be wealthier couples.

Constitution of Community Property

Generally, community property consists of the proceeds of a spouse's work during the regime and the fruits and income due or collected from all that spouse's property during the regime. The community property is administered equally by both spouses.

Private property usually consists of their own clothes, private gifts, property gained through inheritance and private law damages, e.g. for personal injury. Such property is not divided at the end of the marriage.

Liability for debts

Whether the community property can be provided as security by either spouse depends on whether the community property regime in the jurisdiction is immediate or deferred. If the regime is of the deferred type, the community property only falls into place *after* the marriage ends and so, debts incurred during the marriage only affect the debtor's own property. There is no 'community property' yet as such.

If the regime is of the immediate type, the community property is constituted at the time of marriage and the signature of one spouse puts all the community property before the creditor, akin to a partnership. However, the rigour of this rule is often attenuated: the income of one spouse can not generally be seized by the creditors of the other, unless the debt was incurred "for the upkeep of the household or the education of the children"; also, debts arising from a guarantee given, or a loan taken on by a spouse without the consent of the other will not engage the community property (ultra vires loans).

Distribution of the community assets

When the marriage comes to an end, community assets are generally divided on a 50/50 basis with provisions to adjust the distribution according to 'compensation', present and future financial needs as well as the needs of children.

Compensation is a term of art, describing the sums payable to the community property pool or vice versa. Because of the movement of resources between the community property and the individuals' personal property during the marriage, the community may have paid a personal debt for one of the spouses; or a house may have been built with the community's money on land belonging personally to one spouse. The house will belong to the landowner, but he will have to compensate / make good the community property pool.

Each spouse keeps their personal property on dissolution of the marriage.

Hong Kong

As is apparent in how Hong Kong court divide family assets after divorce, the principle of separation of property is uncertain and can lead to unfairness. Hunter JA, in *C v C*, said that the reasonable needs of the dependant spouse / applicant should be the upper limit of what he or she should receive. This approach was conceded to be problematic by Lam J in *L v L*. The different treatment of the different contributions by each spouse may violate the ICCPR as it applies to Hong Kong. Indeed, Professor E. Cooke recently commented that "because of these legal difficulties, the often painful experience of a break-up can be made even more distressing, and financially expensive, for both parties. The whole area is an unresolved matter of concern for government policy-makers."

The question to be decided then, is whether a community of property regime would lead to a fairer distribution of matrimonial assets. The key differences that a community of property regime can bring to Hong Kong is a 50/50 distribution of family assets as a starting point as well as the recognition that contributions by either spouse are equally important to familial wealth though they may each be of a different nature. A host of other problems follow in determining what constitutes 'community property', possible 'community of debt' and assuring societal acceptance of 'shared property'. We submit that instead of a full-fledged community regime, it may be better to legislate the distilled advantages into Hong Kong law.

Hong Kong courts have persistently avoided equality of division as a starting point for property division and have resisted giving reasons for any departure from equality of division. This is problematic in itself because the process becomes opaque and the property positions of spouses in financial disputes remains uncertain. In all regards, the only reasons available for a judge to consider are listed exhaustively in section 7 of the MPPO. There is little reason in hesitating to give specific reasons for the proportions in splitting matrimonial property.

Legislation providing for a 50/50 starting point with various considerations for adjustment would improve the bargaining power of non-income-earning spouses on the negotiating table – an important aspect of divorce settlement since most financial settlements are settled out of court. Such legislation would also provide for courts to have the discretion to depart in cases where it is necessary to do so. Hong Kong's position does not have to be so strict as New Zealand where it must be found to be repugnant to justice to order a non-equal distribution of the assets. Hong Kong courts may continue to use the statutory criteria in section 7 of the MPPO as factors to consider moving away from a 50/50 distribution. Further movement can be provided if periodic payments such as maintenance is ordered, for example.

An Australian Institute of Family Studies (AIFS) study found that when marital property is divided equally between parties, the effect may be to reduce the proportion of assets received by the wife in marriages of very low to medium asset wealth. Conversely, an equal split of property may substantially increase the wife's share of property for those women from marriages of high asset wealth.[37] Such an equality approach may be unfair to those from low to medium-wealth households. Further, Australian courts have stated that legislating equality of sharing as a starting point may be interpreted as extending such equality to the end point of any distribution.[38]

With respect, this argument does not seem to be tenable if legislation provides for an exhaustive set of factors that courts may use to adjust the division proportion to provide a fair distribution to the spouses (as the MPPO currently does). Current factors to be considered by the judge include the financial needs of the spouses, earning capacity, duration of the marriage and the pre-breakdown standard of living.

A 50/50 proportion starting point may reduce potential conflicts with the ICCPR applied in Hong Kong by the Basic Law by eliminating the need to assess the difference in the nature of contributions by each spouse.[39] Of course, this may expressly be legislated, but a 50/50 starting point would give such a provision more force.

We submit, therefore, that the implementation of a community property regime with its inherent complications will not likely affect the resultant distribution of assets in the event of a marital breakdown. Hong Kong may instead distil from those jurisdictions under those regimes legislation that provides a 50/50 starting point for property distribution accompanied with curial discretion to adjust it by various criteria. This will enhance the law's constitutionality and improve spousal fairness in marital-financial disputes.

---

[37] *Division of Matrimonial Property in Australia, Australian Institute of Family Studies Research Paper 25*, G. Sheehan and J. Hughes, March 2001

[38] Figgins v Figgins [2002] FamCA 688 para.120

[39] Article 23(4) ICCPR: State Parties to the present Covenant shall take appropriate steps to ensure [equality] of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.

Conclusion

In our discussions, we have recommended that prenuptial agreements should be enforceable subject to certain safeguards to ensure that justice is upheld. We have also recommended that the advantages of community of property regimes can be adopted in Hong Kong.

Prenuptial agreements provide an alternative to matrimonial litigation by allowing the parties to privately determine the financial arrangements after the marriage breaks down. A legislated equality of distribution will help non-income earning spouses on the negotiating table and in court. These recommendations stem from the underlying principle that the autonomy of rational agents should be respected. Upon marriage, two autonomous agents make a conscious and informed decision to live together, contributing to and sacrificing for the family. Therefore, when the marriage breaks down, the contributions of each party should be equally recognized. As a result, equal division should be the starting point in determining how the financial arrangements are to be made.

However, we should also recognize that if the terms of a marriage contract are negotiable, parties to a marriage should be given the opportunity to opt-out of a 50/50 division. This, as we have argued, is an integral part of the whole package which will improve our law relating to the financial arrangements after divorce. This system will provide for necessary flexibility and at the same time respect autonomy of the agents. In addition, it also recognizes the role of the court in ensuring that justice would not be sacrificed in upholding the parties' agreements.

These recommendations help to settle the disputes between the divorcing parties as to the settlement of property. They also protect the parties by ordering the stronger parties to provide for the weaker parties' reasonable needs. In this regard, the proposed changes will buttress the main functions of family law.[40]

Cliff Lui
Faustus Tang

November 2006

[40] In particular, it serves the protective and the resolution of disputes functions.