Choice of Law and Pre-Nuptial Agreements

I really have sympathy for Nicolas Granatino. It is no only because he is French. He also gave up a career in investment banking at JP Morgan in his mid-30s to become a biotechnology researcher at Oxford University. Like many readers of this blog, he chose to devote his life to research.

Now, one likely difference between M. Granatino and a few readers of this blog is that he had married five years earlier Katrin Radmacher, a German paper industry heiress worth more than £ 100 million. So, as long as they were happily married, Mr. Granatino was freer than many to do whatever he wished and pursue his own interests. But if they were to divorce, the situation might change. They had entered into a pre-nuptial agreement providing that neither party was to acquire any benefit from the property of the other during the marriage or on its termination.

After their divorce in 2006, this did not prevent Mr Granatino from getting £ 5.85 million from the High Court, and £ 3.5 million from the Court of appeal. Yesterday, however, the UK Supreme Court upheld the prenuptial agreement.

The case was obviously international. Althought they had married in London, the spouses were foreigners. The pre-nuptial agreement had been entered into in Germany, before a German notary, and included a choice of law clause providing for the application of German law. Ms Radmacher now lives in Monaco with the children of the couple.

The Supreme Court found that English law governed. The majority held:

> *The foreign element and the agreement*
>
> *96. The wife was German, and the husband was French. The agreement was drafted by a German lawyer under German law. They were then living in London and London was plainly intended to be their first matrimonial home.*
>
> *97. The agreement stated (in recital 2) that (a) the husband was a French citizen and, according to his own statement, did not have a good command of*

German, although he did, according to his own statement and in the opinion of the officiating notary (Dr Magis), have an adequate command of English; (b) the document was therefore read out by the notary in German and then translated by him into English; (c) the parties to the agreement declared that they wished to waive the use of an interpreter or a second notary as well as a written translation; and (d) a draft of the text of the agreement had been submitted to the parties two weeks before the execution of the document.

98. Clause 1 stated the intention of the parties to get married in London and to establish their first matrimonial residence there. By clause 2 the parties agreed that the effects of their marriage in general, as well as in terms of matrimonial propertyand the law of succession, would be governed by German law. Clause 3 provided for separation of property, and the parties stated: "Despite advice from the notary, we waive the possibility of having a schedule of our respective current assets appended to this deed."

99. Clause 5 provided for the mutual waiver of claims for maintenance of any kind whatsoever following divorce:

"The waiver shall apply to the fullest extent permitted by law even should one of us – whether or not for reasons attributable to fault on that person's part – be in serious difficulties.

The notary has given us detailed advice about the right to maintenance between divorced spouses and the consequences of the reciprocal waiver agreed above.

Each of us is aware that there may be significant adverse consequences as a result of the above waiver.

Despite reference by the notary to the existing case law in respect of the total or partial invalidity of broadly worded maintenance waivers in certain cases, particularly insofar as such waivers have detrimental effects for the raising of children and/or the public treasury, we ask that the waiver be recorded in the above form …

Each of us declares that he or she is able, based on his or her current standpoint, to provide for his or her own maintenance on a permanent basis, but is however aware that changes may occur."

100. Clause 7(2) recorded that Dr Magis had pointed out to the parties that, despite the choice of German law, foreign law might, from the standpoint of foreign legal systems, apply to the legal relationships between the parties, in particular in accordance with the local law of the matrimonial residence, the law of the place and/or nationality of the husband, with nationality and the place where assets were located being especially relevant to inheritance. The agreement said: "The notary has pointed out that he has not provided any binding information about the content of foreign law, but has recommended that we obtain advice from a lawyer or notary practising in the respective legal system." By letter to the parties dated 3 August, 1998 Dr Magis again stressed that, before taking up permanent residence abroad, they should take the advice of a local lawyer in relation to the effect of the agreement there.

101. The unchallenged evidence before the judge was that: (a) the agreement was valid under German law; (b) the choice of German law was valid; (c) there was no duty of disclosure under German law; (d) the agreement would be recognised as valid under French conflict of laws rules.

102. The terms of the agreement recite that the parties intend to establish their first matrimonial residence in London and it confirms by clause 7(2) that the law of their matrimonial residence may come to apply to their legal relationship as spouses. It was therefore inherent in the agreement that another system of law might apply its terms and so it could never be regarded as foolproof.

Applicable law

103. In England, when the court exercises its jurisdiction to make an order for financial relief under the Matrimonial Causes Act 1973, it will normally apply English law, irrespective of the domicile of the parties, or any foreign connection: Dicey, Morris and Collins, Conflict of Laws, vol 2, 14th ed 2006, Rule 91(7), and e.g. C v C (Ancillary Relief: Nuptial Settlement) [2004] EWCA Civ 1030, [2005] Fam 250, at para 31.

104. The United Kingdom has made a policy decision not to participate in the results of the work done by the European Community and the Hague Conference on Private International Law to apply uniform rules of private international law in relation to maintenance obligations. Although the United Kingdom Government has opted in to Council Regulation (EC) No 4/2009 of 18

December, 2008 on jurisdiction, applicable law and enforcement of decisions and cooperation in matters relating to maintenance obligations, the rules relating to applicable law will not apply in the United Kingdom. That is because the effect of Article 15 of the Council Regulation is that the law applicable to maintenance obligations is to be determined in accordance with the 2007 Hague Protocol on the law applicable to maintenance obligations, but only in the Member States bound by the Hague Protocol.

105. The United Kingdom will not be bound by the Hague Protocol, because it agreed to participate in the Council Regulation only on the basis that it would not be obliged to join in accession to the Hague Protocol by the EU. The United Kingdom Government's position was that there was very little application of foreign law in family matters within the United Kingdom, and in maintenance cases in particular the expense of proving the content of that law would be disproportionate to the low value of the vast majority of maintenance claims.

106. For the purposes of the present appeal it is worth noting that the Hague Protocol allows the parties to designate the law applicable to a maintenance obligation, but also provides that, unless at the time of the designation the parties were fully informed and aware of the consequences of their designation, the law designated by the parties shall not apply where the application of that law would lead to manifestly unfair or unreasonable consequences for any of the parties (Article 8(1), (5)).

107. The ante-nuptial agreement had provision for separation of property and exclusion of community of property of accrued gains (clause 3), in relation to which the chosen law would have governed: Dicey, Morris and Collins, vol 2, para 28-020. But although the economic effect of Miller/Macfarlane may have much in common with community of property, it is clear that the exercise under the 1973 Act does not relate to a matrimonial property regime: cf Case C-220/95 Van den Boogaard v Laumen (Case C-220/95) [1997] ECR I-1147, [1997] QB 759; Agbaje v Agbaje [2010] UKSC 13, [2010] 2 WLR 709, para 57.

108. In summary, the issues in this case are governed exclusively by English law. The relevance of German law and the German choice of law clause is that they clearly demonstrate the intention of the parties that the ante-nuptial agreement should, if possible, be binding on them (see para 74 above).

The judgment of the Supreme Court is available here.