Enforcing Prenuptial Agreements in English Courts

A comparative article on international prenuptial agreements – focused on the failure of English courts to enforce prenuptial agreements – will be published in the forthcoming issue of *International Family Law*. In the article entitled "**Enforceable Pre-nuptial Agreements: the World View**" international family lawyer Jeremy D. Morley calls the English approach:

> *an anachronistic peculiarity of English law and an unfortunate example of a stubborn refusal to adapt the law to new conditions.*

Morley argues that the recent judgments of the House of Lords in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186 point to the urgent need for the courts to set aside the preposterous contention that it is 'substantially uncontestable' that substantial harm to the public would arise if prenuptial agreements were enforceable.

He states that the current law results from the ruling in 1929 in *Hyman v Hyman* [1929] AC 601 that binding prenuptial agreements contravened public policy. However, society has changed dramatically since 1929. When Hyman was decided, people had little expectation of getting divorced and divorce was generally regarded as sinful. People with assets did not require contractual protection should a divorce occur because the law did not provide for capital transfer upon divorce. The status of marriage itself provided all of the necessary terms of the relationship between spouses. Morley goes on to argue that as,

> *international affairs proliferate, England's "anomalous view of prenuptial agreements will increasingly and inappropriately create problems for international litigants.*

See Issue 4 of 2006 *International Family Law* for the full article.

Jurisdiction over European Patent Disputes, and the European Payment Procedure Order

Richard Taylor (DLA Piper) has written a short summary in the latest issue of the Law Society Gazette, discussing the response by the European Court of Justice, in *Roche Nederland BV v Primus* (C-539/03) and in *Gesellschaft fur Antriebstechnik mbH & Co KG (GAT) v Lamellen und Kupplungsbau Beteiligungs KG (LuK)* (C-4/03), **to attempts by European courts to extend their jurisdiction over European patent disputes**, referring to the provisions of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968.

Ref: *Law Society's Gazette L.S.G. (2006) Vol.103 No.39 Page 31*

In other news, the **European Parliament's second reading of the proposal for the adoption of a Regulation of the European Parliament and of the Council creating a European order for payment procedure** is scheduled for the 23rd October 2006.

The discussions in the various European organs have gone smoothly for this particular proposed Regulation. The only point of difference between the amended Commission proposal and the common position of the Council concerns the definition of the term “cross-border case”. The Commission "regrets" the limitation to cases where both parties are domiciled in a Member State and has made a declaration accordingly.

No surprises are expected on the 23rd October either; the common position of the Council has been negotiated together *with* the European Parliament in view of reaching a first-reading agreement. Therefore the European Parliament should not request any amendments of the common position – at least in theory.

EDPS Opinion on Maintenance Obligations Regulation Proposal

The European Data Protection Supervisor (EDPS) has given his **opinion** on the **Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations** (COM(2005) 649 final).

The matters discussed in the opinion are limited to those concerning personal data protection. The EDPS summarizes the main thrust of the Proposal thus:

> *the proposal lays down a mechanism of exchange of information about the debtor and the creditor of maintenance obligations, with a view to facilitating the establishment and the recovery of maintenance claims. For this purpose, central national authorities will be designated in order to handle requests of information lodged by national judicial authorities (of other Member States) and collect personal data from different national administrations and authorities in order to fulfil these requests. The usual procedure will be as follows: a creditor will lodge an application through a court; the national central authority, upon request of the Court, will send an application to the central authorities of the requested Member State (through a specific form contained in Annex V); the latter central authorities will gather the requested information and will reply to the requesting central authority, which will then provide the information to the requesting court (para.4.)*

The EDPS notes that the current proposal does not provide for exchanges of personal data with third countries, but international cooperation is explicitly envisaged in the explanatory memorandum. In this context, the EDPS states, it is noteworthy to mention the ongoing negotiations for a new comprehensive Convention of the Hague Conference on Private International Law concerning international recovery of maintenance. He continues:

> *It goes without saying that this international cooperation is likely to lay down*

> *mechanisms for exchanges of personal data with third countries. In this regard, the EDPS would like to stress again that these exchanges should be allowed only if the third country ensures an adequate level of protection of personal data or if the transfer falls within the scope of one of the derogations laid down by Directive 95/46/EC.*

Overall, the EDPS welcomes the proposal, subject to alterations and reservations of a technical, rather than substantive, nature. The opinion of the EDPS can be found here.

Many thanks to the EU Law Blog for the tip-off.

Significant Reform of Japanese Private International Law

The most significant reform of Japanese private international law for more than a century has been completed with the enactment of a new Act. The new Act, **Ho no Tekiyo ni Kansuru Tsusoku Ho**, will come into effect on 1st January 2007. The reform is far-reaching and covers, *inter alia*, contract, tort, unjust enrichment, and assignment of rights.

For further details, see Koji Takahashi, "A Major Reform of Japanese Private International Law" (2006) 2 *Journal of Private International Law* 311, due out this month.

EU Council Confirms Decision for the Accession of the Community to the Hague Conference on Private International Law, and Common Position on European Small Claims Procedure

At its recent Justice and Home Affairs meeting (2752nd), **the Council adopted a decision on the accession of the European Community to the Hague Conference on private international law** (HCCH) (7591/06). Page 30 of the press release states:

> *At present, the Community enjoys only observer status in the HCCH. Full membership is necessary for two reasons. It would grant the Community a status consistent with its new role as a major international player in the field of civil judicial cooperation. It would also enable the Community to fully participate in the negotiation of conventions in areas of its competence by expressing its views and positions and ensuring consistency and coherence between its own rules and envisaged international instruments. Moreover, the Community as such rather than its Member States would be the subject of the rights and obligations stemming from Hague Conventions in areas of its competence.*
>
> *The Hague Conference on private international law is a long-established international organisation with the objective of ensuring the progressive unification of the rules of private international law, mainly by negotiating and drafting international conventions (www.hcch.net).*

In other news, **the Council confirmed its common position on the European Small Claims Procedure**.

> *Following its agreement on 1 and 2 June 2006 and after completion of the work*

on recitals and standard forms, the Council confirmed its general agreement on the whole of a draft regulation establishing a European small claims procedure. The European Parliament has not yet delivered its opinion in first reading.

The purpose of this proposal is to simplify and speed up litigation concerning small claims in crossborder cases and to reduce costs by establishing a European Procedure for Small Claims. The proposal also eliminates the intermediate measures necessary to enable recognition and enforcement of judgments given in one Member State in a European Small Claims Procedure in other Member States.

This draft Regulation will apply, in cross-border cases, in civil and commercial matters, whatever the nature of the court or tribunal, where the value of a claim does not exceed EUR 2000 at the time the procedure is commenced, excluding all interest, expenses and outlays. Litigation on revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of state authority is excluded from the scope of application.

…A claimant will commence the European Small Claims Procedure by completing a claim form set out in the Annex to the text and lodging it at the competent court or tribunal directly, by post or by any other means of communication such as fax or e-mail acceptable to the Member State in which the procedure is commenced. The claim form will include a description of evidence supporting the claim and be accompanied, where appropriate, by any relevant supporting documents. Once the Regulation will be adopted, it will be applied in all Member States with the exception of Denmark. (p.28-29)

The full press release for both items can be found here.

Commission's Response to

Council’s Common Position on Rome II

In the wake of the **Council's common position** on the proposed adoption of a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II") (see our news item on the common position here), the **European Commission have published their Communication to the European Parliament**, pursuant to Art 251(2) of the EC Treaty.

The Communication discusses the common position's points of departure from both the Commission's modified proposal on 21 February 2006, and the amendments made by the European Parliament on 6 July 2005 (which were reflected in the Commission's modified proposal.) One point in particular may be of interest:

> *Article 16 departs from Article 13 of the Commission’s amended proposal which contained an additional paragraph dealing with the possibility for the court to give effect to overriding mandatory rules of another country than the country whose law is applicable under the rules of the instrument. This provision in the Commission’s proposal did not reflect any particular Community interest; it was aiming at consistency as it was inspired by a similar provision in the 1980 Rome Convention on the Law Applicable to Contractual Obligations.* ***The Commission has accepted this deletion****.*

Whilst the Commission states overall that it, "accepts the common position in the light of the fact that it includes the key elements included in its initial proposal and Parliament’s amendments as incorporated into its amended proposal", there are nevertheless some strong indicators of its displeasure over the common position in the text. For example:

> *The Commission continues to regret the approach in the common position which provides for a rather complex system of cascade application of connecting factors. It remains persuaded that its original solution offered an equally balanced solution for the interests at stake, while expressed in much simpler drafting.*

The word "regret", in fact, appears no less than *four* times in the six-page document. It will be interesting to see what the European Parliament makes of it all; the second reading has been scheduled by the DG of the Presidency for 12 December 2006.

The Commission's Communication to the European Parliament can be downloaded from here (PDF). All comments welcome.

Recognition of a Surname and Validity 2

A German case which has been reported on before has now been continued (see for the facts and the history of the case the following older entry: Recognition of a Surname and Validity). After the ECJ has refused to hear the case in its judgment of 27th April 2006 (C-96/04), the parents filed an application at the Local Court (*Amtsgericht)* Flensburg to instruct the registrar to recognize the double-barrelled name of their son which had been determined according to Danish law and to register their son under this name in the family register. However, according to the Local Court (*Amtsgericht*) Flensburg, the court is not competent to instruct the registrar to register the applicants` son under this name since German law (§ 1617 I 1 German Civil Code (*BGB*)) does not provide for double-barrelled names if the parents do not use a common married name. Since the court regards it as a violation of Artt. 12, 18 EC-Treaty to ask a citizen of the European Union to use different names in different Member States, the court sees itself obliged to bring the matter before the Court of Justice according to Art. 234 III EC-Treaty.

Therefore the Local Court (*Amtsgericht*) Flensburg asked with decision of 16th August 2006 (69 III 11/06) the ECJ to give a preliminary ruling on the following question: "In light of the prohibition on discrimination set out in Article 12 of the EC Treaty and having regard to the right to the freedom of movement for every citizen of the Union laid down by Article 18 of the EC Treaty, is the provision on

the conflict of laws contained in Article 10 of the EGBGB valid, in so far as it provides that the right to bear a name is governed by nationality alone?" (see C-353/06)

We await the decision with interest.

Seminar: A Coherent Legal Regime for EU Media – Balancing Liberties

Diana Wallis MEP, on behalf of the ALDE group, is holding a seminar on 17 October 2006 in the European Parliament. The seminar is entitled: **'A coherent legal regime for EU media – Balancing liberties. The right to be let alone v. freedom of speech'**. As Ms Wallis' website states,

> *This event will gather experts, academics and Members of the European Parliament to discuss the current legal regime for EU media and explore possible options for the future, in particular with regard to the issue of applicable law. This seminar is set against the background of the Commission's rejection of Parliament's first reading formulation on defamation and the withdrawal of these provisions from the draft Regulation. The second reading of Rome II scheduled for the end of 2006 also coincides with the discussions on Television without Frontiers and the review of Brussels I and the E-commerce Directive.*

DRAFT PROGRAMME

12.45 – 13.00: Introductory Welcome

Session 1. Chair: Diana Wallis MEP, Rapporteur on Rome II

13.00 -13.30: European Private International Law and the media: relationship between existing instruments

- Speakers: Gregory Paulger, DG 'Information, Society and Media', European Commission
- Claudia Hahn, DG 'Justice and Home Affairs', European Commission

13.30 – 14.00: Jurisdiction, applicable law and the country of origin principle

- Speakers: Horatia Muir Watts, Université Paris I Panthéon Sorbonne
- Professor Paul Beaumont, University of Aberdeen

14.00 – 14.30: Q&A

14.30 – 14.50: Tea and coffee break

Session 2. Chair: Jean-Marie Cavada MEP, Chairman of LIBE

14.50 – 15.20: Applicable law to the violation of personality rights – a quest for reasonableness?

- Speakers: Marie-Christine de Perçin, vice chairperson of Presse-Liberté
- Speaker invited

15.20 – 15.50: Regulating the media: what role for the EU?

- Speakers: Tim Sutter, OFCOM
- Cecilia Renfors, Swedish audiovisual board

15.50 – 16.20: Q&A

16.20 – 16.30: Conclusions

The event will take place on Tuesday 17 October 2006 from 12.45 to 16.30 at European Parliament, Brussels, room ASP 3G3. More information on attending the event can be found here.

German Federal Supreme Court: Jurisdiction over Applications for an Injunction due to Nuisance

The German Federal Supreme Court assumed international jurisdiction of German courts according to Art. 5 Nr.3 Brussels I Regulation in a case of an application for an injunction due to nuisance according to § 1004 German Civil Code (judgment of 24.10.2005 – II ZR 329/03).

See for an annotation: Erik Jayme, IPRax 2006, 502.

German Publication: The Adoptive Child´s Right to Succeed in Private International Law

A new dissertation on private international law of family law has been published: *Inke Dietz*, Das Erbrecht des Adoptivkindes im Internationalen Privatrecht.

The publisher´s information reads as follows:

"Social developments have lead to an increasing significance of international adoptions in recent years. Starting from this finding, the thesis gives an overview of the developments of the German law on adoption including the adoption´s effects on the right to succeed (...) before examining German choice of law rules on adoption and the choice of law rules concerning the adoptive child´s right to succeed as well as the intertwining of the lex successionis on the one side and the applicable law on adoption on the other side. Further, the recognition of adoptions according to the Hague Convention on protection of children and co-operation in respect of intercountry adoption of 1993 is considered as well as the

option to transform weak adoptions according to the *Adoptionswirkungsgesetz (law on the effects of adoptions according to foreign law).*"