# New Book on the Boundaries of European Private International Law

The new book *Boundaries of European Private International Law*, edited by Jean-Sylvestre Bergé (Université Jean Moulin Lyon 3), Stéphanie Francq (Université catholique de Louvain) and Miguel Gardeñes Santiago (Universitat Autònoma de Barcelona), is the result of two European workshops (funded by the Jean Monnet Programme) that brought together renowned specialists and young researchers. This collective work tackles issues relating to the boundaries of EUPIL from diverse perspectives and offers a great variety of contributions in English, French and Spanish.

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*Many thanks to Céline Camara for the hint.*

# Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2/2015: Abstracts

The latest issue of the *"Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)"* features the following articles:

*Moritz Brinkmann*, **„Clash of Civilizations" oder effektives Rechtshilfeinstrument? Zur wachsenden Bedeutung von discovery orders nach Rule 28 U.S.C. § 1782(a)**
The author analyses two recent decisions by U.S. federal courts on Rule 28 U.S.C. § 1782(a). Under this rule a court may grant judicial assistance with respect to a foreign or international tribunal by ordering the respondent "to give his testimony or statement or to produce a document or other thing". The decision of the District Court for the Southern District of New York in In re Kreke concerns inter alia the question whether discovery under § 1782(a) is available also with respect to documents which are not located in the U.S. The CONECEL case, decided by the Court of Appeals for the Eleventh Circuit, touches upon the highly contested issue whether under § 1782(a) judicial assistance may also be obtained with respect to arbitration tribunals.

*Peter Mankowski*, **International Jurisdiction in Insurance Matters: Professional Lessor as Injured Party and Standardized, not Case-by-case Assessment of Need of Protection**
The injured party can sue its opponent's liability insurer at its own domicile under Art. 11 II in conjunction with Art. 9 I lit. b Brussels I Regulation/Art. 13 II in conjunction with Art. 11 I lit. b Brussels Ibis Regulation. This holds true also where the injured party is not a natural person but a legal entity. Likewise, it does not matter whether the injured party is a professional. Generally, the protective regimes of the Brussels I/Ibis Regulations including the regime governing insurance matters apply irrespective of whether any protected party deserves protection measured by a concrete yardstick. Conversely, the standard is abstract

and typical in line with efficiency, legal certainty and predictability of jurisdiction.

*Carl Friedrich Nordmeier*, **Coordination of parallel proceedings according to Art. 27 Brussels I Regulation and exclusive jurisdiction – including an analysis of the scope of Art. 22 no. 1 Brussels I Regulation**

Parallel proceedings are coordinated by Art. 27 Brussels I Regulation on the ground of the principle of priority according to which the court first seized examines its international jurisdiction. The present judgment breaks this principle if the court second seized bases its jurisdiction on an in rem claim (Art. 22 no. 1 Brussels I Regulation). In the first part, this article argues that Art. 22 no. 1 Brussels I Regulation covers neither proceedings for the consent to register the transfer of ownership with the German Land Register nor proceedings for a declaration that the exercise of the right of pre-emption under German Law was ineffective and invalid. The second part shows that the reason for strengthening the court second seized – which can be identified in Art. 31 no. 2 Brussels I Regulation (recast) as well – is the protection of the especially close link between the matter in dispute and the place of trial. In contrast, the reliability to predict the (non-)recognition of the judgment which the court first seized may hand down cannot serve as a justification to break the principle of priority. Other potential reasons of non-recognition than the infringement of an exclusive jurisdiction do not allow the court second seized to continue its proceedings.

*Hannes Wais*, **The concept of a particular legal relationship in Article 23 Brussels I Regulation and application of Article 5 No. 1 Brussels I Regulation in matters relating to a non-competition clause**

The Higher Regional Court of Bamberg had to deal with mainly two questions: Whether, pursuant to Art 23 (I) Brussels I Regulation, choice of court agreements in sales contracts had a binding effect for a dispute arising from negotiations over a distribution agreement between the same parties (1), and whether a claim, based on an alleged violation of a non-competition agreement, qualified as contractual, pursuant to Art 5 No. 1, or as tort, pursuant to Art 5 No. 3 Brussels I Regulation (2). The court answered the first question in the negative. With respect to the second question, the court held that this claim, even though it may qualify as tort under national law, had to be qualified as contractual under the Brussels I Regulation.

*David-Christoph Bittmann*, **The legitimacy of substantive objections against a European Enforcement Order in the state of enforcement**

In its judgment of 21/11/2014 the Oberlandesgericht Cologne had to deal with the controversial question whether it should be permitted to a debtor to contest a European Enforcement Order in the state of enforcement by the way of substantive objections, raised in a remedy like the Vollstreckungsabwehrklage according to § 767 of the German Code of Civil Procedure (ZPO). To answer this question, the Oberlandesgericht had to deal with two issues: First, the Senate stated that the courts of the state of enforcement have jurisdiction for such remedies according to art. 22 no. 5 of Reg. (EC) 44/2001. In its argumentation the Oberlandesgericht refers to the judgment of the ECJ in the case Prism Investments BV. Second, the Senate stated, that § 1086 ZPO, which gives a debtor the possibility to raise substantive objections by the way of the Vollstreckungsabwehrklage, is not in contrast to the provisions of Reg. (EU) 805/2004. This judgment is in line with the majority of legal writers. An analysis of the wording, the systematic and the objective of Reg. (EU) 805/2004 shows however, that § 1086 ZPO violates European Law, because the regulation concentrates substantive objections at the courts of the state of origin. A comparison with the procedure of declaration of enforceability according to Reg. (EC) 44/2001 confirms this result.

*Leonhard Hübner*, **Cross-border change of legal form – implementation of ECJ's Vale judgment into German law**

The following article discusses the national implementation of the cross-border change of legal form by means of transfer of the statutory seat against the background of the Vale judgment of the ECJ. First, it treats the issues arising in case of a cross-border change of legal form to Germany. These include the missing legal foundation, the treatment of the de-registration of the company from the foreign register, and the protection of the stakeholders. It then examines the reverse situation – the cross-border change of legal form to a foreign country.

*Thomas Rauscher*, **Unbilligkeit bei Versorgungsausgleich mit Auslandsbezug**

Both decisions in comment apply the hardship clause in article 17 (3) (2) introductory law to the civil code (EGBGB). The article explains intertemporal and substantial consequences of the coming into force of the Rome III-Regulation on the law applicable to divorce as far as the distribution of pension rights (Versorgungsausgleich) is concerned. As to the boundaries between the international hardship clause under article 17 (3) 2, the material hardship clause

(para 27 Law on the Distribution of Pension Rights, VersAusglG) and forfeiture of rights the author favors a narrow interpretation of the scope of application of the international clause.

*Kurt Siehr*, **Habitual Residence of Abducted Children before and after Their Return**

Two children, born in 2002 and 2003, had been abducted by their mother from La Palma (Spanish Canary Islands) to Germany. Both parents had custody rights (patria potestad) according to Spanish law. In Germany the parents agreed on 13 February 2013 that the children had to be returned to La Palma. In March 2013 the children were brought back by their mother. In La Palma the Spanish court declined jurisdiction because, according to Spanish law, the mother is entitled to take the children to Germany. She returned with them to Germany and here the father applied for enforcement of the agreement of 13 February 2013 and for an order to return the children to La Palma. The mother argued that she had already performed her obligation by returning the children to La Palma in March 2013. The father, however, objected and was of the opinion, supported by a decision of the Court of Appeal of Karlsruhe of 14 August 2008, that a child is only returned if it had established habitual residence in the state of origin. But this was not the case in the present situation because the children, after a short visit in La Palma in March/April 2013, returned to Germany. The Court of Appeal for the German State of Schleswig-Holstein (Oberlandesgericht in Schleswig), seized of this matter, finally decided that the duty of the mother to return the children had been performed in March 2013. The establishment of a new habitual residence in the state of origin is not necessary for the performance of the duty to return. Therefore no new return order is given by the court. – Discussed is the habitual residence of an abducted child before and after return to the country of origin from which the child has been abducted. Mentioned is also the English case O v. O (Abduction: Return to Third Country), [2013] EWHC 2970 (Fam), in which the "return" of a child was ordered to a country (USA) from which the child had not been abducted and in which the child was not habitually resident immediately before being abducted. The child had to be "returned" to the state in which the parents agreed to establish their new habitual residence after having given up their former habitual residence in Australia.

*Alexandra Hansmeyer*, **Legal effects of a third party notice (Streitverkündung) filed in German court proceedings on court and**

**arbitration proceedings in China**

As the world's second largest economy and its largest exporter, China's manufacturers occupy an increasing number of positions across the supply chains of a wide range of industries. With Chinese manufactured or processed products being sold globally, many international product liability cases require bringing claims up the supply chain against Chinese manufacturers. Third party notices ("Streitverkündung") provide a mechanism for courts to recognize specific aspects regarding such claims made in a preceding court proceeding. The article examines the legal impact of third party notices filed in German court proceedings against a Chinese party on subsequent proceedings in Chinese civil courts or by the China International Economic and Trade Arbitration Committee ("CIETAC"). The article concludes that according to the current Chinese law and state of jurisprudence, third party notices have no legally binding effect on subsequent proceedings in China, neither with regard to ordinary courts, nor with regard to CIETAC arbitrations. Further, even if a Chinese party accedes to German court proceedings, such action, according to Chinese contract law, cannot be deemed as an implicit waiver of an arbitration clause in an underlying Chinese law contract.

*Marc-Philippe Weller/Alix Schulz*, **Maintenance obligations and Legal kidnapping – Jurisdiction at the illegally established habitual residence?**

The following article discusses "habitual residence" as a ground for jurisdiction in maintenance claims according to Art. 5 Nr. 2 Brussels-I-Regulation as well as pursuant to Art. 3 of the Regulation n° 4/2009 on maintenance obligations. In cases of legal kidnapping by one of the parents, it may be worth discussing whether habitual residence can be established in the destination state, even if the change of the child's living environment itself has been illegal.

*Carl Zimmer*, **The change in the habitual residence under the 2007 Hague Maintenance Protocol**

The Austrian Supreme Court's case gave rise to two crucial questions concerning the application of the Hague Maintenance Protocol from 2007: First, whether a change of habitual residence may already occur as from the moment of relocation to another State and secondly, whether Art. 4 para 3 or Art. 3 para 1 Hague Maintenance Protocol applies when, at the moment of commencement of proceedings, the maintenance creditor and the maintenance debtor have their habitual residence in the same state. While the second instance court addressed

both questions, the Austrian Supreme Court did not: the father's appeal was dismissed because of a lack of motivation. The author supports the solution of the second instance court to grant the claimant a choice of procedure with regard to Art. 4 para 3 Hague Maintenance Protocol. The court's concept of habitual residence based on a fixed time-criterion, however, seems questionable.

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# 4th Petar Šarcevic Conference on Competition and State Aid

The fourth Petar Šarcevic international scientific conference is entitled EU Competition and State Aid Rules: Interaction between Public and Private Enforcement. Its aim is to explore the contemporary questions of antitrust law, in particular those arising in the context of public and private enforcement on the EU and national levels. The review of the recent practices in these areas is provided first hand from those involved in the decision-making process. Additionally, the focus is on the novelties related to the enactment of the Directive on Antitrust Damages Actions. Of interest to the readers of this blog is probably the last section of the conference dedicated to the private international law aspects.

The conference is to be held on 9-10 April 2015 in Rovinj, Croatia. More information is available at the conference website ps4conference.law.hr.

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# XV World Congress Procedural

# Law (IAPL) – Istanbul 25-28 May 2015

The XVth World Congress of the International Association of Procedural Law will be held in Istanbul from 25-28 May 2015.

The Congress is dedicated to **Effective judicial relief and remedies in an age of austerity.**

The key note speeches will be given by *Richard Marcus (*Hastings College of Law) and *Teresa Wambier (*Sao Paolo University). The presentations of the General reports will focus on:

- **Interim relief** (*Muhammet Özekes* and *David Bamford)*
- **Relief in small and simplified matters** (*Xandra Kramer* and *Shusuke Kakiuchi*)
- **Civil constraints on personal mobility** (Soraya Amrani Mekki and *Dirk van Heule*)
- **Coercive in personam orders** (*Selçuk Öztek* and *Antony TH Smith*)
- **Reform of institutions** (*Baki Kuru* and *Hakan Pekcan?tez)*

For the last session on **Forms of relief** there is a Call for papers  (open till 31 March).

For more information and registration visit the Congress website.

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# ASIL Private International Law Prize 2015

The Private International Law Interest Group of the American Society of International Law invites submissions for this year's ASIL Private International Law prize. The prize is given for the best text on private international law written

by a young scholar. Essays, articles, and books are welcome, and can address any topic of private international law, can be of any length, and may be published or unpublished, but not published prior to 2014. Submitted essays should be in the English language. Competitors may be citizens of any nation but must be 35 years old or younger on December 31, 2014. They need not be members of ASIL.

This year, the prize will consist of a $400 stipend to participate in the 2015 or 2016 ASIL Annual Conference, and one year's membership to ASIL. The prize will be awarded by the Private International Law Interest Group based upon the recommendation of a Prize Committee. Decisions of the Prize Committee on the winning essay and on any conditions relating to this prize are final.

Submissions to the Prize Committee must be received by June 1st 2015.

Entries should be submitted by email in Word or pdf format. They should contain two different documents: a) the essay itself, without any identifying information other than the title; and b) a second document containing the title of the entry and the author's name, affiliation, and contact details.

Submissions and any queries should be addressed by email to Private International Law Interest Group Co-Chairs Prof. S.I. Strong (strongsi@missouri.edu) and Cristian Gimenez Corte (cristiangimenezcorte@gmail.com). All submissions will be acknowledged by e-mail.

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# German Federal Court of Justice on Surrogacy and German Public Policy

*By Dina Reis, Albert-Ludwigs-University Freiburg (Germany)*

In its ruling of 10 December 2014 (Case XII ZB 463/13), the German Federal

Court of Justice (Bundesgerichtshof – BGH) had to decide whether, despite the domestic prohibition of surrogacy, a foreign judgment granting legal parenthood to the intended parents of a child born as a result of a surrogacy arrangement should be recognized.

The appellants, a same-sex couple habitually resident in Berlin, are German citizens and live in a registered partnership. In August 2010, they concluded a surrogacy contract with a woman in California. The surrogate mother, a citizen of the United States, is habitually resident in California and was not married during the surrogacy process. In accordance with the contract, the child was conceived by way of assisted reproduction technology using appellant no. 1's sperm and an anonymously donated egg. Prior to the child's birth, appellant no. 1 acknowledged paternity at the German Consulate General in San Francisco with the surrogate mother's consent, and by judgment of the Superior Court of the State of California, County of Placer, legal parenthood was assigned exclusively to the appellants. In May 2011, the surrogate mother gave birth in California; thereafter, the appellants travelled with the child to Berlin where they have been living since. After the civil registry office had refused to record the appellants as the joint legal parents of their child, they brought proceedings for an order requiring the civil registry office to do so, which was denied by the lower courts.

The BGH held that recognition of the Californian judgment could not be refused on the grounds of violation of public policy and ordered the civil registry office to register the child's birth and state the appellants as the joint legal parents. The Court found that German public policy was not violated by the mere fact that legal parenthood in a case of surrogacy treatment was assigned to the intended parents, if one intended parent was also the child's biological father while the surrogate mother had no genetic relation to the child.

**Public policy exception within the scope of 'procedural' recognition**

First, the Court outlined that, contrary to a mere registration or certification, the Californian judgment could be subject to a 'procedural' recognition laid down in §§ 108,109 of the German Act on the Procedure in Family Matters and Matters of Non-contentious Jurisdiction (FamFG), which enumerate limited grounds for denying recognition. The Court noted that the Californian decision was based on a substantive examination of the validity of the surrogacy agreement and the resulting status issues, which was not to be reviewed (prohibiton of '*révision au*

*fond*'). According to § 109(1) No. 4 FamFG, recognition of a judgment will be refused where it leads to a result which is manifestly incompatible with essential principles of German law, notably fundamental rights (public policy exception). The Court stated that, in order to achieve an international harmony of decisions and to avoid limping status relationships, the public policy exception was to be interpreted restrictively. For this reason, a mere difference of legislation did not imply a violation of domestic public policy; the contradiction between the fundamental values of domestic law and the result of the application of foreign law in the case at hand had to be intolerable.

**Paternity of one intended parent**

With regard to the legal parenthood status of appellant no. 1, the Court pointed out that no violation of public policy could be found because the application of German law would produce the same result as the decision of the Superior Court of the State of California: Due to the fact that the surrogate mother was not married at the time of the child's birth and appellant no. 1 had acknowledged paternity with her prior consent, German substantial law (§§ 1592 No. 2, 1594(2) German Civil Code) would also regard appellant no. 1 as the legal father of the child.

**Assigning legal parenthood to the registered partner of the biological father not contrary to public policy**

With regard to the legal parenthood status of appellant no. 2, the Court argued that the outcome of the Californian judgment in fact deviated from the domestic determination of parenthood. However, this divergence would not violate public policy if one of the intended parents, unlike the surrogate mother, was genetically related to the child.

**Deviation from German substantive law**

Commercial as well as altruistic surrogacy are prohibited under § 1(1) No. 7 German Embryo Protection Act and § 14b Adoption Placement Act, which penalize the undertaking of surrogacy and commercial activities promoting surrogacy such as placement of surrogate mothers. However, the surrogate mother and the intended parents are not punished. The scope of the provisions is limited to acts committed within German territory (§ 7 German Criminal Code).

In addition to the penal aspects, § 1591 German Civil Code defines the woman who gives birth as the mother of a child and excludes the motherhood of another woman even if the latter is the child's genetic mother. The provision respects the social and biological bond between child and birth mother and aims at avoiding 'split' motherhood resulting from surrogacy treatment, including cases where the latter is performed abroad. The BGH outlined that German law provided neither for joint legal parenthood of two men acknowledging paternity nor for assigning legal parenthood to the registered partner of a parent by operation of law; same-sex partners could establish joint legal parenthood solely by means of adoption.

Then the Court held, first, that assigning joint legal parenthood to same-sex partners did, in itself, not violate public policy because, according to the ruling of the German Federal Constitutional Court on so-called 'successive adoption' – a practice granting a person the right to adopt a child already adopted by their registered partner -, married couples and couples living in a registered partnership were considered as equally suited to provide conditions beneficial to the child's upbringing [German Federal Constitutional Court 19.02.2013, Case 1 BvL 1/11 and 1 BvR 3247/09, para 80 with further references = FamRZ 2013, 521, 527].

Secondly, the Court pointed out that the general preventive aims underlying the provisions mentioned above needed to be distinguished from the situation where surrogacy had been nevertheless – lawfully – carried out abroad, because now the welfare of the child as a legal subject with independent rights had to be taken into account. A child, however, could not be held responsible for the circumstances of his or her conception. And while on the one hand a violation of the fundamental rights of the surrogate mother or the child could imply a public policy infringement, the Court stressed that, on the other hand, fundamental rights could also argue for a recognition of the foreign judgment.

### Birth mother's human dignity not *per se* violated by surrogacy: drawing a parallel to adoption

With regard to the surrogate mother, the Court argued that the mere fact that surrogacy had been undertaken was, in itself, not sufficient to ascertain an infringement of human dignity. That applied, *a fortiori*, in respect of the child who owed his or her existence to the surrogacy process. The Court emphasized that the surrogate mother's human dignity could be violated if it was subject to doubt

whether her decision to carry the child and hand it over to the intended parents after birth had been made on a voluntary basis. However, the Court found that if the law applied by the foreign court imposed requirements to ensure a voluntary participation of the surrogate mother and the surrogacy agreement as well as the circumstances under which the surrogacy treatment was performed had been examined in proceedings that complied with the standards of the rule of law, then, in the absence of any contrary indications, the foreign judgment provided reasonable assurance of the surrogate mother's voluntary participation. According to the surrogate mother's declaration before the Superior Court of the State of California, she was not willing to assume parental responsibilities for the child. The Court held that in this case, the surrogate mother's situation after childbirth was comparable to that of a mother giving her child up for adoption.

**Focus on the best interests of the child**

Given those findings, the Court concluded that the decision whether to grant recognition to the foreign judgment should be guided primarily by the best interests of the child. For this purpose, the Court referred to the guarantee of parental care laid down in Art. 2(1) in conjunction with Art. 6(2) first sentence of the German Constitution, which grants the child a right to be assigned two legal parents [cf. German Federal Constitutional Court 19.02.2013, Case 1 BvL 1/11 and 1 BvR 3247/09, paras 44, 73 = FamRZ 2013, 521, 523, 526], and the case-law of the European Court of Human Rights on Art. 8(1) ECHR concerning the child's right to respect for his or her private life: The European Court of Human Rights had ruled that the latter encompassed the right of the child to establish a legal parent-child-relationship which was regarded as part of the child's identity within domestic society [ECtHR of 26.06.2014, No. 65192/11 – Mennesson v. France, para 96].

Here, the Court stressed that not only was the surrogate mother not willing to assume parental responsibilities, but she was, in fact, also not available as a parent on a legal basis: An assignment of legal motherhood to the surrogate mother, which could only be established under German law, would have no effect in the surrogate mother's home state because of the opposing foreign judgment.

Under those circumstances, the Court found that depriving the child of a legal parent-child-relationship with the second intended parent who – unlike the surrogate mother – was willing to assume parental responsibilies for the child,

violated the child's right laid down in Art. 8(1) ECHR. According to the Court's view, the limping status relationship between the surrogate mother and the child failed to fulfill the requirements laid down in Art. 2(1) in conjunction with Art. 6(2) of the German Constitution and Art. 8(1) ECHR.

The Court agreed with the opinion of the previous instance that adoption would be an appropriate instrument in the case at hand because, unlike a judgment based on the foreign legislature's general assessment of surrogacy cases, the adoption procedure included an individual examination of the child's best interests. However, the Court pointed out that in cases of stepchild adoption, the outcome of this individual evaluation would usually be favourable and thus coincide with the Californian decision, leading to legal parenthood of the biological parent's registered partner. The consistent results clearly argued against a violation of public policy. Moreover, the Court observed that adoption would not only encounter practical difficulties in the child's country of birth, where the appellants were already considered the legal parents, it would also pose additional risks for the child: It would be left to the discretion of the intended parents whether they assumed parental responsibilities for the child or changed their minds and refrained from adoption; for example, if the child was born with a disability.

**Conclusion**

The Court's decision has been received with approval within German academia and legal practice [see the notes by *Helms*, FamRZ 2015, 245; *Heiderhoff* NJW 2015, 485; *Mayer*, StAZ 2015, 33; *Schwonberg*, FamRB 2/2015, 55; *Zwißler*, NZFam 2015, 118]. Before this judgment, lower courts had shown a tendency to regard public policy as violated by the mere fact that surrogacy had been performed [cf. Higher Regional Court Berlin 01.08.2013, Case 1 W 413/12, paras 26 *et seqq.* = IPRax 2014, 72, 74 *et seq.*; Administrative Court of Berlin 05.09.2012, Case 23 L 283.12, paras 10 *et seq.* = IPRax 2014, 80 *et seq.*]. In recent years, however, some scholars had advocated a more cautious and methodical handling of the public policy exception [see especially *Heiderhoff*, NJW 2014, 2673, 2674 and *Dethloff*, JZ 2014, 922, 926 *et seq.* with further references]. Instead of resorting to a diffuse disapproval of surrogacy as a whole, the ruling of the BGH is essentially based on an accurate analysis of the concrete alternatives at hand and a critical evaluation of the possible outcomes in the present case.

However, it has rightly been pointed out that, within the complex field of surrogacy, the situation in the case at hand was fairly straightforward: The surrogate mother was not married so that the biological father could acknowledge paternity without complications, there was no conflict between the intended parents and the surrogate mother because the latter did not want to keep the child, and the legal parenthood of the intended parents had been established in a judicial procedure where the rights of the child and the surrogate mother, especially her voluntary participation, had been subject to review [cf. *Heiderhoff*, NJW 2015, 485].

The BGH expressly left open whether a different finding would have been appropriate if neither of the intended parents had been the child's biological parent or if the surrogate mother had been also the genetic mother [para 53]. Neither did the court discuss the issue of 'recognition' of civil status situations and documents. Furthermore, surrogacy arrangements that are undertaken in countries with poor human rights standards and a lower degree of trust in the administration of justice may not fulfill the requirements for a recognition established by the BGH. Insofar, the judgment could have a deterrent effect as regards seeking surrogacy treatment in countries that do not meet the required standards [*Heiderhoff*, NJW 2015, 485].

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# Advocate General's Opinion on Art. 34 para. 1 of Regulation (EC) No. 44/2001

On 3 March 2015, Advocate General Szpunar delivered its opinion in the case C-681/13 (*Diago Brands BV*) concerning the interpretation of Art. 34 para. 1 of Regulation (EC) No. 44/2001 (former Regulation (EU) No. 1215/2012), in a case where recognition of a judgment of one Member State is sought in another Member State. In his Opinion, the Advocate General held that the mere fact that a judgment given in the State of origin is contrary to EU law does not justify the

refusal of the recognition of this judgment on public policy grounds in the State in which recognition is sought. According to his Opinion, a mere error of national or EU law cannot justify refusal of recognition as long as it does not constitute a manifest breach of an essential rule of law in the State in which recognition is sought.

The full text of the Opinion can be accessed here.

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# French Same-Sex Marriage, a Strange International Public Policy

*By Dr. François Mailhé, maître de conferences, Paris II*

Last month, on January 28, the French Cour de cassation decided on a new "Same-sex Marriage" Act international case. After "Thalys babies" in September, the issue was about the authorization to wed a French and a Moroccan nationals, the last of whom citizen of a country prohibiting same-sex marriages.

*THE DECISION*

The facts were simple indeed. Two men, Dominique, French, and Mohammed, Moroccan, wanted to get married in Jacob-Bellecombette, in the suburbs of Chambéry, France, the city of the 1968 Winter Olympics. The Same-sex Marriage Act had just been passed in Parliament, and it was understood as having created a "right to marry" for all, that is for homosexual as well as heterosexual couples (the Act is also known as the "Marriage for all" Act), and for foreigners and French alike. Indeed, Article 202-1 Civil code (C.Civ.) read, at the time:

*"The qualities and conditions necessary to be able to contract marriage are governed, for each spouse, by his personal law.*

*Nevertheless, two persons of the same sex may contract marriage when, for at*

*least one of them, either his personal law, or the law of the State within which he has his domicile or his residence, permits it*".

Obviously, since Dominique was French and they both lived in France, the condition of Article 202-1 C.civ. was fulfilled. Unforunately, it was not applicable to the case. Indeed, France and Morocco have signed a bilateral convention, on August 10, 1981, concerning personal and family status and judicial cooperation. Sure enough, this "right to wed" therefore knew exceptions, those compelled by the pyramid of norms: where there existed provisions of international source providing solutions for conflict of marriage law, these solutions would prevail over Article 202-1 C.civ. It had actually even been expressly written down in the draft Act, only to be later written off by the Senate on the ground that the principle of hierarchy of norms enshrined in Article 55 of the Constitution made it irrelevant.

That was until January 28, 2015. In a highly advertised decision, the Cour de cassation decided that:

« […] *if, according to Article 5 of the Franco-Moroccan Convention* […] *substantial conditions such as prohibitions to marriage, are governed for each future spouse by the law of the State he is a citizen of, its Article 4 outlines that one of the contracting States laws may be set aside by the courts of the other State if it is manifestly incompatible with its public policy ;* […] *that is the case of the applicable Moroccan law opposed to the marriage of two persons of the same-sex when, for at least one of them, either his personal law, the law of the State of his domicile or that of his residence allows it* ».

Dominique and Mohammed are therefore allowed to wed. What now?

*AN ANALYSIS*

At first glance the decision may appear complex but on the whole quite conventional. The Court, after all, only uses the public policy exception allowed by the Convention itself. The solution, therefore, would be specific to the Convention itself, and Morocco only could be concerned by the decision.

The originality of this exception, though, is surprising. This public policy exception is not an absolute exception. It doesn't purport to create an absolute "right to wed". Instead, it depends upon the recognition of same-sex wedding in one of the following States: that of the domicile, the residence or the nationality

of at least one of the spouses. This originality calls for three observations, the first about conflict of norms, the second about the scope of this exception, the last about the nature and development of this kind of exception in Europe.

**1/** The first observation concerns the phrasing of the public policy clause at play. Indeed, if the Cour de cassation refers to Article 4 of the Convention to justify this surprising exception, its wording is actually grounded in Article 202-1 C.civ. itself. Comparing both this paragraph of the decision and the second paragraph of Article 202-1 C.civ. makes the relationship quite obvious: the exact same words were employed for both of them. Of course, one could say any public policy exception is the political safety valve that Courts may design as they think fit. Why not designing on the basis of Article 4 of the Convention what is now written in Article 202-1 C.civ.? The blog format is perfect for such an assertion since this seems open to debate, but I would like to propose a negative answer.

In its letter, first, Article 4 is designed as a quite classical public policy exception. "*The law of one of both States applicable under the Convention may only be set aside by the Courts of the other State if it is manifestly incompatible with its public policy*". Words have some weight, though, and it seems necessary to notice that it requires a "manifest" incompatibility. The discussion of this word's value in the context of Article 21 Rome I Regulation should at least raise the attention. And anyway, how can a violation of a public policy exception be "manifest" if it requires checking a potentially foreign law?

In its spirit, second, the solution is nothing less than a levelling of the situations. The Cour de cassation refused to differentiate situations according to the applicable norms when, apart from the nationality of the parties, the situations don't differ. But isn't it the purpose of such conventions to treat citizens differently when their States together agreed to do so? Should the teleological rationale of such mechanism (to exclude the applicable law to defend certain values) eventually level down any and all such clauses, even those more restrictive than the others?

**2/** This leads me to the second observation: this exception cannot be limited to the Franco-Moroccan convention. France has ratified identical bilateral conventions with Poland, Vietnam and the former Yugoslavia (which now concerns Slovenia, Bosnia, Serbia and Montenegro). Laos, Cambodia, Tunisia, Madagascar and Algeria have each also entered into similar conventions and though this last group

of conventions has no public policy clause, it is still considered available in the silence of the texts. Citizens from all these countries now beneficiate from this "right to wed", even if their countries either ignore or even penalize homosexuality: the policy reasons for which Article 202-1 C.civ. took the guise of the convention are not specific to French-Moroccan relations.

**3/** The third observation is more about of this very "specific clause of public policy" (Rigaux and Fallon, n°7.54) that was first developed in Belgium (Article 46, Private International Law Act, 2004) and served as an inspiration to the French Act.

There is an ambiguity as to the nature of this clause. In France, some have characterized it as a positive public policy exception, defending the "right" implemented in the law instead of negatively protecting some values of the society. Noting that Article 202-1 C.civ. does not stop at setting aside the prohibitive law but actually gives the exact answer to the problem, some have characterized it as a substantial provision, not a conflict one. Actually, the debate doesn't seem of great importance : it may be both. Since the effect of the rule is an exclusion of the applicable law to be replaced by the Court's lex fori, it is a public policy exception. Since the effect of the rule is to make sure same-sex marriages are not declared void or prevented in France on this specific ground, it is a substantive rule.  When a substantive provision may exclude the application of an opposite foreign solution, the border between notions gets blurred.

But whatever the characterization of the clause, its originality needs to be emphasized. Because they defend what is perceived as a sort of individual right still very variously regarded abroad, Article 202-1 C.civ. as well as Article 46 Belgian law are not absolute in their rejecting prohibitive foreign laws. They require a connection to a State which defends the same right. It looks, therefore, like an application of *Inlandsbeziehung*. But this is a very special one, since *Inlandsbeziehung* requires a unilateral connection with the State of the forum. Here the connection is bilateral, with any State which accepts same-sex marriages. It is as if the French and Belgian legal systems defended that solution only insofar as it gets support from a State that is connected to the case. Truly enough, this State will most often be the French State itself, since the several connecting factors listed in Article 202-1 C.civ. will frequently lead to that country. But a French judge asked to decide on the alleged invalidity of a same-sex marriage of two Moroccan nationals, residing and married in the Netherlands,

would have to set aside Moroccan law on this public policy ground because *Dutch law* recognizes same-sex marriages.  If this clause is a real public policy clause, and public policy clauses defend values of the connected legal order, then this clause doesn't defend *French* values. It defends the values of an international community, and stands as a sort of truly international public policy, a transnational public policy…

Food for thoughts, and I hope for reactions on this blog.

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# Annexes I and II Brussels Recast

Quick post to inform about the publication, on the OJ L 54, 25.02.2015, of the Commission delegated Regulation (EU) 2015/281, of 26 November 2014, replacing Annexes I and II of Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Click here to access the text.

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# Tort jurisdiction and pure economic loss – Request preliminary ruling

*Written by Laura van Bochove, Erasmus University Rotterdam*

In January, the Dutch Court of Cassation referred several questions on Article 5(3) Brussels I Regulation to the CJEU for a preliminary ruling (Case C-12/15), including the questions how a court should establish 1) whether an economic loss

is an ‘initial loss’ or a ‘consequential loss’ and 2) in which country economic losses occur.

Briefly stated, the facts of the case are as follows. In 1998, Universal Music International Ltd (part of the Universal Music Group) and Czech record company B&M agreed upon the purchase of 70 per cent of the shares of B&M by companies within the Universal Music Group. In addition, parties agreed that in 2003, Universal would buy the remaining 30 per cent. In the draft version of the Letter of Intent, the intended purchase price of all shares equalled five times the annual profit of B&M. For the drafting of the definitive share option agreement regarding the 30 per cent of the shares, the Universal Music Group turned to Czech law firm A. On 5 November 1998, a share option agreement was concluded by Universal Music International Holding B.V. (hereafter: Universal Music), seated in the Netherlands, B&M and its shareholders. However, due to an alleged mistake of A.’s employee in the drafting of the agreement, the price Universal had to pay for the shares was increased radically. In 2003 Universal Music bought, as agreed, the remaining 30 per cent of the shares. It calculated, on the basis of the intended purchase price, that it should pay about 313,000 euros. B&M’s shareholders, however, calculated the price of the shares on the basis of the formula in the final agreement, resulting in an amount of more than 30 million euros. Parties went to arbitration and in 2005 Universal Music and B&M’s shareholders settled their dispute for 2.6 million euros.

Universal Music then commenced legal proceedings before the court of Utrecht (the Netherlands) against the law firm and its employee for the amount of 2.7 million euros, being the difference between the intended price of the shares and the settlement plus the costs for the arbitration proceedings and the settlement. The defendants argued that the Utrecht court did not have jurisdiction. In first instance, the court denied jurisdiction, on the basis that none of the facts giving rise to the damage occurred in the Netherlands and that the connection with the Netherlands was too weak to accept jurisdiction. The Court of Appeal followed this decision and held that the court of the place where pure economic loss was suffered cannot accept jurisdiction on the basis of Article 5(3) Brussels I Regulation. Universal Music then filed an appeal in cassation.
The Court of Appeal’s ruling is in line with the majority opinion long held in Dutch scholarship that the place of (initial) pure economic loss cannot be considered the place where the damage occurred or the ‘Erfolgsort’. Although one could argue

that the CJEU already in its 2004 decision in Kronhofer (C-168/02) suggested otherwise, the Dutch Court of Cassation deemed it necessary to ask for a preliminary ruling on this topic. However, taking into consideration the recent CJEU decision in Harald Kolassa v. Barclays Bank plc (C-375/13), which was published after the Court of Cassation referred its questions to the CJEU, it is likely that the matter will be viewed as an 'acte éclairé', since the CJEU rules that the court of the place where pure economic loss occurred as a direct consequence of misleading information in a prospectus, can establish jurisdiction on the basis of Article 5(3) Brussels I Regulation. The Kolassa judgment also provides an affirmative answer to one of the other questions of the Court of Cassation, namely whether the court in deciding on its jurisdiction should also take into account the defendant's arguments regarding jurisdiction.

However, the two remaining questions referred to the CJEU for a preliminary ruling have not yet been answered. The Court of Cassation informs how a national court should establish whether the damage should be considered initial economic loss or consequential economic loss, and how a national court should establish whether the economic damage has occurred in its territory. In the case at hand, the question is whether the difference between the intended share price and the settlement eventually paid and the costs related to arbitration and settlement should be regarded as initial economic loss, and if so, if the Netherlands should be considered the place where the damage occurred, since these costs were paid at the expense of Universal Music's assets (bank account) located in the Netherlands.

Since the boundaries between initial and consequential economic loss can be hard to delineate and the localisation of pure economic loss often raises problems, it would be useful if the CJEU would provide courts with more guidance. It will be interesting to see whether the CJEU is willing to extent its ruling in Kolassa to all pure economic loss cases and adopt as a general rule that in cases of pure economic loss the Erfolgsort is the place where the victim suffers the loss to its assets, in this case the bank account from which the amount was transferred. Yet, the CJEU could also rule that the Kolassa judgment should be interpreted restrictively and that it only applies to private investors suffering economic damage on their investments due to misinformation.

To be continued…