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.

Dutch Conference on the Impact of the ECHR on Private International Law

On 12 November 2010 the Netherlands Organisation for Scientific Research (NWO), the Amsterdam Center for International Law (ACIL) and the Centre for the Study of European Contract Law (CSECL) will organize a symposium about 'The Impact of the European Convention on Human Rights on Private International Law'.

The conference will take place in Amsterdam in the Doelenzaal of the university library (UB).

Preliminary Program

9h00–9h30: Arrival and Registration

9h30–9h45: *Welcome and Introduction*: Erika de Wet (Amsterdam/ Pretoria)

9h:45–11h.15: *The ECHR and the Public Policy Exception in Private International Law*
Chair: Jannet Pontier (Amsterdam)
Speaker: Ioanna Thoma (Athens) (25min)
Discussants: James Fawcett (Nottingham); Aukje van Hoek (Amsterdam) (20min each)

11h:45-13h15: *Art. 1 ECHR and Private International Law*
Chair: André Nollkaemper (Amsterdam)
Speaker: Louwrens Kiestra (Amsterdam) (25min)
Discussants: Jaco Bomhoff (Leiden, tbc); Michael Stürner (Frankfurt/Oder) (20min each)

13h15-14h15: Lunch

14h15-15h45: *The Prohibition of Discrimination under the ECHR and Private International Law*
Chair: Ted de Boer (Amsterdam)
Speaker: Patrick Kinsch (Luxemburg) (25min)
Discussants: Andrea Büchler (Zurich); Mathias Reimann (Ann Arbor) (20min each)

16h15-17h15: *General Discussion* – Chair: A.E. Oderkerk (Amsterdam)

17h15-17h30: *Closing Comments by the Organizers*

More information can be found here.

Childress on Erie and International Cases

Trey Childress, who teaches at Pepperdine University School of Law, has posted When Erie Goes International on SSRN. Here is the abstract:

> *This Article challenges the widely held belief that the Erie doctrine automatically applies in private international law cases – namely, cases where a United States federal court is asked by private litigants to apply foreign, non-United States law. Under the conventional understanding, the Erie doctrine not only requires federal courts to apply the law of the state in which the court sits but also to apply that state's conflict-of-laws rules, even when those rules direct the court to apply the law of a foreign country. This Article argues that courts should question the mechanistic application of a doctrine announced in the 1930s (and updated to conflict of laws in the 1940s and 1970s) to the realities of private international litigation today, especially in light of more recent Supreme Court cases concerning constitutional constraints on choice of law. Among other findings, the Article provides empirical evidence uncovering a previously unrecognized connection in the scholarly literature:*

internationalizing the Erie doctrine may in part explain the increased use of the forum non conveniens doctrine by federal district courts. The Article also reframes the ongoing and contested scholarly debate between Professors Curtis Bradley, Jack Goldsmith, Harold Koh, and others regarding the application of Erie to customary international law in light of Erie's application in private international law cases. The Article not only provides a new empirical and scholarly lens through which to view the international application of the Erie doctrine but also offers a suggested approach to be employed by courts when faced with such cases.

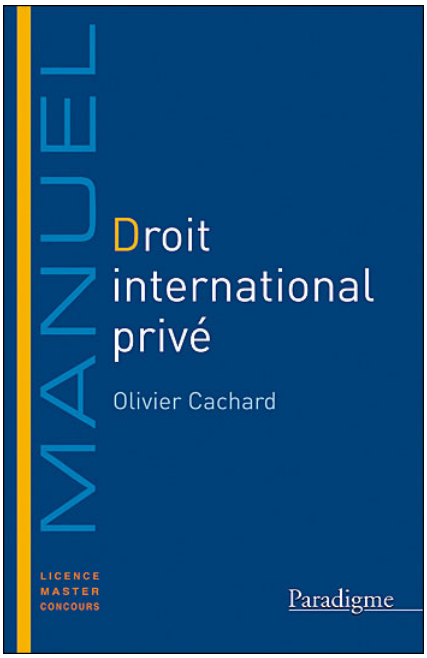
The paper, which is forthcoming in the *Northwestern University Law Review*, can be freely donwloaded here.

ATS and the lack of corporate liability under International Law

For those interest in the fate of the american ATS, see the recent order of the US District Court of the Southern District of Indiana here (a summary of the decision by Antoine Martin, PhD reasearcher in International Law at the University of Surrey and editor of International Law Notepad website, may also be found here).

New French Book on Private International Law

Professor Olivier Cachard, who is the Dean of the Law Faculty of Nancy, has recently published a book on French private international law.

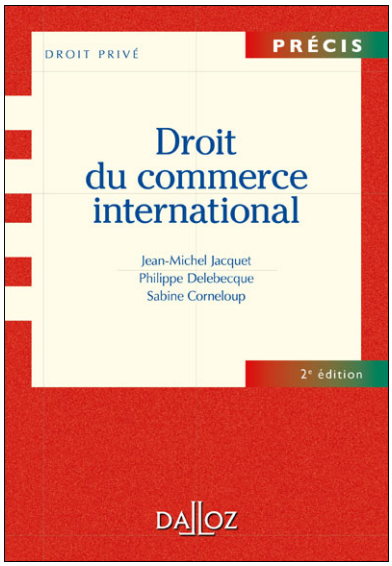


The book is short (less than 300 pages). It aims at surveying the subject, and will thus be very useful for not only for students, but also for foreigners wishing to get a first acquaintance with the subject. Remarkably, it also includes quite a few materials such as cases, statutory texts and extracts from leading articles.

More details can be found here.

New French Book on International Commercial Law

The second edition of Jean-Michel Jacquet, Philippe Delebecque and Sabine Corneloup's manual on international business law (*Droit du commerce international*) was released this summer.



It is one of the few comprehensive French books in this field, and it is up to date.

For more details, see here.

Rueda and Cuniberti on Abolition of Exequatur

Isabelle Rueda and I (University of Luxembourg) have posted Abolition of Exequatur – Addressing the Commission's Concerns on SSRN. The abstract reads:

> *After the European Council called for the reduction of intermediate measures necessary for the enforcement of judgments, the European Commission has initiated a process of gradual abolition of exequatur in the European Union. The exequatur procedure, however, serves the important purpose of preventing the enforcement of foreign judgments made in violation of human rights. Along with many other critiques of the project, this Article argues that existing mechanisms sanctioning human rights violations do not serve the same purpose, and that the new remedies forged by the Commission do not afford the same level of protection. However, unlike many other critiques, the Article argues that the concerns articulated by the European lawmaker with respect to the traditional exequatur procedure should not be ignored and could be*

addressed by reforming exequatur in a less radical way.

The paper can be freely downloaded here. All comments welcome!

Faculty Position at National University of Singapore

The Faculty of Law at the National University of Singapore invites applications for full-time academic appointment at all levels.

JOB DESCRIPTION:

We seek candidates who are committed to excellence in research and teaching. Applications in all areas are welcome. At present, we are especially interested in scholars who specialise in (1) Conflict of Laws (Private International Law) or (2) Law and Economics.

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NUS Faculty of Law is a leading law school in Asia widely noted for its global outlook and high standards of scholarship and education. The law school has more than 60 academic staff members and more than 1200 undergraduate and postgraduate students. The Faculty is actively engaged in research and its members regularly publish books and monographs as well as articles in leading journals in Singapore and abroad.

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School of Law, the NUS law school offers the NYU@NUS programme which allows students to earn an LLM concurrently from both institutions and the LL.B. (NUS) and LL.M. (NYU) concurrent degree programme. For more information on the NUS Faculty of Law, please visit: http://www.law.nus.edu.sg

The strength of the NUS Faculty of Law lies in its outstanding students and faculty. The law school offers subjects ranging from the theoretical to the practical, with comparative and cross-disciplinary perspectives. The overriding objective is to provide students with a liberal legal education that will allow them to realise their full potential intellectually and professionally.

APPLICATION PROCEDURE:

To apply, please visit: http://law.nus.edu.sg/about_us/academic_positions.html for more information.

If you have any queries, you may email: lawlsfj@nus.edu.sg (Contact: The Search Committee Secretariat).

APPLICATION DEADLINES: 31 Dec 2010 and 1 June 2011

Another twist in surrogacy motherhood saga

Many thanks to Isabel Rodríguez-Uría Suárez

The 5th of October the Spanish Dirección General de los Registros y el Notariado (hereinafter DGRN) has issued an Instruction about the regulation of affiliation registration in cases of surrogate pregnancy in order to protect the best interests of the child and the interests of the women who give birth (see BOE, n. 243, 7.10.2010).

According to the Instruction, a prerequisite is required for the registration of

births by surrogate motherhood: it is necessary to produce before the Spanish responsible of the Registro Civil a judicial resolution of the competent Court of the country in which the surrogate pregnancy occurred. The judicial resolution must determine the affiliation of the child. This requisite is demanded in order to control the legal requirements of the surrogate pregnancy contract and to ensure the protection of the best interests of the child and the interests of the pregnant mother.

The foreign court decision raises a question of recognition in Spain. The DGRN distinguishes between contentious and non-contentious proceedings: on the one hand, contentious foreign decisions must be recognized by *exequatur*; on the other hand, the DGRN gives a set of guidelines for the recognition of non-contentious decisions in affiliation matters. In short, the Spanish officer in charge of the Registro Civil must check: a) the formal validity of the foreign decision b) that the original court had based its international jurisdiction in conditions equivalent to those provided by Spanish law c) the due process respect d) that the interests of the child and the pregnant mother had been guaranteed e) that the foreign decision is a final decision and that the consents given in the contract are irrevocable.

Finally, the Spanish DGRN states that foreign registration certificates do not support affiliation registration in the Registro Civil.

Conference on the Judge and the Border in Beirut

An international conference will be held on 22 October 2010 in Beirut, Lebanon, on ‘The Judge and the Border’.

The morning session focuses on ‘The extra-territorial activity of the courts’, and deals with the powers of the courts in respect of foreign territories, foreign evidence, foreign litigants, foreign judgments, etc. The afternoon session deals with ‘International judicial cooperation and conflict of laws’, and covers issues

such as lis pendens, the reception of foreign procedural institutions, the application of foreign mandatory rules, etc.

The speakers include Professors Paul Lagarde, Bernard Audit, Pascal de Vareilles-Sommières, Léna Ganagé, Marie-Maure Niboyet, Etienne Pataut, Arnaud Nuyts, Mouhib Maamari, Sami Mansour, Haffiza Haddad. The Conference (in French and Arabic) is held under the auspices of the 'Conseil supérieur de la magistrature' and 'Institut d'Etudes Judiciaires du Liban'.

The full programme can be found on www.dipulb.be.