Belgian Court Recognizes Californian Surrogacy

In the case of the two men who had contracted with a woman living in California in a case of international surrogate motherhood, a Court of Appeal has recently issued its ruling, reversing in part the decision of the lower court (Court of Appeal of Liège, 1st Chamber, ruling of 6 September 2010, docket No 2010/RQ/20).

As has been indicated, the lower court had denied any recognition to the birth certificates of the twin girls issued by the authorities in California. The lower court had based its reasoning primarily on the violation of the public policy exception, holding that the birth certificates were only the last step in a series of events which started with the surrogacy agreement. The court placed great weight on the fact that this agreement violated basic human dignity in that it put a price on the life of a child.

In appeal, the Court again reviewed the matter *ab novo*. It found that the first step in the analysis was to review whether the birth certificates could have been issued if the rules of Belgian private international law had been applied. This test is mandated by Article 27 of the Code of Private International Law, which requires that foreign acts, including acts concerning the civil and family status of individuals, comply with the requirements of the law(s) declared applicable by the Belgian rules of private international law. Since both men were Belgian nationals, the Court of Appeal first undertook to determine whether the birth certificates could have been issued applying Belgian law.

The Court proceeded first to review the situation of the parent who was the biological father of the twin girls. It found that under Belgian law, since the surrogate mother was not married, the father could have recognized the children and hence legally become their father. The situation was different for the other man who had 'commissioned' the children, as he was not biologically linked with the children. The Court found that under Belgian law, there was no possibility to establish a legal parentage between a child and two persons of the same sex, outside the specific situation of adoption by same sex couples.

Having found that at least one of the commissioning parents could have established his paternity over the children, had Belgian law been applied, the Court undertook to review the impact on this paternity of the very peculiar circumstances which surrounded the birth of the twin. Specifically the Court examined whether these circumstances, and in particular the existence of a contract between the mother and the commissioning parents, contract which had given rise to the payment of money, did not lead to a violation of public policy.

While it recognized that contracts which directly concern human beings and the human body were void under public policy principles, the Court noted that the public policy reservation called for a nuanced application. Among the principles which could be taken into consideration in the light of the public policy mechanism, the Court singled out the interest of the children, as protected both by international law instrument and the Belgian Constitution. According to the Court, this interest would be unreasonably curtailed if the children, who resided in Belgium, were deprived of any legal link with their biological father, while at the same time they could not legally be considered the children of the mother who had carried and delivered them. The same could not be said, however, according to the Court, for the legal link between the twin sisters and the other man.

Accordingly, the Court only partially granted the relief sought by the two men. It decided to recognize and give effects to the birth certificates issued in California in so far as they form the basis for the legal link between the sisters and their biological father.

While this ruling may not be the last word in this case, it is quite likely that the other parent will now seek to adopt the children.

Editors' note: Patrick Wautelet is a professor of law at Liege University.

Convergence and Divergence in

Private International Law – Liber Amicorum Kurt Siehr

As we pointed out in a previous post, a very rich collection of essays **in honor of Prof. Kurt Siehr** on his 75th birthday has been recently published by Eleven International Publishing and Schulthess, under the editorship of *Katharina Boele-Woelki*, *Talia Einhorn*, *Daniel Girsberger* and *Symeon Symeonides*: **Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr**. A previous *Festschrift* was dedicated to Prof. Siehr in 2000: "Private Law in the International Arena – From National Conflict Rules Towards Harmonization and Unification: Liber amicorum Kurt Siehr" (see Google Books).

Here's the table of contents:

Part I: General Aspects of PIL Law-Making.

- *Talia Einhorn*, American vs. European Private International Law – The Case for a Model Conflict of Laws Act (MCLA);
- *Peter Hay*, Comparative and International Law in the United States – Mixed Signals;
- *Herbert Kronke*, Connecting Factors and Internationality in Conflict of Laws and Transnational Commercial Law;
- *Jim Nafziger*, Democratic Values in the Choice-of-Law Process;
- *Anton K. Schnyder*, Keine Berührungsangst des Schweizerischen Bundesgerichts im Umgang mit Eingriffsnormen;
- *Frank Vischer*, 'Revolutionary ideas' and the Swiss Statute on Private International Law;
- *Jun Yokoyama*, Renvoi in Japanese Private International Law.

Part II: Family Relations and Succession.

- *Katharina Boele-Woelki & Maarit Jantära-Jareborg*, Protecting Children Against Detrimental Family Environments under the 1996 Hague Convention and the Brussels II bis Regulation;
- *Andrea Bonomi*, Choice-of-law Aspects of the Future EC Regulation in

Matters of Succession – A First Glance at the Commission's Proposal;

- *Alegria Borras*, The Necessary Flexibility in the Application of the New Instruments on Maintenance;
- *William Duncan*, Hague Conference Future Developments in International Family Law with Special Emphasis on Cross-border Child Protection: A View from The Hague;
- *Eric Jayme*, Der deutsche Nachlaßrichter und die amerikanische „tracing rule" im Internationalen Ehegüterrecht – Eine Problemskizze;
- *Peter Kindler*, From Nationality to Habitual Residence: Some Brief Remarks on the Future EU Regulation on International Successions and Wills;
- *Patrick Kinsch*, Luxembourg Recognition in the Forum of a Status Acquired Abroad – Private International Law Rules and European Human Rights Law;
- *Christian Kohler*, Germany Elliptiques variations sur un thème connue: compétence judiciaire, conflits de lois et reconnaissance de décisions en matière alimentaire d'après le règlement (CE) n° 4/2009 du Conseil;
- *Rong-chwan Chen*, Conflict of Laws of Divorce: Judicial Practice and Legislative Development of Taiwan;
- *Heinz-Peter Mansel*, The Impact of the European Union's Prohibition of Discrimination and the Right of Free Movement of Persons on the Private International Law Rules of Member States – With comments on the Sayn-Wittgenstein case before the European Court of Justice;
- *Gustaf Moller*, On the Hague Convention on the Civil Aspects of International Child Abduction and its application by the Supreme Court of Finland;
- *Jan Neels*, South Africa External Public Policy, the Incidental Question Properly So-called and the Recognition of Foreign Divorce Orders;
- *Teun Struycken*, The Netherlands Surrogacy, a New Way to Become a Mother? A New PIL Issue.

Part III: Contractual and Non-Contractual Obligations.

- *Michael Bogdan*, Some Reflections on Contracts and Torts in Cyberspace in view of Regulations Rome I and Rome II;
- *Andreas Furrer*, Cross-border Multimodal Transport – Problems and Limits of Finding an Appropriate Legal Regime;

- *Ulrich Magnus*, UN-Kaufrecht und Verbraucher;
- *Peter Mankowski*, The Principle of Characteristic Performance Revisited Yet Again;
- *Robin Morse*, Contracts of Carriage and the Conflict of Laws;
- *Monika Pauknerova*, Presumptions, Escape Clauses and International Carriage of Goods Contracts;
- *Oliver Remien*, Tourism, Conflict of Laws and the Rome I Regulation;
- *Symeon Symeonides*, Party Autonomy in Rome I and II from a Comparative Perspective; [see our dedicated post here]
- *Lajos Vekas*, Hungary Questions of Contract Law in the New Hungarian Civil Code.

Part IV: International Litigation and Arbitration.

- *Paul R. Beaumont & Burcu Yüksel*, The Validity of Choice of Court Agreements under the Brussels I Regulation and the Hague Choice of Court Agreements Convention;
- *George Bermann*, USA Parallel Litigation: Is Convergence Possible?;
- *Dagmar Coester-Waltjen*, Einige Überlegungen zu Schiedsgerichtsvereinbarungen und ihrer Wirksamkeit;
- *Giuditta Cordero-Moss*, Legal Capacity, Arbitration and Private International Law;
- *Harry Duintjer Tebbens*, New Impulses for the Ascertainment of Foreign Law in Civil Proceedings: A question of (inter)networking?;
- *Marc Fallon & Dimitrios-Panagiotis Tzakas*, Res Judicata Effects of Foreign Class Action Rulings in the EU Member States;
- *Celia Fassberg-Wasserstein*, Israeli Foreign Judgments Law: A Case for Codification?;
- *Manlio Frigo*, The Linguistic Factor in the Circulation of Arbitral Awards and Some of its Pitfalls;
- *Helene Gaudemet-Tallon*, La clause attributive de juridiction, un moyen d'échapper aux lois de police?;
- *Daniel Girsberger*, The Effects of Assignment on Arbitration Agreements – Why Conflict-of-Laws Theory is Still Needed;
- *Tibor Varady*, Observation of Group Affiliation (or: Cohabitation with the Impossible) in International Commercial Arbitration;
- *Spyridon Vrellis*, The Validity of a Choice of Court Agreement Under the

Hague Convention of 2005.

Part V: Cultural Property.

- *Johan Erauw*, Conflict of Laws with Folgerecht ('droit de suite') on the Sale of Works of Art in and out of Europe – after the EC-Directive No. 2001/84;
- *John Henry Merryman*, The van Meegeren Problem;
- *Gerte Reichelt*, Versunkene Welten Rechtlicher Schutz des archäologischen Unterwasserkulturerbes;
- *Marc-André Renold*, The International Scope of Application of the Swiss Rules on the Due Diligence of Dealers in Cultural Property.

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Title: **Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr**, edited by *Katharina Boele-Woelki*, *Talia Einhorn*, *Daniel Girsberger*, *Symeon Symeonides*; Eleven International Publishing – Schulthess, The Hague – Zürich, 2010, 918 pages.

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Katharina Boele-Woelki Talia Einhorn Daniel Girsberger Symeon Symeonides

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New Edition of Audit's Droit International Privé

The sixth edition of Bernard Audit's leading treaty on French private international law was just released.

This new edition is co-authored by Louis d'Avout, who is a professor of law at the University of Lyon III.

More details can be found here.

Reminder: Journal of Private International Law Conference 2011 (Milan) Call for Papers

The organisers of the conference are delighted that many people have already submitted their abstracts for the next Journal of Private International Law Conference in Milan in April 2011 but more abstracts are still very welcome. You are politely reminded that you have until the **end of Sunday 31 October 2010** to email your abstract if you would like to be considered as a speaker at the conference. Please make it clear whether you are willing for your abstract to be considered for the 'early career' parallel sessions of the Conference. Further details on the conference are available here.

Kuwait Airways Corporation v. Iraq in the Supreme Court of Canada

In yet another, but not the final, step in the very long-running litigation between KAC, IAC and the Republic of Iraq, the Supreme Court of Canada has held that the enforcement in Quebec of a 2008 judgment of the English Commercial Court ordering Iraq to pay CAD$84 million to KAC is not barred by soveriegn immunity (decision here).

Many on this list will be familar with the facts. After the 1990 invasion of Kuwait, KAC sued IAC in England for conversion of several airplanes. As part of that litigation, KAC was able to claim against Iraq for the costs of the actions that had been brought. This claim flowed from Iraq's having controlled and funded IAC's defence, and it was not barred by sovereign immunity in England because it fell

within the commercial activity exception. Iraq did not defend this claim and default judgment was granted.

KAC discovered immovable property owned by Iraq in Quebec and also some undelivered airplanes Iraq was buying from Bombardier Aerospace. It thus brought proceedings in Quebec to enforce the English judgment. Two lower courts held the claim was barred by sovereign immunity but the Supreme Court of Canada found that it fell within the commercial activity exception.

The court applied the *State Immunity Act*, RSC 1985, c S-18 and held that it applied to proceedings to enforce a foreign judgment (paras. 19-20). The English decision, which addressed the issue of sovereign immunity, was not binding in Canada and was not *res judicata* (since to be so it would first have to be recognized in Canada, which was the very issue before the court) (para. 22). The application of the commercial activity exception to the facts is somewhat brief (para. 35), though there is some useful discussion of the scope of the exception in the United Kingdom, the United States and Canada (paras. 25-33).

Two other points of interest: 1. the court does not wade into the issue of whether there are any exceptions to sovereign immunity beyond those set out in the statute (para. 24), and 2. the court accepts the factual findings of the English decision as part of its analysis, prior to concluding that the decision is enforceable in Canada (para. 34). This latter point seems somewhat hard to explain, and the court does not offer much explanation.

The Supreme Court of Canada did not determine if the English judgment is enforceable in Quebec – it only dealt with the sovereign immunity issue. The case was therefore remanded to the court of first instance to hear the claim for enforcement. Iraq likely has some further arguments to advance, such as that the Quebec court lacks jurisdiction over it and that the English default judgment is not entitled to recognition and enforcement (for example, due to the lack of a real and substantial connection between England and the claim advanced against Iraq).

Looking Back and Looking Forward at Canadian Private International Law

At the recent 40th Annual Workshop on Commercial and Consumer Law at the University of Toronto, three leading Canadian conflict of laws scholars – Vaughan Black of the Schulich School of Law, Joost Blom of the University of British Columbia and Janet Walker of Osgoode Hall Law School – presented a paper looking back at the last forty years in private international law and offering thoughts on what lies ahead. Each author picked out a particular theme: a judicial trend toward uniformity between provincial conflicts rules, the impact of *Morguard* on the structure of conflicts rules, and how the profile of the field has changed over time. The paper is not currently available on the web but will be published in an upcoming issue of the Canadian Business Law Journal.

The paper was supplemented at the Workshop by Genevieve Saumier of McGill University's oral comments on trends in Quebec's private international law. The session was chaired by Elizabeth Edinger of the University of British Columbia.

Symeonides on Party Autonomy in Rome I and II

Dean Symeon Symeonides has posted Party Autonomy in Rome I and II from a Comparative Perspective on SSRN. The abstract reads:

> *This essay discusses the modalities and limitations of party autonomy under the Rome I Regulation on the Law Applicable to Contractual Obligations (and secondarily Rome II) on the one hand, and the Second Conflicts Restatement, on the other hand. The comparison reveals the differences between the legal cultures from which these documents originate and which they are designed to*

serve.

The Restatement opts for under-regulation, reflecting a typically American skepticism toward a priori rules and a high degree of confidence in the courts' ability to develop appropriate solutions on a case-by-case basis. That confidence finds its justification in the fact that American state and federal judges share the same legal training and tradition and have long experience in working with malleable "approaches". The drafters had hoped – but could not mandate – that, over time, judges would develop similar solutions and thus eventually provide a modicum of consistency and predictability. Four decades later, the extent to which that hope has materialized remains debatable.

In contrast, Rome I reflects the rich continental experience in crafting a priori rules and a reluctance to entrust courts with too much discretion. This reluctance finds additional justification in the fact that Rome I is designed to serve a plurilegal and multiethnic Union, one that brings together uneven legal traditions. As a result, Rome I consists of many detailed black-letter rules, subject to few narrow escapes according little judicial flexibility, and aims at greater consistency and predictability.

At the same time, the drafters of Rome I deserve praise for having the political courage and legal acumen to devise a series of specific rules explicitly designed to protect consumers, employees, passengers, and insureds. As the discussion in this essay illustrates, however, these rules work quite well in the case of consumers and employees, but not so well in the case of passengers, insureds, and other presumptively weak parties, such as franchisees. Even so, one might well conclude that it is preferable to have rules protecting weak parties in most cases (even if those rules do not work well in some cases), rather than not having any such rules, as is the case with the Restatement and American conflicts law in general.

The paper is forthcoming in *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr* (2010).

Conference on Extraterritoriality and Collective Redress

The British Institute of International and Comparative Law will host a Conference on Extraterritoriality and Collective Redress on November 15th in London.

> *This event will provide a forum for the debate of latest developments in the area of international mass litigation.*
> *The question of extraterritoriality of national legislation has been extensively discussed by the US Supreme Court in the Morrison case. The US position post Morrison shall be highlighted in comparison with the recent Dutch legislation on collective settlements. The speakers will comment on mass litigation phenomena from a global and a European position. A focus will also lie on the UK viewpoint regarding collective redress. Furthermore, the Brussels I framework and its suitability for cross-border collective claims will be covered as well as problems relating to the recognition of US class actions and of punitive damage judgments. Various experts from the US, UK, the Netherlands and other European countries will meet to discuss the status quo and the way forward from their different perspectives.*

Speakers will include:
Professor Diego Corapi, University Rome I – La Sapienza
Thomas A Dubbs, Labaton Sucharow
Dr Duncan Fairgrieve, Director Product Liability Forum, BIICL
Professor Burkhard Hess, University of Heidelberg
Adam Johnson, Partner, Herbert Smith, London
Dr Eva Lein, Herbert Smith Senior Research Fellow, BIICL
Dr Hélène van Lith, University of Rotterdam
Gerard Mc Dermott QC, Outer Temple Chambers
Professor Rachael Mulheron, QM University of London
Dr Francesco Quarta, University of Salento
Pierre Servan-Schreiber, Skadden Arps, Paris.
Professor Linda Silberman, Martin Lipton Professor of Law, NYU
Jonathan Sinclair, Stewarts Law

Vincent Smith, Visiting Fellow, BIICL
John Sorabji, Legal Secretary to the Master of the Rolls
Professor Ianika Tzankova, NautaDutilh; Tilburg University

The event will be held at Herbert Smith London Office, from 2 pm to 6:45 pm, and will be followed by a reception.

More details can be found here.

Cuadernos de Derecho Transnacional, vol. 2/2010

The second issue for 2010 of the *Cuadernos de Derecho Transnacional*, the Spanish journal published twice a year by the *Área de Derecho Internacional Privado* of Univ. Carlos III of Madrid under the editorship of *Alfonso Luis Calvo-Caravaca* (Univ. Carlos III) and *Javier Carrascosa-González* (Univ. of Murcia), has been recently published. It contains twenty articles, shorter articles and casenotes, encompassing a wide range of topics in conflict of laws, conflict of jurisdictions and uniform law, all **freely available for download** from the journal's website.

Here's the table of contents (each contribution is accompanied by an abstract in English):

Estudios

- *José María Alcántara*, *Frazer Hunt*, *Svante O. Johansson*, *Barry Oland*, *Kay Pysden*, *Jan Ramberg*, *Douglas G. Schmitt*, *William Tetley C.M., Q. C.*, *Julio Vidal*, Particular concerns with regard to the Rotterdam Rules;
- *Giacomo Biagioni*, Tecniche internazionalprivatistiche fondate sulla volontà delle parti nel Diritto dell'Unione Europea;
- *Alfonso-Luis Calvo Caravaca*, *Celia Caamiña Domínguez*, L'incorporation

au régime juridique espagnol de la normative communautaire de restitution de biens culturels;
- *Federico F. Garau Sobrino*, Los acuerdos atributivos de jurisdicción en Derecho Procesal Civil Internacional español;
- *Miguel Gómez Jene*, Concurso y arbitraje internacional;
- *Carlos Llorente Gómez de Segua*, Las Reglas de Rotterdam (II);
- *Olivia Lopes Pegna*, La proposta di cooperazione rafforzata sulla legge applicabile a separazione e divorzio: profili problematici;
- *Agustín Luna Serrano*, Hacia el abandono de la mención de la causa en la conformación definitoria del contrato;
- *Maria João Matias Fernandez*, O Direito aplicável aos negócios relativos a instrumentos financeiros: a disciplina introduzida pelo novo Regulamento comunitário sobre a lei aplicável às obrigações contratuais («Roma I»);
- *Juan Jorge Piernas López*, The notion of State aid and regulation in the EU: drawing the shape of a moving target;
- *María José Santos Morón*, Forma contractual y "desarmonización" comunitaria.

Varia

- *Celia Caamiña Domínguez*, Las resoluciones de restitución de menores en la Unión Europea: el caso Rinau;
- *Alfonso-Luis Calvo Caravaca*, *Javier Carrascosa González*, Notas breves sobre la Sentencia del TJUE (Sala Cuarta) de 20 mayo 2010 (Bilas: asunto C-111/09): la sumisión tácita en los litigios internacionales de seguro, consumo y trabajo;
- *Cristina Campiglio*, Il foro della residenza abituale del coniuge nel Regolamento (CE) N° 2201/2003: note a margine delle prime pronunce italiane;
- *Antonia Durán Ayango*, El concepto de orden público internacional y el derecho a un proceso justo. Nota a la STJCE de 2 de abril de 2009;
- *Antonia Durán Ayango*, El concepto de parte en el proceso de exequátur. Nota a la STJCE de 23 de abril de 2009;
- *Pilar Juárez Pérez*, Dieciocho años de ciudadanía de la Unión: ¿hacia una figura emancipada?;
- *Pilar Maestre Casas*, Doble nacionalidad y forum patriae en divorcios internacionales;

- *Giulia Rossolillo*, Convenzioni concluse dagli Stati Membri e Diritto processuale civile internazionale dell'Unione Europea: interpretazione conforme o rispetto degli obblighi internazionali?;
- *Julia Suderow*, Cuestiones de jurisdicción internacional en torno a la aplicación privada del Derecho antitrust: forum shopping y "demandas torpedo".

See also our previous posts on issues 1/2009 and 2/2009 of the CDT. The journal's website provides a very useful search function, by which contents can be browsed by issue of publication, author, title, keywords, abstract and fulltext.

(Many thanks to Pietro Franzina, University of Ferrara, for the tip-off)

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.