French Court Rules Parallel Litigation in France Bars Recognition of Foreign Judgment

In a judgment of June 20th, 2012, the French supreme court for private and criminal matters (*Cour de cassation*) ruled that parallel litigation in France could be a ground for denying recognition to a foreign judgment.

The case was concerned with an Algerian couple separating after 45 years of marriage. The couple had married in Algeria in 1962. They then moved to France where they were to spend 45 years and have 6 children. In June 2007, the husband left and went back to Algeria. Seven months later, in February 2008, the wife initiated proceedings in France seeking maintenance.

In April 2008, the husband sought divorce in Algeria and obtained it a month and a half later, in May 2008. He then relied on the Algerian judgment in France, claiming that it had *res judicata* and that the French proceedings should thus be terminated.

Fraude au jugement

The *Cour de cassation* denied recognition to the Algerian judgment on the ground that the wife had first sued in France, and that the husband had sued "in haste" for the purpose of defeating the French proceedings.

Algerian and Morrocan divorce orders are regularly denied recognition in France on the ground that they violate public policy (either because the wife is not informed of the proceedings, or because Islamic law is discriminatory against women). However, they are virtually never denied recognition on the ground of strategic behavior of the parties (*fraude*).

The theory is that *fraude* is a ground for denying recognition to foreign judgments. *Fraude* occurs when one party sues abroad for the **sole** purpose of avoiding French justice. French scholars have long wondered, however, whether *fraude* can be found in cases where the party allegedly frauding has a strong connection with the foreign court, which is another requirement for recognizing

foreign judgments under the French common law of judgments. This is because it seems hard to demonstrate that a party domiciled in a given country would petition his own courts for the sole reason of defeating French justice: he may just be suing at home because he lives there.

I had reported on a couple of jugdments of the *Cour de cassation* ruling that American wives suing in the U.S. right after their French husband had initiated proceedings in France were not committing *fraude* as it seemed perfectly legitimate for them to sue at home. Much like the Algerian husband, they had first lived as a family in France, and had then left their husband and gone back home where they had been living for more than 6 months. This was enough to make it legitimate, from a French perspective, to sue at home.

These cases are hard to reconcile with the Algerian one. The Algerian husband had moved to Algeria seven months before his wife sued him before French courts.

Why was it illegitimate, then, for him to sue at home?

- Because he had not taken the kids with him?
- Because *fraude* can only be committed by males, and not by females?
- Because the law is different for Arabs and for Americans?

Liber Amicorum Patrick Courbe

A French Liber Amicorum was recently published in memory of the late Patrick Courbe, a French scholar of private international law and family law who taught at the University of Rouen (*Mélanges à la mémoire de Patrick Courbe ; le droit entre tradition et modernité*).

It includes several papers on private international law issues.

- Bertrand Ancel (Univ. Paris II – Panthéon-Assas), *L'épreuve de vérité (brève réflexion en surface sur la transcription des actes de naissance des enfants issus d'une gestation pour autrui délocalisée)*

- Carine Brière (Univ. Rouen), *Le droit des transports: terrain de prédilection des conflits de conventions internationales*
- Pierre Callé (Univ. Caen Basse-Normandie), *Le notaire, les actes notariés et le droit international privé*
- Amélie Dionisi-Peyrusse (Univ. Rouen), *La conformité à l'article 8 de la CEDH des refus de reconnaissance des situations familiales créées à l'étranger au nom de l'ordre public international*
- Hugues Fulchiron (Univ. Jean Moulin – Lyon III), *Droit à une nationalité, droit à la nationalité, droit à sa nationalité? (variations sur le thème de l'évolution contemporaine des rapports entre individu et nationalité).*
- Hélène Gaudemet-Tallon (Univ. Paris II – Panthéon-Assas), *Le divorce international depuis la communication de Patrick Courbe au Comité français de droit international*
- Johanna Guillaumé (Univ. du Havre), *Ordre public plein, ordre public atténué, ordre public de proximité: quelle rationalité dans le choix du juge?*
- Fabienne Jault-Seseke (Univ. Rouen), *Mariages et partenariats enregistrés: critique de la diversité des méthodes de droit international privé*
- Horatia Muir Watt (École de droit de Sciences-po), *Concurrence ou confluence? Droit international privé et droits fondamentaux dans la gouvernance globale*
- David Robine (Univ. Rouen), *L'appréhension de la situation de confusion des patrimoines dans le cadre du règlement n° 1346/2000 du 29 mai 2000*

More details on the book are available here.

English-language Commentary on the Rome I and II Regulations

It has not yet been mentioned on this blog that there is a new English-language commentary on the Rome I and II Regulations out there. Edited by *Gralf-Peter*

Calliess from the University of Bremen and published by Kluwer Law International, the commentary provides an in-depth analysis of the new European conflict rules on contractual and non-contractual obligations. More information is available on the publisher's website.

The official announcement reads as follows:

> *The year 2009 marks a revolution in European conflict of laws. The so-called Rome I and II Regulations, both entering into force this year, will bind the Member States of the European Union to a common set of rules for the choice of law in international private law disputes. They apply to both contractual and non-contractual disputes, their reach even extends to the application of non-Member State law. This poses great challenges to Courts and practitioners in every EU Member State, as there is only little case-law and doctrinal literature on the new rules, the uniform application of which will be overseen by the European Court of Justice. The Commentary answers to these challenges. It is an indispensable companion for both academics and legal professionals seeking their way through the Regulations. Renowned conflict of laws scholars comment every provision of the Regulations in a systematic, thorough and comprehensive manner, making them accessible to a broad international legal audience.*
>
> *Mirroring the German tradition of scholarly commentaries on Parliamentary Acts, the authors are selected from the distinguished group of relatively young German private international law scholars, whose exceptionally high qualifications are represented by their passing through the German "Habilitation"-system (second book requirement) as well as their proven ability to publish in the English language .*

The list of authors reads as follows:

- Professor Dr. Dietmar Baetge, University of Hamburg
- Assistant Professor Dr. Frank Bauer, University of Munich
- Professor Dr. Benedikt Buchner, LL.M. (UCLA), University of Bremen
- Professor Dr. Martin Franzen, University of Munich
- Professor Dr. Martin Gebauer, University of Heidelberg
- Professor Dr. Urs Peter Gruber, University of Halle
- Professor Dr. Axel Halfmeier, Frankfurt School of Finance

- Professor Dr. Jan von Hein, University of Trier
- Professor Dr. Lars Klöhn, LL.M. (Harvard), University of Marburg
- Assistant Professor Dr. Leander D. Loacker, University of Zurich
- Research Associate Moritz Renner, University of Bremen
- Assistant Professor Dr. Florian Roedl, University of Bremen
- Professor Dr. Boris Schinkels, LL.M. (Cambridge), University of Greifswald
- Professor Dr. Goetz Schulze, University of Lausanne
- Professor Dr. Matthias Weller, Mag. rer. publ., EBS Law School Wiesbaden

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Book: Pocar – Viarengo – Villata (Eds.), Recasting Brussels I

The Italian publishing house CEDAM has published a new volume on the review of the Brussels I regulation: "Recasting Brussels I". The book, edited by *Fausto Pocar*, *Ilaria Viarengo* and *Francesca Clara Villata* (all from the Univ. of Milan) includes twenty-five papers divided into five parts, devoted to the scope of application (I), rules on jurisdiction (II), choice-of-court agreements (III), coordination of proceedings (IV) and recognition and enforcement of judgments (V).

Here's the table of contents (.pdf file):

PART I – SCOPE OF APPLICATION

- *Rainer Hausmann,* The Scope of Application of the Brussels I Regulation;
- *Ilaria Viarengo*, The Removal of Maintenance Obligations from the Scope of Brussels I;
- *Claudio Consolo – Marcello Stella*, Brussels I Regulation Amendment Proposals and Arbitration;
- *Peter Kindler*, Torpedo Actions and the Interface between Brussels I and International Commercial Arbitration;

- *Stefano Azzali – Michela De Santis*, Impact of the Commission's Proposal to Revise Brussels I Regulation on Arbitration Proceedings Administered by the Chamber of Arbitration of Milan.

PART II – RULES ON JURISDICTION

- *Burkhard Hess*, The Proposed Recast of the Brussels I Regulation: Rules on Jurisdiction;
- *Riccardo Luzzatto*, On the Proposed Application of Jurisdictional Criteria of Brussels I Regulation to Non-Domiciled Defendants;
- *Fausto Pocar*, A Partial Recast: Has the Lugano Convention Been Forgotten?;
- *Alexander R. Markus*, Harmonisation of the EU Rules of Jurisdiction Regarding Defendants Outside the EU. What About the Lugano Countries?;
- *Ruggiero Cafari Panico*, Forum necessitatis. Judicial Discretion in the Exercise of Jurisdiction;
- *Marco Ricolfi*, The Recasting of Brussels I Regulation from an Intellectual Property Lawyer's Perspective;
- *Eva Lein*, Jurisdiction and Applicable Law in Cross-Border Mass Litigation;
- *Zeno Crespi Reghizzi*, A New Special Forum for Disputes Concerning Rights in Rem over Movable Assets: Some Remarks on Article 5(3) of the Commission's Proposal.

PART III – CHOICE-OF-COURT AGREEMENTS

- *Ilaria Queirolo*, Prorogation of Jurisdiction in the Proposal for a Recast of the Brussels I Regulation;
- *Christian Kohler*, Agreements Conferring Jurisdiction on Courts of Third States;
- *Francesca C. Villata*, Choice-of-Court Agreements in Favour of Third States' Jurisdiction in Light of the Suggestions by Members of the European Parliament.

PART IV – COORDINATION OF PROCEEDINGS

- *Luigi Fumagalli*, Lis Alibi Pendens. The Rules on Parallel Proceedings in the Reform of the Brussels I Regulation;

- *Pietro Franzina*, Successive Proceedings over the Same Cause of Action: A Plea for a New Rule on Dismissals for Lack of Jurisdiction;
- *Lidia Sandrini*, Coordination of Substantive and Interim Proceedings;
- *Cristina M. Mariottini*, The Proposed Recast of the Brussels I Regulation and Forum Non Conveniens in the European Union Judicial Area.

PART V – RECOGNITION AND ENFORCEMENT OF JUDGMENTS

- *Sergio M. Carbone*, What About the Recognition of Third States' Foreign Judgments?;
- *Thomas Pfeiffer*, Recast of the Brussels I Regulation: The abolition of Exequatur;
- *Stefania Bariatti*, Recognition and Enforcement in the EU of Judicial Decisions Rendered upon Class Actions: The Case of U.S. and Dutch Judgments and Settlements;
- *Manlio Frigo*, Recognition and Enforcement of Judgments on Matters Relating to Personality Rights and the Recast Proposal of the Brussels I Regulation;
- *Marco De Cristofaro*, The Abolition of Exequatur Proceedings: Speeding up the Free Movement of Judgments while Preserving the Rights of the Defense.

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Title: Recasting Brussels I, edited by *F. Pocar*, *I. Viarengo* and *F.C. Villata*, CEDAM (Series: Studi e pubblicazioni della Rivista di diritto internazionale privato e processuale – Volume 76), Padova, 2012, XXIV – 382 pages.

ISBN 9788813314699. Price: EUR 32,50. Available at CEDAM.

(Many thanks to Prof. Francesca Villata for the tip-off)

Issue 2012.2 Nederlands Internationaal Privaatrecht

The second issue of 2012 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* includes the following articles on Recognition of (Dutch) Mass Settlement in Germany, the CLIP Principles, the European Patent Court and case note on Brussels I and the Unknown Address (Lindner):

Axel Halfmeier, Recognition of a WCAM settlement in Germany, p. 176-184. The abstract reads:

The Dutch 'Wet Collectieve Afwikkeling Massaschade'(WCAM) [Collective Settlements Act] has emerged as a noteworthy model in the context of the European discussion on collective redress procedures. It provides an opportunity to settle mass claims in what appears to be an efficient procedure. As the WCAM has been used in important transnational cases, this article looks at questions of jurisdiction and the recognition of these court-approved settlements under the Brussels Regulation. It is argued that because of substantial participation by the courts, such declarations are to be treated as 'judgments' in the sense of the Brussels Regulation and thus are objects of recognition in all EU Member States. Written from the perspective of the German legal system, the article also takes the position that the opt-out system inherent in the WCAM procedure does not violate the German ordre public, but is compatible with fair trial principles under the German Constitution as well as under the European Human Rights Convention. The WCAM therefore appears as an attractive model for the future reform of collective proceedings on the European level.

Mireille van Eechoud & Annette Kur, Internationaal privaatrecht in intellectuele eigendomszaken – de 'CLIP' Principles, p. 185-192. The English abstract reads:

The European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP) presented its Principles in November 2011 to an international group of legal scholars, judges, and lawyers from commercial practice, governments and international organisations. This article sets out the objectives and principal characteristics of the CLIP Principles. The Principles are informed by instruments

of European private international law, but nonetheless differ in some important respects from the rules of the Brussels I Regulation on jurisdiction and the Rome I and II Regulations on the law applicable to contractual and non-contractual obligations. This is especially so in situations where adherence to a strict territorial approach creates significant problems with the efficient adjudication of disputes over intellectual property rights or undermines legal certainty. The most notable differences are discussed below.

M.C.A. Kant, A specialised Patent Court for Europe? An analysis of Opinion 1/09 of the Court of Justice of the European Union from 8 March 2011 concerning the establishment of a European and Community Patents Court and a proposal for an alternative solution, p. 193-201. The abstract reads:

Attempts have been made for decades to establish both a Community patent and a centralised European court which would have exclusive jurisdiction in this matter. However, none of these attempts has ever been fully successful. In its Opinion 1/09 from 8 March 2011, the Court of Justice of the European Union (hereinafter CJEU) held, inter alia*, that the establishment of a unified patent litigation system as planned in the draft agreement on the European and Community Patents Court would be in breach of the rules of the EU Treaty and the FEU Treaty. However, it is argued in this paper that also in view of Opinion 1/09 the creation of a unified court has not become* per se *unattainable. After clarifying in whose interest effective patent protection in Europe should primarily be formed, different constellations of judicial systems shall be discussed. The author will deliver his own proposal for a two-step approach in structure and time, comprising, in a first step, the creation of a specialized chamber of the CJEU for patent litigation, and in a second step the creation of a central EU Court for all EU intellectual property litigation. The paper will finish with an analysis of how the requirements for a unified patent litigation system (indirectly) set up by the CJEU in its Opinion 1/09 could be taken into consideration, and with some further deliberations on effective patent protection and enforcement.*

Jochem Vlek, De EEX-Vo en onbekende woonplaats van de verweerder. Hof van Justitie EU 17 november 2011, zaak C-327/10 (*Lindner*) (Case note), p. 202-206. The English abstract reads:

The author reviews the decision of the ECJ in the case of Hypotecni banka/Udo Mike Lindner *in which the ECJ ruled on the application of the jurisdictional rules*

of the Brussels I Regulation in the case of a consumer/defendant with an unknown domicile. Several issues are highlighted: first, the existence of an international element in the case of a defendant with unknown domicile whose nationality differs from the state of the court seized; secondly, the application of Article 4(1) Brussels I Regulation if the domicile of the defendant is unknown and (since the ECJ does not apply Article 4(1) in this regard) the interpretation of Article 16(2) Brussels I Regulation; thirdly, the requirement that the rights of the defence are observed, as also laid down in Article 47 of the Charter of Fundamental Rights of the EU. Additionally, the article briefly mentions the subsequent case of G/Cornelius de Visser*, in which a German Court resorted to public notice under national law of the document instituting the proceedings in the case of a defendant with an unknown address.*

Issue 2012.1 Nederlands Internationaal Privaatrecht

The first issue of 2012 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* includes the following articles on Recognition and Enforcement of US Punitive Damages and Documentary Credit under Rome I:

Csongor István Nagy, Recognition and enforcement of US judgments involving punitive damages in continental Europe, p. 4-11. The abstract reads:

The paper examines the recognition practice of US punitive awards in continental Europe from a comparative and critical perspective. After analysing the pros and cons of the recognition of punitive awards from a theoretical point of view, it presents and evaluates the judicial practice of the European (French, German, Greek, Italian, Spanish and Swiss) national courts and the potential impact of the 2005 Hague Choice-of-Court Convention and the Rome II Regulation. The paper ends with the final conclusions containing a critical evaluation of the present judicial practice and a proposal for a comprehensive legal test for the recognition

of punitive damages.

Marc van Maanen en Alexander van Veen, Toepasselijk recht op documentair kredietverhoudingen onder het EVO en Rome I, p. 12-18. The English abstract reads:

A documentary credit contains a variety of contractual relationships between the applicant, one or more banks and the beneficiary. Usually the parties involved are domiciled in more than one country. Unsurprisingly, disputes over the governing law in documentary credit matters regularly arise. In a case where the letter of credit called for drafts drawn on the issuing bank, the Amsterdam Court of Appeal held that the legal basis for the claim of the Dutch beneficiary vis-à-vis *the Iraqi issuing bank is the obligation to pay under the letter of credit, not the debt embodied in the drafts. The Court of Appeal held that pursuant to Article 4(2) Rome Convention (Rome, 19 June 1980) the relationship is governed by the law of the country of the party effecting the characteristic performance. Even though the letter of credit was available at a Dutch advising bank, the Court of Appeal held that the characteristic performance was effected by the issuing bank and that consequently, Iraqi law applied. The Court of Appeal held that the limitation period under Iraqi law is 15 years. Therefore, the beneficiary's claim was not time barred. In similar cases, however, English courts have applied Article 4(5) Rome Convention instead. An English court would in this case probably consider that the credit was available in the Netherlands and hold that the relationship is more closely connected with the Netherlands than with Iraq. Therefore, an English court would probably apply Dutch law instead of Iraqi law and the beneficiary's claim would, consequently, have been time barred. In this article the judgment of the Court of Appeal is analysed and (some of) the differences between the Dutch and the English approaches are discussed. In addition, it is considered whether it is likely that the Rome I Regulation (EC No 593/2008) harmonises the different approaches.*

Book Presentation: N.A. Baarsma, *The Europeanisation of International Family Law*, T.M.C. Asser Press, The Hague 2011 (p. 19-20)

Proposal for a Spanish International Cooperation (Civil Matters) Act

The Spanish Civil Procedure Act (*Ley de Enjuiciamiento Civil*), adopted in 2000, required the Government to send to Parliament a bill of international legal co-operation in civil matters. Soon after, the private international law Department of the Universidad Autónoma of Madrid (UAM) drafted a law proposal on the subject intending to provide guidance to the government. More than a decade later, the legal imperative contained in the Civil Procedure Act has not yet been fulfilled. The original proposal needed to be updated and adapted to the existing normative framework. UAM Professors Miguel Virgós Soriano, Iván Heredia Cervantes, and Francisco José Garcimartín Alférez, together with the Spanish registrar and current president of the International Commission on Civil Status (CIEC) Spanish section Juan María Díaz Fraile, have undertaken the task with a twofold purpose: to be a point of reference in the development of a future law, and to promote a critical and public debate on the topic. The Spanish *Boletín Oficial del Ministerio de Justicia* has just published their work, reproducing the last version of the Proposal and including a detailed explanatory memorandum which exposes the draft's essential features. The article can be downloaded from the website of the newly born *Spanish Forum of Private International Law*, the approval of a future International Legal Cooperation Act being one of the issues on which the Forum intends to focus its immediate activity.

Kiobel Supplemental Briefs

For those interested in summer beach reading, I wanted to note that all briefs in the *Kiobel* case, including the supplemental briefs on the extraterritoriality question, are being compiled by SCOTUSBlog and can be accessed here. For an interesting comparative examination of the case, Jodie Kirshner has an article

entitled “Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe? Extraterritorialism, Sovereignty, and the Alien Tort Statute.” Here is the abstract:

> *The United States has policed the multinational effects of multinational corporations more aggressively than any other coun-try, but recent decisions under the Alien Tort Statute indicate that it is now backtracking. Europe, paradoxically, is moving in the other direction. Why do some countries retract extraterritorial jurisdiction while others step forward? The article traces the opposing trends through corporate human rights cases and suggests that the answer may lie in attitudes towards national sovereignty. The developments raise important questions regarding the position of the United States in a globalizing world and its role in upholding international norms.*

French Court Rules Gay Adoption Violates Public Policy

In two judgments of June 7th, 2012, the French Supreme Court for private and criminal matters (*Cour de cassation*) ruled that foreign judgments allowing adoption by a same sex couple were contrary to French public policy.

In the first case, the couple was composed of two men, one French and one Canadian, who had lived together in Montreal since 1997 and had welcomed in 2005 a three year old. They had obtained an adoption order from a Quebec court in 2009.

In the second case, the couple was composed of two men, one French and one British, who lived in the United Kingdom. In 2008, an English court had issued an adoption order for a 10 year old.

Both couples sought recognition of the relevant adoption judgment in France so that they could appear as the parents of the child on French registries. The lower courts had granted recognition. The *Cour de cassation* reversed, and ruled that the foreign judgments violated French public policy.

> *Attendu qu'est contraire à un principe essentiel du droit français de la filiation, la reconnaissance en France d'une décision étrangère dont la transcription sur les registres de l'état civil français, valant acte de naissance, emporte inscription d'un enfant comme né de deux parents du même sexe*

In substance, the Court held that a fundamental principle of French law prohibited that French registries provide that a child had parents of the same sex. An important factor was that the foreign judgments were perceived as cutting the filiation relationship between the child and his biological parents. This suggests that incomplete adoption would not raise the same issue.

The conciliation of these decisions with a previous one of 2010 which had recognised a foreign gay adoption will be an interesting exercise for French scholars.

Second Issue of 2012's ICLQ

The second issue of the *International and Comparative Law Quarterly* for 2012 includes three articles exploring choice of law issues.

Zheng Sophia Tang (Leeds University), Effectiveness of Exclusive Jurisdiction Clauses in the Chinese Courts — A Pragmatic Study

> *Chinese judicial practice demonstrates great diversity in enforcing exclusive jurisdiction clauses. In practice, the derogation effect of a valid foreign jurisdiction clause is frequently ignored by some Chinese courts. It may be argued that these Chinese courts fail to respect party autonomy and international comity. However, a close scrutiny shows that the effectiveness of an exclusive jurisdiction clause has close connections with the recognition and*

enforcement of judgments. If the judgment of the chosen court cannot be recognized and enforced in the request court by any means, the request court may take jurisdiction in breach of the jurisdiction clause in order to achieve justice. Chinese judicial practice demonstrates the inevitable influence of the narrow scope of the Chinese law in recognition and enforcement of foreign judgments. It is submitted that the Chinese courts do not zealously guard Chinese jurisdiction, or deliberately ignore party autonomy and international comity. Instead, the Chinese courts have considered the possibility of enforcement of judgments and the goal of justice. Applying the prima facie unreasonable decision test is the best the courts can do in the specific context of the Chinese law. The status quo cannot be improved simply by reforming Chinese jurisdiction rules in choice of court agreements. A comprehensive improvement of civil procedure law in both jurisdiction rules and recognition and enforcement of foreign judgments is needed.

Jacob van de Velden (Gronigen University), The Cautious Lex Fori Approach to Foreign Judgments and Preclusion

If from the imperfect evidence of foreign law produced before it, or its misapprehension of the effect of that evidence, a mistake is made by an English court, it is much to be lamented, but the tribunal is free from blame. The mistake to be lamented presently is the High Court decision in Yukos Capital Sarl v OJSC Rosneft Oil Co that a Dutch judgment gave rise to an issue estoppel in English proceedings, precluding a party from disputing as a fact the partiality and dependence of the Russian judiciary. The decision was a mistake because on a proper construction of Dutch law the significance of the Dutch judgment was—if anything—evidential, not preclusive. The outcome is lamentable, because a party was unduly shut out from litigation by the application of English preclusion law to a foreign judgment that was not preclusive in the jurisdiction where it was originally given.

Aude Fiorini (Dundee University), Habitual Residence and the New Born – A French Perspective

Where a pregnant woman travels and subsequently gives birth to a child abroad, should the left behind father be able to petition for the 'return' of his child under the 1980 Hague Convention on the Civil Aspects of International

Child Abduction? An affirmative answer would not only presuppose that the abduction of the child had been in breach of the father's actually exercised rights of custody, but would also depend on which country, if any, the child was habitually resident in immediately before the 'abduction'.

The full table of content is available here.