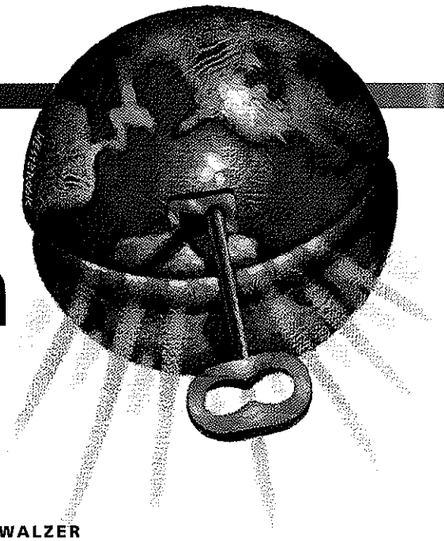
Enforcing and attacking foreign prenups in the United States



BY **PETER M. WALZER**

CAN LOVE BE IMPORTED? Apparently—at least that is what one discovers from perusing the vast number of websites that promise success in finding a foreign bride or groom. One such website profiles 6,500 women from 49 countries. Americans are roaming the world looking for love via the Internet. At least some of them are likely to marry a foreigner. Those prospective brides or grooms would be wise to enter into an American-style premarital agreement to ensure enforcement in American courts. For those who elect a foreign marital regime, there is no guarantee that it will be enforced in the United States.

Foreign agreements can be divided into two main categories: marital regimes and religious agreements. In most cases, a foreign client who is inclined to protect his or her property from a spouse will elect a marital regime.

Marital regimes

A "marital regime" is a marriage contract that controls how property is divided upon divorce or death. In France, for example, these contracts are called *contrat de marriage*. France has five types of regimes, but the separate property regime, or *separation de biens*, is the one a party is most likely to attempt to enforce in the United States. This agreement provides that each spouse will own his or her own property as if the couple were not married.

To elect a marital regime, the couple appear before a notaré (notar in Germany) who will explain the types of regimes and draft the contract for the regime. The notaré is a lawyer who drafts and records legal instruments for private parties. Unlike public notaries in the United States, notarés are trained to provide legal advice and prepare instruments with legal effect. The qualifications and expertise of the notaré will be relevant to a U.S. court when determining whether a party was advised by counsel and voluntarily entered into the agreement.

Not all marital regimes are alike. In some countries, they are the only planning tool for a marriage; in others, the parties may choose to enter into a premarital agreement. In some countries, parties may have separate counsel representing them; in others (and in most cases), the parties will meet only with the notary. In some countries, such as Mexico, courts have discretion to override the election of the separate property marital regime when the trial court determines what is in the interests of justice.

Louisiana is the only state in which the parties can elect a marital regime like those used in most countries in the world. Presumably, Louisiana courts will be more likely to enforce agreements entered in a marital regime country where the formalities are followed. New York courts have enforced foreign marital regimes, but such outcomes are the exception, not the rule.

In *Stawski v. Stawski*, 843 N.Y.S.2d 544 (App. Div. 2007), a New York appellate court upheld the findings of a special referee that a marital contract made in Germany was valid and enforceable, despite the fact that the contract was entered into more than 30 years before and the wife was not represented by independent counsel. The court found no evidence of duress, that the wife was educated, and that the parties followed the agreement throughout their marriage. However, a strong dissent in this case indicates how other states might view the German marital contract. The dissenting justice wrote:

> [Wife], with no advance notice, was brought to the office of [Husband's] family 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.

Id. at 556.

Stawski was followed by *Van Kipnis v. Van Kipnis,* 872 N.Y.S.2d 426 (2008), which enforced the parties' contrat de marriage entered into in 1965, where the couple selected the marital regime separation de biens—an agreement to keep their property separate. Other states have been less willing to enforce foreign marital regimes. In *Kyle v. Kyle*, 128 So. 2d (Fla. 1961) (*cert. denied* Florida Supreme Ct. at 139 So. 2d 885), the question before the court was whether the Quebec marital regime was enforceable in Florida. Mrs. Kyle was attempting to apply Florida law to enforce her rights of dower to real estate in Florida. The husband contended that his wife had relinquished her dower rights in the Quebec agreement. Mrs. Kyle contended that under Florida law, two witnesses are required for such a waiver. The Quebec contract was not witnessed, although it was validly executed under Quebec law.

The Florida court found that because the dower right affected land in Florida, the doctrine of *lex rei sitae* applied and thus the law of Florida applied. The court stated, "Florida zealously maintains a traditional interest in preserving her sovereign and exclusive dominion over the land located within her borders and has also evinced an abiding concern for the right of dower."

Gustafson v. Jensen, 515 So. 2d 1298 (Fla. 1987), involved an appeal from a decision of the probate court upon the husband's death. Husband's personal representative contended that it was error not to uphold the Danish equivalent of a separate property regime. The Florida appellate court found that "where a party seeking to rely upon foreign law fails to demonstrate that the foreign law is different from the law of Florida, the law is the same as Florida['s]." The court also found that appellant was unable to demonstrate that the agreement was fair and that there was full disclosure of husband's assets as is required under Florida law.

The court went on to discuss application of the laws of comity. The court emphasized that where the foreign country has no significant interest in the issue being adjudicated, comity will not apply. Further, the court states that comity will not be applied where "to do so would bring harm to a Florida citizen or would frustrate an established public policy of this state." The court further found that under Danish law, a husband's domicile determines the validity of the premarital agreement, and since husband was domiciled in Florida at the time of the making of the agreement, and Florida was the intended home of the couple, Florida law controlled.

The 26 states (and the District of Columbia) that are signatories to the Uniform Premarital Agreement Act (UPAA) require fair and reasonable disclosure (California includes the word "full") or a waiver of that right *and* proof that the agreement was unconscionable. Some states determine whether the agreement was unconscionable as of the date of execution of the agreement, and others determine unconscionability at the date of enforcement. All states require the agreement to be entered into voluntarily.

In the United States, we generally presume that if the parties are represented by counsel, they have entered into the agreement voluntarily. In marital regime countries, parties to the agreement are usually not represented by independent counsel; they meet only with the notaré. Counsel must convince a judge that the agreement should be decided under the law of the jurisdiction in which the parties were married or persuade the court that meeting with a notary is sufficient to establish the parties' voluntary assent to the agreement. Unless you are litigating the issue in New York, enforcing the contract de marriage will be a challenge.

Religious agreements

Many people enter into some form of religious agreement when they marry. They may be from Illinois or Jordan, or virtually any other place in the world. Some courts address the issue of separation of church and state head on, whereas others avoid the issue (like the California courts). The courts that have enforced these religious agreements as a contract usually do not allow them to interfere with the jurisdiction of the secular court to divide property or award alimony.

The basis for marriage under Islamic law (Sharia) is the marriage contract, or *mahr* (also called a *sadaq*). This contract is negotiated between the prospective husband and wife prior to marriage. When the bride and groom and their witnesses sign the contract in front of a sharia court official, the marriage begins. The contract can include an agreement concerning property (dower rights), the custody and place of residence of children, and the wife's ability to leave the country if the marriage should be terminated by death of the husband or divorce. However, a court in the United States is unlikely to enforce such a provision.

Until foreign countries draft agreements with provisions allowing for parties to decide which law will apply, their agreements will stand on shaky ground in the United States

California courts have not upheld these agreements. In *In re Marriage of Dajani,* 204 Cal. App. 3d 1387 (Ct. App. 1988), the parties were married by proxy in Jordan in 1982. Mrs. Dajani later joined her husband in California. In 1983, they married again in a civil ceremony. In 1985, Mrs. Dajani filed for dissolution of the marriage. According to the terms of the Jordanian proxy contract, Mr. Dajani was obligated to pay Mrs. Dajani a dowry of approximately $1,700. The trial court found that Mrs. Dajani waived her claim to dowry by initiating dissolution. Mrs. Dajani appealed, arguing that it was against public policy to deny dowry on the grounds that she had initiated dissolution.

The court of appeal affirmed, holding that "[p]renuptial agreements which 'facilitate divorce or separation by providing for a settlement only in the event of such an occurrence are void as against public policy.'" As Mrs. Dajani is not entitled to receive anything except in the event that the marriage is dissolved or Mr. Dajani dies, the "contract clearly provided for wife to profit by a divorce, and it cannot be enforced by a California court."

Similarly, under Jewish law, parties can agree to be bound by a contract called a *ketubah*. In *In re Marriage of Noghrey*, 169 Cal. App. 3d 326 (Ct. App. 1985), the court held that whereby in the event of divorce, Mr. Noghrey would give Mrs. Noghrey his house and $500,000, or one-half of his assets, whichever was greater. Mrs. Noghrey testified that the purpose of the ketubah was to provide protection for Mrs. Noghrey in the event of a divorce, because it is difficult for an Iranian woman who is not a virgin to marry. (Mrs. Noghrey was medically examined to be certain she was a virgin as part of the ketubah.) Seven months after the marriage, Mrs. Noghrey filed for dissolution, and the trial court, in a bifurcated hearing, found the ketubah binding. Mr. Noghrey appealed, and the court of appeal reversed, holding that the terms of ketubah encouraged dissolution, and thus were unenforceable in California. The decisions in these cases did not cite the First Amendment to the United States Constitution.

On the other hand, New Jersey enforced a mahr agreement that was part of the Islamic marriage license in *Odatalla v. Odatalla,* 810 A. 2d 93 (N.J. Super. Ct. Ch. Div. 2002). The court received into evidence a copy of the Islamic marriage license and a videotape of the entire marriage ceremony. The videotape showed the families sitting on separate couches in the living room negotiating the terms and conditions of the agreement. The agreement was presented to both parties for signature and was read and signed freely and voluntarily. The defendant handed the plaintiff one golden pound coin as called for in the mahr agreement.

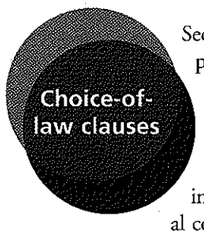
Husband attacked the agreement citing the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The court held that it could uphold the mahr agreement on the basis of contract law without relying on religious policy or theories. The court enforced the secular parts of the agreement.

It should be noted that the court did not directly address this agreement as a premarital agreement, nor did it indicate that this agreement superseded the court's jurisdiction to award alimony or divide property by equitable distribution. The court held that this type of agreement, even though part of a religious ceremony, is enforceable if it meets the two-prong test: (1) is capable of specific performance under "neutral principles of law," and (2) once those "neutral principles of law" are applied, the agreement in question meets the state's standards for those "neutral principles of law." 810 A.2d at 98. The court cited in support of this position, *Hurwitz v. Hurwitz,* 215 N.Y.S. 184 (App. Div. 1926), and *Avitzur v. Avitzur,* 459 N.Y.S.2d 572 (1983).

In *Avitzur,* a New York court held that the court had the power to require a man to give his wife a "get," which is a Jewish divorce, as provided for in the ketubah. This decision has created controversy because under Jewish law the get must be given by the husband to the wife voluntarily—and not ordered by a court.

In *Victor v. Victor*, 866 P.2d 899 (Ariz. Ct. App. 1993), an Arizona court declined to order the husband to grant a religious divorce document because the terms of the agreement were too vague. (Cf. *In re Marriage of Goldman,* 554 N.E.2d 1016 (Ill. App. Ct. 1990—enforcement of get), and *Akileh v. Elchahal,* 666 So. 2d 246 (Fla. Dist. Ct. App. 1996—enforcement of Islamic agreement)).

States differ on their approach to religious agreements. California and Arizona courts shy away from enforcing these agreements. New Jersey, Florida, and Illinois take a more liberal view and allow enforcement of the secular aspects of the agreements. New York courts, which tend to enforce foreign agreements, will even enforce the religious aspects of the agreement. Whether these agreements will be enforced will depend more on the state in which the divorce occurs than on any other factor.



Section 3(a)(7) of the UPAA provides that parties may contract regarding "[t]he choice of law governing the construction of the agreement." All 26 states (and the District of Columbia) that have adopted the act have incorporated this provision into their state laws. In other states, general contract law allows the parties to choose the law that would apply to the agreement. To enforce the agreement, the parties and/or issues must have some nexus to the forum whose laws the parties wish to apply.

If the couple has not lived in the country and the agreement was drafted a long time ago, the court may apply the law of the state in which they live. Choice-of-law clauses are common in contracts entered into in the United States because people move from state to state where laws often differ. Unlike the United States, most countries have laws that apply uniformly throughout the country, making choice-of-law provisions unnecessary.

If a foreign marital contract has a choice-of-law clause, courts in the United States may follow it. In *In re Marriage of Proctor,* 125 P.3d 801(Or. Ct. App. 2005), the Oregon court interpreted a choice-of-law clause in a California premarital agreement pursuant to the UPAA. The choice-of-law clause provided only that California law applied to the construction of the agreement, but not to state substantive law to be applied in the case. Thus, the Oregon court refused to apply California property law and instead applied Oregon law relating to various reimbursement issues.

To be effective, choice-of-law clauses must provide for the application of substantive and procedural law of the foreign jurisdiction. The lesson here is that until our colleagues in foreign countries draft agreements with provisions allowing for parties to decide which law will apply, their agreements will stand on shaky ground in the United States.

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 *DeLorean v. DeLorean,* 511 A.2d 1257 (N.J. Super. Ct. App. Div. 1986), the court 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 divorce to use a private California judge to interpret the agreement, they could have included a provision in the premarital agreement to use a California private judge in deciding any issues relating to the interpretation or enforcement of the agreement.

To increase the likelihood that a foreign marital contract will be enforceable in the United States, the parties should be represented by independent counsel (and not rely exclusively on a notary). There should be a fair and reasonable disclosure of assets and obligations. Disclosure should be waived beyond disclosure provided, and at least seven days should elapse between the time the agreement is first presented and the time it is signed (California Family Code § 1615(c)(2)).

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 also may select a dispute resolution process. Counsel should have the agreement translated if one of the parties does not speak the language of the country and require that the foreign party acknowledge in writing that he or she understands the meaning of the agreement. Videotape the execution of the agreement and the voir dire of the parties to record their assent that the contract was not procured by duress or fraud, that they understood the contract, and that they had the capacity to sign the contract.

Even if the agreement is drafted perfectly, a court in the United States may still determine that the law of the state applies because the parties have no nexus to the country in which the agreement was drafted, that the agreement addresses issues relating to real or personal property in the state, or that the agreement offends the public policy of the state.

There is no guarantee that a state will enforce a foreign agreement. Your client's best shot at enforcement is an American-style premarital agreement. One might argue that the only really safe bet is not to get married at all. However, if you were offering that kind of advice, you might as well have advised your client not to look at the foreign love website in the first place. **FA**

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