by Peter M. Walzer

Foreign Affairs

While California courts have never ruled directly on the enforceability of foreign prenuptial agreements, the threshold for enforcement is likely to be high

When Louis XIV and Marie-Thérèse, daughter of Philip IV of Spain, were married in 1659, their marriage contract was part of the Treaty of the Pyrenees, which ended France's war with Spain. The contract also provided for the payment of a large dowry by Spain to France, which was never paid because Spain ran out of money. Imagine, if you can, that Marie-Thérèse becomes fed up with her husband's numerous infidelities, moves to California, and files for divorce.[1] Louis XIV may have thought that California was an island populated by Amazons, but if he had worries about whether California would enforce his foreign premarital contract, they might be more realistic.

If two people divorce in California, they are subject to California's community property and support laws. However, a couple may modify their default marriage contract by entering into a premarital agreement. But California premarital agreements are significantly different from foreign marital contracts, which allow a couple to elect a regime of marriage—for example, joint or community property regimes, a separate property regime, or a variation thereof—depending on the country.

Whether a California court will enforce a foreign marital contract may depend on whether the court applies California law or foreign law. California's law is set forth in the Premarital Agreement Act, which was modeled after the Uniform Premarital Agreement Act (UPAA).[2] The National Conference of Commissioners on Uniform State Laws approved the act in 1983,[3] and since then various states have become signatories to it.[4] California enacted the UPAA in 1986 but revised the statute in 2002[5] in response to *In re Marriage of Bonds*[6] and *Marriage of Pendleton and Fireman*.[7]

The California statute provides that certain conditions must be met for a premarital agreement to be enforceable:
• The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, rep-

Peter M. Walzer is a partner with the family law firm Walzer & Melcher LLP in Woodland Hills. He is a fellow of the International Academy of Matrimonial Lawyers.

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resentation by independent legal counsel.[8]

- The party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed.[9]
- The party against whom enforcement is sought, if unrepresented by legal counsel, was fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up by signing the agreement, and the party was proficient in the language in which the explanation of the party's rights was conducted and in which the agreement was written. The explanation of the rights and obligations relinquished was in writing and was delivered to the party prior to signing the agreement. The unrepresented party executed a document declaring that he or she received the information and indicating who provided that information.[10]
- A provision in a premarital agreement regarding spousal support is not enforceable if the party was not represented by independent counsel when signing the agreement or if the provision regarding spousal support is unconscionable at the time of enforcement.[11]
- The agreement was not executed under duress, fraud, or undue influence, and the parties did not lack capacity to enter into the agreement.[12]
- The party against whom enforcement is sought was provided a fair, reasonable, and full disclosure of the property or financial obligations of the other party, unless that party did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided, or that the party did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.[13]
- The agreement did not promote divorce.[14]
- The agreement was not against public policy.[15]

If a California court were to interpret a foreign marital contract according to the strict statutory provisions set forth above, few foreign contracts would be enforced, because the statutory requirements are different for a foreign marital contract. The main difference between a foreign marital contract and a California agreement is that the parties in most foreign countries are not represented by independent legal counsel. In France, for example, the parties meet together with a notary, who advises the couple on the law and drafts the agreement.[16] For all practical purposes, California law requires that parties have independent counsel advise them prior to executing their premarital agreement. Thus, unless the parties to the foreign marital contract had independent counsel, the attorney asserting that the foreign marital contract is valid in California would have to argue that the foreign law should apply to the agreement.

California has no case law addressing the issue of whether a foreign marital contract is enforceable,[17] nor are there any cases on point from states that are signatories to the UPAA. On the other hand, New York has addressed this issue on several occasions, and it always has enforced the foreign marital contract.

In *Stawski v. Stawski,*[18] the New York appellate court upheld the findings of a special referee that a marital contract made before a notary in Germany was valid and enforceable, despite the fact that the couple were not represented by independent counsel. The court found that there was no evidence of duress, the wife was educated, and the parties followed the agreement throughout their marriage. However, a strong dissent in this case foreshadows how a California court could view the German marital contract. The dissenting justice wrote:

> Wife, with no advance notice, was brought to the office of Husband's family's lawyers, and presented with a German document that, while purporting to be simple, dealt with unfamiliar concepts of German marital property "regimes," in German. The purportedly neutral [notary] whose obligation was to ensure that everything was handled fairly and properly, failed to check that plaintiff [wife], a United States citizen, was fluent in German, or understood the concept of the property regime she purportedly was selecting, or had received any legal advice or explanation of the document in advance.[19]

To avoid the risk that a California court would apply California law and determine that the foreign law violated California's particular statutory provisions, the marital contract should include a choice-of-law clause to ensure that the foreign law is used to interpret the contract. When a contract has no such clause, California courts will apply the law of the jurisdiction in which the contract was made and performed to determine questions of enforceability.

In *Henderson v. Superior Court*, the court determined that the law of Florida should be applied to the interpretation of a cohabitation agreement. The court held:

> In California a contract is governed by the law and usage of the place where it is to be performed, or, if place of performance is not indicated, by the law and usage of the place where it is made. (Civ. Code, § 1646.) When the application of section 1646 is obscure, California courts are guided by the factors set out in Restatement Second, Conflict of Laws section 188, in determining what law to apply to the contract. Section 188 declares that the rights and duties of the parties to a contract are determined by the law of the state which has the most significant relationships to the transaction and the parties. Factors to be taken into account include, (a) the place of contracting; (b) the place of negotiation;

(c) the place of performance; (d) the location of the subject matter of the contract; (e) the domicile and residence of the parties.[20]

In *Black v. Powers*,[21] a court in Virginia (a UPAA state), using that rationale, applied the law of the U.S. Virgin Islands to the interpretation of a premarital agreement, because the contract was to be performed there. The court found that because the parties were married in the U.S. Virgin Islands, the contract was performed there despite the fact that they intended to live in Virginia. In that case, the court held that the act that was to be performed was the wedding.

If a foreign marital contract has a choice-of-law clause, California courts may be expected to follow it. The UPAA and California law provide that parties may contract regarding "[t]he choice of law governing the construction of the agreement."[22] There are no California cases interpreting the UPAA's choice-of-law provision, but in a case in Oregon (a UPAA state), *Marriage of Proctor*,[23] the court interpreted a choice-of-law clause in a California premarital agreement. In the case, the choice-of-law clause provided only that California law applied to the construction of the agreement but not that California property law would apply. Thus, the Oregon court refused to apply California property law and applied Oregon law relating to various reimbursement issues. This case instructs that to be effective, choice-of-law clauses must provide for the application of substantive and procedural law of the foreign jurisdiction.[24]

The parties also may be able to select the forum and the form of dispute resolution they will use to resolve any disputes related to the interpretation or application of the contract. If parties to a German marriage contract, for example, agree that the German contract will be construed under German law and that German substantive law will apply, it may be prudent to select a judicial or extrajudicial body that could effectively apply German law. In New Jersey (a UPAA state), a court deciding *DeLorean v. DeLorean*[25] applauded the parties' stipulation to use a California private judge to interpret the premarital agreement. The court stated, "Indeed, since the antenuptial agreement specifically provides in paragraph eight that it 'shall be construed under the laws of the State of California' there was obvious logic in having a retired California judge pass upon that issue." Although the parties agreed at the time of their divorce to use a private California judge to interpret the agreement, the parties could have included a provision in the premarital agreement that they would use a California private judge to decide *any* issues relating to the interpretation or

enforcement of the agreement.

To ensure that a foreign marital contract will be enforceable in California, the parties should be represented by independent counsel.[26] There should be an adequate disclosure of assets and obligations, and there should be an adequate time to review the agreement before signing it.[27] The premarital agreement should include a choice-of-law clause that applies to the construction of the agreement and the substantive law of the selected forum. The parties should also select a dispute resolution process by which any disputes relating to the agreement will be decided.[28] Counsel should have the agreement translated if one of the parties does not speak the language of the country and make sure the party acknowledges in writing that the agreement has been translated and understood. Another safeguard is to videotape the execution of the agreement and the voir dire of the parties to ensure their assent to the contract was not procured by duress or fraud, that they understand the contract, and they had capacity to sign the contract.

To analyze whether a foreign marital contract may be enforced in California, attorneys should determine which country's law should apply to construction of the agreement and which country's law should apply to the executory provisions of the contract.[29] Unless the marital contract specifically states that the parties' contract should be construed under the foreign law and the foreign law should govern the division of the property, counsel may argue that the agreement called for performance in the foreign country, and therefore the foreign law should apply.[30] Applying the choice-of-law doctrine to the marriage contract between Louis XIV and Marie-Thérèse, it would appear that French law should apply to the interpretation of the contract, even if a divorce in California could mean renewed hostilities between France and Spain. ■

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[1] Although this scenario is unlikely, in 1602, the Spaniard Sebastián Vizcaíno explored California's coastline as far north as Monterey Bay, where he put ashore. He ventured inland south along the coast and recorded a visit to what is likely Carmel Bay.

[2] 9B WEST'S UNIFORM LAWS ANNOTATED, *Uniform Premarital Agreement Act (UPAA)* (1987).

[3] *Id.* at 371.

[4] Signatories to the act: Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Utah, Virginia, and Wisconsin.

[5] When California enacted the UPAA in 1984, it did not include the provision in the uniform act that permitted the limitation on spousal support (alimony or maintenance). California adopted this provision in 2002 after the California Supreme Court decided In re Marriage of Pendleton & Fireman, 24 Cal. 4th 39 (2000).

[6] In re Marriage of Bonds, 24 Cal. 4th 1 (2000) (The lack of an attorney is merely one factor to consider in determining the voluntariness of a party's assent to the premarital agreement.).

[7] Marriage of Pendleton & Fireman, 24 Cal. 4th 39 (Spousal support waivers and limitations contained in written premarital agreements are not contrary to public policy and are not per se unenforceable.).

[8] FAM. CODE §1615(c)(1).

[9] FAM. CODE §1615(c)(2).

[10] FAM. CODE §1615(c)(3).

[11] FAM. CODE §1612.

[12] FAM. CODE §1615(c)(4).

[13] FAM. CODE §1615(A), (B), (C).

[14] Glickman v. Collins, 13 Cal. 3d 852 (1975); In re Marriage of Dajani, 204 Cal. App. 3d 1387 (1988); In re Marriage of Noghrey, 169 Cal. App. 3d 326 (1985).

[15] Diosdado v. Diosdado, 97 Cal. App. 4th 470 (2002) (Marital agreement with monetary penalty for breaching obligation of sexual fidelity was void.); *see also* In re Marriage of Mehren & Dargan, 118 Cal. App. 4th 1167 (2004).

[16] French couples who wish to enter into a marital contract must appear together before a notary before the wedding and select one of the *régimes matrimoniaux* offered by the French Civil Code. The *notaire* advises future spouses as to the legal consequences of their choice of a regime.

[17] Fernandez v. Fernandez, 194 Cal. App. 2d 782 (1961). This is the only California case that even mentions foreign marital contracts. It does not address the recognition issue because the parties already stipulated that they would follow Mexican law.

[18] Stawski v. Stawski, 43 A.D. 3d 776, 843 (2007); *see also* Van Kipnis v. Van Kipnis, 43 A.D. 3d 71 (2007).

[19] Stawski, 43 A.D. 3d 776 (Saxe, J., dissenting).

[20] Henderson v. Superior Court, 77 Cal. App. 3d 583 (1978).

[21] Black v. Powers, 628 S.E. 2d 546 (2006).

[22] FAM. CODE §1600(a)(6). Utah has a variation on this statute: "Parties to a premarital agreement may contract with respect to…the choice of law governing the construction of the agreement, except that a court of competent jurisdiction may apply the law of the legal domicile of either party, if it is fair and equitable." UTAH CODE §30-8-4(1)(f).

[23] Marriage of Proctor, 203 Or. App. 499 (2005).

[24] *But see* Nedlloyd Lines B.V. v. Superior Court, 3 Cal. 4th 459 (1992) to indicate how the California Supreme Court addresses the issue of enforcement of choice-of-law clauses in insurance contracts. The doctrines set forth in *Nedlloyd* have not been applied to choice-of-law clauses in premarital agreements or foreign marital contracts, but the principles set forth in the case could be utilized under the right set of facts.

[25] DeLorean v. DeLorean, 511 A. 2d 1257 (N.J. Super. Ct. 1986).

[26] Although the statute permits signing an agreement without counsel if certain conditions are met, it is unlikely a California court will enforce the agreement.

[27] It is not known whether a California court would require that the parties follow the seven-day waiting period between the time it is first presented and signed.

[28] Attorneys should draft the agreement to anticipate that any particular judicial officer, arbitration board, or forum selected by the parties may no longer exist at the time of enforcement, or that the selection could be unfavorable to the client's position.

[29] Marriage of Proctor, 203 Or. App. 499 (2005).

[30] France, Luxembourg, and the Netherlands entered the Convention on the Law Applicable to Matrimonial Property Regimes in force. Austria and Portugal only signed the convention. http://www.hcch.net/index_en.php?act=conventions.text&cid=87.