The French Cour de cassation and the « Thalys babies »

I am glad to post this comment by F. Mailhé, Associate Professor Paris 2, Panthéon-Assas

On September 22, 2014, the French *Cour de Cassation* (Supreme Court for civil and criminal matters) published two prejudicial opinions on the validity, in a same-sex couple, of the adoption by a woman of a child born to her wife thanks to a foreign medically-assisted procreation (Avis n°15010 and 15011, ECLI:FR:CCASS:2014:AV15010 and ECLI:FR:CCASS:2014:AV15011).

Despite its relatively restricted purpose, the French Same-Sex Marriage Act of May 17, 2013, just starts to give its first private international law consequences (On that law and private international law, see e.g. H. Fulchiron, *JDI* 2013. 1055 ; P. Hammje, *RCDIP* 2013. 774 ; S. Godechot and J. Guillaumé, *D.* 2013. 1756).

Indeed, avoiding any fundamental change in French family law, the Act was only meant to enable same-sex couples to get married. As a consequence, same-sex couples are for example still not allowed to get medically-assisted procreation (MAP) techniques by Article 2141-2 of the Public Health Code ("Code de la Santé Publique", CSP), according to which:

"The purpose of [MAP] is to remedy a couple's infertility which pathological character was medically diagnosed or to avoid the transmission of a particularly severe disease to the child or to the other member of the couple".

Some things changed in adoption law, though. Among other provisions, in order for lonely parents getting married to provide the child with a second parent when the other parent was unknown or deceased, the 2013 Act allowed for their husband or wife to adopt the child in those situations.

The adoption procedure has therefore been used by a number of women in situations where the father was not known… because the baby was born from an insemination with anonymous donor, an MAP, abroad, especially in Belgium. Contrary to France, Belgium had authorized MAP for lonely mothers since July 2007. Called "Thalys babies", by the name of the train which connects Paris to

Brussels, a certain number of babies were born from such travels in the last years.

In July, almost 300 files for adoption had apparently been enrolled in different courts of first instance in France, and the reaction and interpretation of the law was quite diverging. For most, the interest of the child and the evolution of the law asked for the adoption to be allowed (see e.g. TGI Nanterre, July 8, 2014, *D.* 2014. 1669, note Ph. Reigné). For some others, to the contrary, the situation was a plain fraud, since it was the conclusion of a procedure by which the couple simply tried to bypass different French law prohibitions (MAP by a lonely woman or same-sex couple). After the press echoed the emotion of couples blaming a "two tier justice", two courts (Avignon and Poitiers) decided to use a specific prejudicial procedure to ask the *Cour de cassation* to issue an opinion on the matter.

On Sept. 22, 2014, the *Cour de cassation* answered in its uniquely concise style:

"Having resort to medically-assisted procreation, in the form of artificial insemination with anonymous donor abroad, does not bar the mother's wife from adopting the child born from this procreation, as long as the adoption's legal conditions are fulfilled and that it is in line with the child's interest".

The arguments in defense of the prohibition to adopt were indeed rather weak and it is no surprise that this decision of autumn 2014 was in favor of the adoption.

First, the prohibition of Article 2141-2 CSP is of ambiguous nature. Instead of regulating MAP as a filiation issue, it is regulated as a technical one, and destined to medical professionals, not to parents. Its consequence is therefore not a civil one for the parents, but a sort of disciplinary penalty for the professionals. Designed for purely domestic matters, it is therefore not as assertive as it needs to be in international matters: Does it concern the persons getting an MAP abroad, or is it just organizing French clinics and hospitals' life?

Second, and as a consequence, contrary to the sister question of surrogacy, the international public policy is not at stake. Its foundation in Article 2141-2 CSP is too fragile. Actually, the problem does not seem to come so much from the foreign MAP itself than from the fact that a French mother, with no ties to Belgium, went abroad to get what she could not get in France, i.e. a problem of fraud. This is a

much harder question in purely philosophical and political terms. What does "forbidden in France" mean in that context? Should a person be allowed to "internationalize" the situations to bend the law to its will? One of the arguments of counsel for defense in those cases was that freedom of movement within Europe allows for such "legal optimization". If the Court of Justice has approved the reasoning in company law since Centros (Aff. C-212/97), and has peeped into family and personal matters with cases such as Garcia-Avello (Aff. C-148/02), pure choice of law in family matters (and MAPs) does not seem the rule yet, if only because the European private international law regulations in family matters have not provided for such a complete freedom. Unfortunately for the debate, it comes at a time when France was already punished on a neighboring matter where the *Cour de cassation* had used the same rationale, so that, in the eyes of that Court, the door to negotiations seemed closed.

As readers of Conflictoflaws.net have noticed, in *Menesson vs. France* and *Labassée vs. France*, the European Court of Human Rights (ECHR) recently condemned France for refusing to recognize the filiation of the "parents of intent" (here an heterosexual couple) with the children born in the United States from a surrogate mother. The decisions are actually not as assertive as it has been said in the press, the ECHR judging only that the children should each get at least recognition of their filiation with their father (who happened to be both father of intent and biological father). But the ECHR paid scant regard, in both cases, to the argument the *Cour de cassation* has used in more recent ones : fraud.

In 3 decisions of Sept. 13, 2013 and March 19, 2014 on another foreign surrogacy case, the *Cour de cassation* had preferred to argue that the parents of intent could not avoid the French interdiction of gestational surrogacy by going to get one in the United States and then ask recognition of the American decision in France (on those decisions, see e.g. L. Gannagé, *RCDIP* 2013. 587 ; J. Guillaumé, *JDI* 2014. 1 ; J. Heymann, *JCP* 2014. 613 ; H. Fulchiron et Ch. Bidaud-Garon, *D.* 2014. 905). This change of rationale (from international public order to fraud) was understood by some authors as showing a change in the strategy of the *Cour de cassation* to persuade the ECHR who was already seized of the *Menesson* and *Labassée* cases. But if this was the aim, it failed. Its case-law was condemned nonetheless.

The consequence of the *Menesson* and *Labassée* cases on the issue of the adoption of a child born by artificial insemination with anonymous donor was of

course not obvious, but the analogy is strong. In both cases, parents had gone abroad to get a child through a medical procedure they could not get in France. How could the *Cour de cassation* therefore decide otherwise than for its validity, when the value argument (through international public order) was so weak, and when the political argument (fraud) had already been knocked down by the European Court of Human Rights for an analog and much stronger case?

One last word, though. This was just a prejudicial opinion. Opinions by the *Cour de cassation* are not issued by plenary sessions of the Court, and do not bind its judging Chambers. It is therefore possible that (as has been seen in other matters) some Chambers will not follow the Opinion and decide otherwise. But, after the EHCR decision in *Menesson* and *Labassée*, after the refusal of the French government to appeal of those decisions (the government actually seems favorable to it), after this Opinion by some members of the *Cour de cassation*, and if the evolution of the French society keep on the same way in the years to come, years which would be needed before the *Cour de cassation* may be seized in its judging formation of the matter, such a reluctance would certainly go against the tide, if not too late, after the tide.

The Evolution of European Private International Law – Coherence, Common Values and Consolidation

The last decade has seen a number of important legislative developments in the field of European private international law and cross-border litigation, including the Rome I-III Regulations, the Brussels I (Recast) and Brussels II bis Regulations, the Succession Regulation, and other instruments in the area of civil procedure.

As these legislative initiatives were introduced at different stages and with different objectives, the question is whether they constitute a *coherent legal framework* with *common legal concepts*, which has fostered the development of *common values* and *principles*, or whether they need consolidation or even a

new structure.

A joint conference BIICL- Queen Mary University of London taking place on the 25 and 26 of November, will addressed the abovementioned question with the aim to assess the European framework for conflict of laws and jurisdictions and to reflect on the possible directions of its future evolution.

Click here to download the event flyer; here for the program.

Notice: 35 Years CISG and Beyond in Basel

The University of Basel, SVIR/SSDI (Swiss Association for International Law) and UNCITRAL are hosting a conference with the title

35 Years CISG and Beyond.

The conference will take place on **29 and 30 January 2015** at the **University of Basel**. Its main focus will be on open issues in regard to the CISG's application and on any possible further harmonization and unification of contract law.

For more information or registration please click here.

Van Den Eeckhout on Choice and Regulatory Competition and on

Business and Human Rights

The working paper “Choice and regulatory competition. Rules on choice of law and forum”, written by Veerle Van Den Eeckhout (https://www.uantwerpen.be/nl/personeel/veerle-vandeneeckhout/) is now available on ssrn, here. The paper is the short written version of her contribution to the Conference “Norm-Setting, Enforcement and Choice”, held in Maastricht (the Netherlands) on 18 October 2013. The Conference report is available here.
The paper analyzes PIL from the perspective of “Choice and regulatory competition”. The final version of the paper will be published in the Congress book.

The Power Point of another Presentation of Veerle Van Den Eeckhout has also been made publicly available: The Power Point of her contribution to the Conference at Lausanne on 10 October 2014 is available on slideshare, see http://www.slideshare.net/vvde/lausanne10oktober201419septdefinitief . This Power Point was presented during the Conference “The Implementation of the UN Principles on Business and Human Rights in Private International Law” at Lausanne, see for the programme of the Conference http://www.isdc.ch/d2wfiles/document/4713/4018/0/Human%20Rights%20in%20PIL-%2010-10-2014.pdf The presentation of Veerle Van Den Eeckhout was entitled “The Private International Law Dimension of the Principles. Introduction.”

Research Projects on EU Law and ECJ Case Law in Civil Matters

Researchers from Latvia (Inga Kacevska, Baiba Rudevska, Arnis Buka, Students Martins Dambergs and Aleksandrs Fillers) are currently conducting two EU research projects (Project JUST/2013/JCIV/AG/4691):

1. "*The European Court of Justice and the impact of its case law in the area of civil justice on national judicial and administrative authorities*". The aim of this research project is to analyse the influence and practical application of the case law of the European Court of Justice (ECJ) in civil matters on decisions and judgments of domestic courts and on national legal acts. The researchers will identify the problems and offer solutions and proposals for a more effective and more frequent application of ECJ case law by domestic courts and authorities.

2. "*Effective adoption, transposition, implementation and application of the European Union legislation in the area of civil justice*". Within this project the researchers will develop Guidelines and Recommendations that will give an overview whether there is an effective control of transposition and implementation of EU law in the field of civil justice. It will also suggest more effective methods of implementation and transposition of EU legislation in domestic legislation.

In the framework of both projects the research team will interview practitioners (judges, attorneys), state officials, academics and other lawyers. Any person working in the field of international cooperation in civil matters in the EU is invited to participate by answering the web-Questionnaire. The Questionnaire is available here and will take approximately 10-15 minutes to complete. Participation is entirely anonymous. The Questionnaire will remain open until 1 December 2014.

Conference on the Brussels I Recast

On 28 and 29 November 2014, the Verona University Department of Law will host a conference on "International Litigation in Europe : the Brussels I Recast as a panacea?". The conference will take place in Verona. The conference language will be English. Registration is possible via email: chiara.zamboni_01@univr.it

More information is available here. The programme reads as follows:

Friday, November 28, 2014

- 13.30 Registration
- 14.00 Welcome and opening remarks
  Prof. Gottardi, University of Verona
  Prof. Ferrari, University of Verona/NYU
- 14.10 Greetings
  Avv. Cristiano, AIJA National Representative, Italy

I Session: The Recast as a political compromise

- 14.20 Goals of the Recast
  Prof. Pocar, University of Milan
- 14.45 The (still limited) territorial scope of application of the new Regime
  Prof. Carbone, University of Genoa
- 15.10 The arbitration exception
  Prof. Radicati di Brozolo, University of Milan
- 15.35 Discussion

II Session: The special and mandatory rules on jurisdiction

- 15.50 A new head of jurisdiction in relation to the recovery of cultural objects
  Prof. Gebauer, University of Tübingen
- 16.15 Enhancing protection for the weaker parties: the jurisdiction over individual contracts of employment
  Prof. Cafari Panico, University of Milan)
- 16.40 The consumer's jurisdictional privilege in the ECJ case law
  Prof. Rühl, University of Jena
- 17.05 Discussion
- 17.20 Coffee Break

III Session: Party autonomy and choice-of-court agreements

- 17.50 The role of party autonomy in the allocation of jurisdiction in contractual matters
  Prof. Mankowski, University of Hamburg
- 18.15 Towards a broadened effectiveness of choice-of-court agreements in the European judicial area?

Prof. Queirolo, University of Genoa)

- 18.40 The enforcement of choice-of-court agreements in Europe: is there any consistency in case law?
  Prof. Villata, University of Milan)
- 19.05 Discussion
- 19.20 End of first conference day
- 20.30 Dinner

Saturday, November 29, 2014

IV Session: Coordination of legal proceedings and provisional measures

- 09.00 The end of torpedoes?
  Prof. Nielsen, University of Copenhagen
- 09.25 Provisional measures in the new Regime
  Prof. Garcimartín Alférez, Autónoma University of Madrid
- 09.50 Discussion

V Session: Cross-border recognition and enforcement

- 10.05 The free circulation of judgments and the abolition of exequatur
  Prof. Pfeiffer, University of Heidelberg
- 10.30 The exceptions to recognition and enforcement
  Prof. Fumagalli, University of Milan
- 10.55 Discussion
- 11.10 Coffee break

VI Session: The Brussels I Recast in the International Arena

- 11.40 The Brussels I Recast and the Lugano Convention: which rules for the outer world?
  Prof. Malatesta, Carlo Cattaneo University
- 12.05 The Brussels I Recast and the Hague Convention on Choice of Court Agreements: convergences and divergences
  Dr. Ragno, University of Verona
- 12.30 The Brussels I Recast and the Unified Patent Court Agreement: towards an enhanced patent litigation system?
  Prof. Marongiu Buonaiuti, University of Macerata
- 12.55 Discussion

Closing remarks

- 13.10 Closing Remarks
  Prof. Pocar, University of Milan
- 13.30 End of the conference

On Unilateral Choice-of-Court Agreements and Options to Arbitrate (article)

A topic we were discussing just a few days ago at the MPI, with especial attention to a Spanish decision. Now it's Italian time. The article, by S. Ferrero, is to be found here.

Abstract:

In this work it is discussed the validity and the enforceability of unilateral choice-of-court agreements and options to arbitrate. Such clauses are very frequent in international contracts, particularly in loan agreements, where the provision is in favour of the lender, the stronger party to the contract. Whilst in various jurisdictions there are significant lines of authorities enforcing such agreements as perfectly valid, unilateral choice-of-court agreements and options to arbitrate have been recently questioned and struck down by the French, the Russian and the Bulgarian Supreme Courts. Recognizing in these decisions a rising general tendency, at the international level, contrary to asymmetric arbitration and choice of court agreements is, perhaps, premature. Nevertheless, the arguments put forward by the mentioned decisions naturally trigger further analysis of the matter. The legal assessment will be carried out under a twofold perspective: on the one hand, the private international law, which entails the analysis of the relevant European legislation (Regulation 44/2001 and Regulation 1215/2012) and, on the other hand, the domestic substantive law, namely Italian law. Particularly, it will be considered whether, in the light of the reasoning of the

foreign case law, Italian courts may change their attitude towards one-sided jurisdiction and arbitration agreements. It is submitted that the decisions against the validity and enforceability are open to criticism and Italian courts should remain in favour of asymmetric arbitration and choice of court agreements for, it is suggested, the European legislation and Italian domestic law do not lead, expressly or implicitly, to hold them invalid and/or unenforceable, except for certain limited cases.

Save the Date: ILA 2016 Biennial Conference

The 77th Biennial Conference of the International Law Association will take place **from 7 to 11 August 2016** in Johannesburg, South Africa.

This year's theme will be **'International Law and State Practice: Is there a North/South Divide?'**

You are invited to register your interest at the official conference website. Further information and programme details will follow as and when they become available.

OGEL & TDM Call for Papers: Special Issue on Renewable Energy Disputes

Oil, Gas, and Energy Law Journal and Transnational Dispute Management invite submissions for a joint Special Issue on Renewable Energy Disputes.

Renewable energy production is nothing new: windmills have been used to produce wind-based energy and dams have been used to produce mechanical energy for centuries past. However, the scale of investment in this area and the increased subsidies, regulation of and drive towards this type of electricity generation are unprecedented. Given the surge in activity in renewable energy production, it is no surprise that disputes in this area have started to arise.

Issues that have led to disputes within the EU, the US and globally have, for example, related to the national governments' objective of ensuring maximum national or regional benefit from governmental measures in this area (similar to what is done in oil and gas-producing countries through local content requirements), miscalculations of subsidies in the planning stages and excessive costs for the state from such subsidies, especially when economic circumstances have changed. Furthermore, the scale of activities has in itself contributed to all kinds of disputes arising at various levels and various forums. These disputes may involve issues of public international law, EU and US law (at the supranational, national and subnational levels), private law and contractual arrangements. The Special Issue examines these types of disputes and analyses their backgrounds and the reasons why they arose. Recent and ongoing renewable energy disputes under international law have concerned international investment law and WTO law. However, recent renewable energy disputes at European level have mostly related to the free movement provisions of EU Treaty law. Contractual arrangements and connection issues serve as illustrations of private and contractual disputes in these areas.

This OGEL/TDM Special Issue on Renewable Energy Disputes will examine all kinds of renewable energy disputes. The basic structure of the special issue is:

Introduction: Renewable energy disputes: an overview – Professor Kim Talus (UEF Law School)

I) Public International Law Disputes

WTO cases: an overview (already in preparation)
WTO case against Canada (Ontario local content requirement) (already in preparation)
Investment Disputes in Renewable Energy (already in preparation)
Further proposals welcome!

II) EU Law Disputes

Judgment Ålands Vindkraft (already in preparation)
Judgment Essent (already in preparation)
Further proposals welcome!

III) National and Subnational Law and Commercial or Contractual Law Disputes

Spain: Spanish Supreme Court and ICSID cases against Spain (already in preparation)
UK Renewable Disputes (already in preparation)
Further proposals welcome!

OGEL and TDM encourage submission of relevant papers, studies, and comments on various aspects of this subject, including International, regional and national disputes on various aspects of renewable energy disputes. Contributions discussing a particular topic within this area, such as need to reform the ISDS with regards renewable energy and climate change, are also welcome.

Papers should be submitted by the 15 January 2015 deadline to Professor Kim Talus – contact details on the OGEL and TDM website – as well as a copy to info@ogel.org

---

Foreign Judgments and Arbitral Awards – A Practical Guide

This new book by Apostolos Anthimos is a further step to record systematically the existing Greek case law in the field of International Civil Litigation. Following last year's publication on the Service of Process Abroad the author engages in an exhaustive presentation of reported and unreported material in the field of recognition and enforcement of foreign judgments and arbitral awards published within the last 40 years in Greece. The methodology selected

resembles to the one chosen in the author's previous publication: Its central purpose is the direct access to key information on a state by state basis, i.e. the presentation of applicable laws and case law for each country separately. The analysis is based on the 4-level model, well known for EU Member States: Domestic provisions (Articles 323, 780, 903, 905, 906 Greek Code of Civil Procedure), (seventeen) bilateral & (nearly ten) multilateral agreements, and seven EC-Regulations are considered, and their repercussion in Greek court practice is thoroughly scrutinized.

After introducing the reader to the existing landscape of recognition and enforcement in Greece (pp. 1-20), the main part of the book (pp. 21-274) elaborates each country of origin separately. The material varies, depending on social and commercial ties and factors. For instance, German, UK, US, Italian, and French judgments emanate both from commercial and family matters, whereas Albanian, Russian, Georgian, Armenian, and Australian judgments are almost exclusively dealing with personal status matters. By way of comparison, no judgments are reported by many African, Asian and Latin American legal orders, where no conventional link or case law could be traced.

The annexes of the book (pp. 285-418) host all bilateral & multilateral conventions signed / ratified by Greece on the matter, and the respective chapters of EC-Regulations. The case law coverage is fully updated, and includes all decisionsreported until August 2014.

(ISBN/ISSN: 978-960-568-179-1; available at Sakkoulas Publications)