An Italian View on the Living Dead Convention

I am grateful to Pietro Franzina, a researcher in International law at the University of Ferrara, Italy, for sharing his thoughts on the recent case of the Cassazione *on the Brussels Convention. Pietro dealt with this topic in 'Interpretazione e destino del richiamo compiuto dalla legge di riforma del diritto internazionale privato ai criteri di giurisdizione della Convenzione di Bruxelles',* Rivista di diritto internazionale, *2010, 817* et seq.

I agree with Gilles Cuniberti: the conclusion reached by the *Corte di Cassazione* in its order of 21 October 2009 regarding Article 3(2) of the Italian Statute on Private International Law (*see* his post here) is an unfortunate one.

Before I attempt to explain why, in my view, the Court erred in saying that the reference made by that provision to the 1968 Brussels Convention should still be interpreted as a reference to the Convention, and not to the Brussels I regulation, let me put forward a few preliminary remarks.

(a) Article 3(2) of the Italian Statute on Private International Law of 31 May 1995 (hereinafter, the Statute) determines whether Italian courts have jurisdiction in civil and commercial matters in respect of proceedings *falling outside the scope of application* of the 1968 Brussels Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters, *i.e.* proceedings instituted against defendants domiciled outside the territory of a contracting State (or a contracting State of the Lugano Conventions). In respect of such proceedings the Italian legislator of 1995 was virtually free to lay out any rule on jurisdiction, and still is.

(b) The drafters of the Statute decided to make use of this freedom in an almost unprecedented way. They incorporated the heads of jurisdiction set out in section 2, 3 and 4 of chapter II of the Brussels Convention within the Statute. To do so, they made an express reference to such heads of jurisdiction, as provided for by the 1968 Convention and by its subsequent modifications in force for Italy ("*e successive modificazioni in vigore per l'Italia*"). This way, the Italian legislator introduced *national* rules providing heads of jurisdiction corresponding to those employed in Articles 5-15 of the Convention.

(c) After the entry into force of the Brussels I regulation, the doubt arose as to whether the reference made in Article 3(2) of the Statute should still be construed as aiming at the Convention, and not at the regulation. While the legislator took no action to amend (or confirm) the wording of Article 3(2), opposing views were expressed by scholars as to how the provision should be interpreted within the new legal landscape.

(d) The interest of the question was not only theoretical. It is well known that while the regulation retained the structure of the Convention and left almost unchanged many of its provisions, some rules have been significantly modified. One of these is Article 5(1), on jurisdiction in contractual matters. Suppose that an Italian company seeks to recover the price of the goods it sold to a non-European buyer. If the relevant heads of jurisdiction were to be found – via the Statute – in Article 5(1) of the Brussels Convention, the chances of bringing the case before an Italian court would presumably be rather high: the relevant obligation for jurisdictional purpose would be the obligation to pay the price (*De Bloos*), and its place of performance should be determined (under *Tessili* and *Custom Made*) pursuant to the substantial rules governing the contract, be they national rules (such as Article 1498(3) of the Italian Civil Code: at the seller's domicile) or uniform rules (such as Article 57(1)(a) of the CISG: at the seller's place of business). On the contrary, should Article 3(2) of the Statute be construed as implying a reference to Article 5(1)(b), first indent, of the Brussels I regulation, the obligation to be taken into account would be the obligation to deliver the goods (*Color Drack*), and – failing an agreement of the parties – its place of performance should be the place where the purchaser obtained, or should have obtained, actual power of disposal over the goods, at the final destination of the sales transaction (*Car Trim*). The Italian seller would thus presumably be unable to sue the buyer in Italy.

In its order of 21 October 2009, the Italian Court of Cassation held that the Brussels Convention, although superseded by the regulation as between Member States, except as regards the territories of such States which fall within the scope of that Convention but lie outside the reach of EU law, must be considered as still in force and applicable. According to the Court, the fact that the Convention remains in force, no matter how narrow its residual scope of application, implies that the reference made in Article 3(2) is still capable of working as it was originally drafted, *i.e.* as a reference to the Convention, leaving no room for a

different reading of the provision.

One would be tempted to say that the rationale behind the decision is, at least partly, a 'political' one. The rule regarding jurisdiction in contractual matters is frequently relied on, in Italy, by small and medium enterprises exporting the goods they manufacture. The latest developments in the ECJ's case law regarding the operation of this rule within the Brussels I regulation (*Car Trim*) make it more and more difficult for these businesses to sue their contractual counterparts before an Italian court (it is worth noting that the *Corte di Cassazione*, up until one year ago, interpreted the expression 'place of delivery' under Article 5(1) of the Brussels I regulation as meaning – according to Article 31(a) of the CISG, and contrary to what is now the view of the ECJ – the place in which the goods are handed over to the first carrier for transmission to the buyer, *i.e.* a place generally 'close' to the seller's place of business). This conclusion may be inevitable for cases regulated by the Brussels I Regulation, but not for cases which are subject to a national provision, such as Article 3(2) of the Statute, provided the 'old' rule of the Convention and its pro-seller bias (as compared with the Regulation) may still be allowed to play a role.

I will leave 'political' considerations aside and try to examine the solution reached by the *Cassazione* from a purely legal standpoint. In this perspective, the Court's order calls for at least two critical remarks.

(1) The Brussels Convention may still be applicable in respect of proceedings against defendants domiciled in Wallis and Futuna, Saint-Pierre and Miquelon and a few other areas around the world, but this does not imply that the Brussels I regulation is to be given no weight in the interpretation of Article 3(2) of the Statute. On the contrary, the correct view – in my opinion – is that the regulation did bring about a "modification" of the Convention for the purpose of Article 3(2) of the Statute. The fact that the two instruments bear a different legal nature is not necessarily at odds with this assumption. According to the law of treaties (as codified in the Vienna Convention of 23 May 1969), a treaty may in general be amended by an agreement between the parties (Articles 39 *et seq.*): the Brussels regulation (and the EU-Denmark Agreement of 19 October 2005, on the application of the regulation between the parties) may be seen as the 'vehicle' by which the contracting States agreed to alter the scope of application of the Convention, limiting it to the cases which were not concurrently regulated by the regulation (and/or the EU-Denmark Agreement). One would hardly imagine,

otherwise, how the EU Member States (those who are parties, at the same time, to the Brussels Convention) might ignore in their mutual relationship, without violating it, a convention to which they are still bound.

(2) If the preceding assumption is correct, one should conclude that Article 3(2) of the Statute, according to its terms, implies – after the entry into force of the Brussels I regulation – a 'double' reference: a reference to the Brussels Convention (as long as it is an international treaty in force) *and* a reference to the regulation. Such double reference – a situation which the Italian legislator could not reasonable expect (until then, the modifications of the Brussels Convention were effected through conventions superseding the previously applicable texts *in their entirety*) – is clearly unworkable in practice. Under the Italian rules on statutory interpretation, issues like this, concerning a national rule ambiguously worded, should be solved through the use of non-textual (*i.e.* systematic and teleological) canons of interpretations. As a matter of fact, the *Corte di Cassazione* paid little or no importance, in its order, to the goals underlying Article 3(2). Through this provisions, the Statute attempted to permanently bring the Italian system of private international law in line with the most developed experiences of international cooperation in this field. Furthermore, by enacting national rules on jurisdiction corresponding to the heads of jurisdiction set out in a frequently applicable legal instrument, such as the Brussels Convention, the drafters of Article 3(2) pursued the objective of simplifying the work of interpreters, placing almost *all* jurisdictional issues susceptible of arising before Italian judges in civil and commercial matters within *one* normative framework. Both goals suggest that the better reading of Article 3(2) is the one implying a reference to the Brussels I regulation, and not to the Convention. The opposite view, followed by the *Cassazione*, prevents the Italian system from taking advantage of the developments of the regime set up by the Convention and 'continued' by the regulation, and runs counter the need of simplification.

Should the 'new' Brussels I regulation contain *erga omnes* rules on jurisdiction, as suggested by many (including the drafters of the Green Paper on the revision of the regulation, COM (2009) 175 def.), the *raison d'être* of Article 3(2) of the Statute will disappear altogether. Till then, the Italian interpreters will need to cope with a highly complex regime arising out of a questionable case law.

The Living Dead Convention

Reports of the death of the 1968 Brussels Convention have been greatly exaggerated.

In some parts of Europe, it is still possible to enjoy the application of old Article 5.1 of the Convention and to determine the place of performance of the obligation in question for a basic sale of goods.

One such example is Italy, where the Convention has risen from the dead. This happened a year ago, in Rome.

Italian Private International Law Act, 1995

In 1995, Italy reformed its private international law and adopted a new statute reforming the Italian System of Private International Law. Article 2 of the 1995 Statute provides that international conventions prevail over domestic rules. Thus, jurisdiction of Italian courts over disputes falling within the scope of the Brussels I Regulation is governed by the said Regulation.

Article 3 of the Statute provides a remarkable rule for disputes in civil and commercial matters falling outside the territorial scope of European law, i.e. when the defendant is not domiciled within the jurisdiction of a Contracting state. Instead of laying down its own rules of jurisdiction, the Italian lawmaker decided to apply further the 'Brussels Convention'. Article 3 provides that the heads of jurisdiction provided by the Convention remain applicable. In other words, Italy extended the territorial scope of the Convention to civil and commercial disputes where the defendant is domiciled outside of a contracting state.

> ***Art. 3 Ambito della giurisdizione****.*
>
> *2. La giurisdizione sussiste inoltre in base ai criteri stabiliti dalle Sezioni 2, 3 e 4 del Titolo II della Convenzione concernente la competenza giurisdizionale e l'esecuzione delle decisioni in materia civile e commerciale e protocollo, firmati a Bruxelles il 27 settembre 1968, resi esecutivi con la L. 21 giugno 1971, n.*

> *804, e successive modificazioni in vigore per l'Italia, anche allorché il convenuto non sia domiciliato nel territorio di uno Stato contraente, quando si tratti di una delle materie comprese nel campo di applicazione della Convenzione.*

That was all fine in 1995, when the Brussels Convention was alive and kicking. But when the Convention was replaced by the Brussels I Regulation, an issue arose. Was the reference to the '1968 Brussels Convention and it successive modifications in force in Italia' to be interpreted as a reference to the new Regulation? Did it matter that Danemark kept on for a while applying the Brussels Convention? and that it has now stopped?

Legal Miracle

The question was put forward the Italian supreme court for private matters (*Corte di Cassazione*) last year. An Italian firm was suing a company incorporated in Monaco in a dispute involving a sale of goods. Monaco is neither a member of the European Union, nor a party to any Lugano Convention. Would jurisdiction be determined by establishing where the obligation in question had been performed, or by referrence to the place of delivery of the goods?

In October 2009, the *Corte di Cassazione* held that the referrence to the Brussels Convention could not be interpreted as designating the Brussels I Regulation. It thus applied old article 5.1 of the Brussels Convention.

Any comment from Italian readers wishing to explain how international conventions can be resurrected is most welcome!

Latest Issue of "Praxis des Internationalen Privat- und

Verfahrensrechts" (6/2010)

Recently, the November/December issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

Here is the contents:

- ***Anne Röthel/Evelyn Woitge*:** "Das Kollisionsrecht der Vorsorgevollmacht" – the English abstract reads as follows:

Various European national laws have recently implemented powers of representation granted by an adult to be exercised when he or she is not in a position to protect his or her interests. The authors show the existence and scope of these powers of representation within Europe and identify the need for conflict norms for this legal institution. Based on an analysis of the respective rules in the Hague Convention on the international protection of adults, the authors highlight the need to find a national solution that acknowledges the special interests of incapable adults. They suggest a regulation for powers of representation in autonomous international private law that adapts the concept of the Hague Convention.

- ***Stefanie Sendmeyer*:** "Die Rückabwicklung nichtiger Verträge im Spannungsfeld zwischen Rom II-VO und Internationalem Vertragsrecht" – the English abstract reads as follows:

In private international law, it is highly disputed whether the law applicable to claims aiming to reverse enrichment in case of a void contract is determined by Art. 10 (1) lit. e) Rome II Regulation or by Art. 10 (1) lit. e) Rome Convention or Art. 12 (1) lit. e) Rome I Regulation respectively. After a short analysis of the current state of discussion, it is shown that the argument emanates from the erroneous assumption that the question of restitution in such cases is a matter of unjust enrichment according to Art. 10 Rome II Regulation as well as a topic of private international law concerning contractual obligations. In fact, the question has to be solved by clearly differentiating between contractual and non-contractual obligations and, therefore, between the scope of the Rome II Regulation and the scope of the instruments of private international law dealing with contractual obligations. In consistence with European international

procedural law, restitution in case of a void contract is considered a contractual obligation and, therefore, the applicable law is determined by Art. 10 (1) lit. e) Rome Convention or Art. 12 (1) lit. e) Rome II Regulation respectively.

- ***Anatol Dutta:*** "Grenzüberschreitende Forderungsdurchsetzung in Europa: Konvergenzen der Beitreibungssysteme in Zivil- und Verwaltungssachen?" (on ECJ, 14.1.2010 – C-233/08 – Milan Kyrian ./. Celní úrad Tabor) **–** the English abstract reads as follows:

The dogma that claims of the State based on its penal, revenue or other public law are not enforceable abroad – a doctrine also known as the revenue rule – is more and more displaced by European instruments obliging the Member States to collect public law claims of their fellow Member States. One example for this development is the Tax Recovery Directive 76/308/EC (later: 2008/55/EC, now: 2010/24/EU) on the mutual assistance for the recovery of claims relating to taxes, duties and other measures – an instrument, which has been gradually extended to all taxes levied by the Member States. The present article, which discusses a recent decision of the European Court of Justice interpreting the Tax Recovery Directive, attempts to highlight some similarities between the European enforcement rules for public law claims and those for private law claims. These similarities do not only allow fertilisation across the public-private law border when applying and interpreting the different enforcement rules, but once more demonstrate that the revenue rule should be reconsidered.

- ***Sebastian Mock:*** "Internationale Streitgenossenzuständigkeit" **–** the English abstract reads as follows:

The international jurisdiction for claims against several defendants at the domicile of one of the defendants as today established by Art. 6 No. 1 Brussels I Regulation is unknown in several member states and consequently causes general doubts due to the existing possibilities of manipulation in this context. Although the European Court of Justice reflected these doubts by establishing the additional need of the risk of irreconcilable judgments resulting from separate proceedings in the application of Art. 6 No. 1 Brussels Convention and Art. 6 No. 1 Lugano Convention – which was later recognized by the European legislator in the drafting of Art. 6 No. 1 Brussels I Regulation – the determination of this additional requirement is still left unclear. In its recent

decision the German Federal Court of Justice delivered a rather broad understanding of this requirement. The court held that the jurisdiction under Art. 6 No. 1 Lugano Convention/Art. 6 No. 1 Brussels I Regulation does not require that all defendants have to be sued at the same time. Moreover the court held that the violation of a duty of a member of the board of directors is sufficient to establish a jurisdiction under Art. 6 No. 1 Lugano Convention/Art. 6 No. 1 Brussels I Regulation for a claim against the member of the board of directors when the plaintiff already filed a claim against the company of the director. However, the author doubts that this ruling can be considered as a general principle in the application of Art. 6 No. 1 Lugano Convention/Art. 6 No. 1 Brussels I Regulation and shows that the ruling has to be seen in context with a special provision of the applicable Swiss corporate law.

- ***Martin Schaper:*** "Internationale Zuständigkeit nach Art. 22 Nr. 2 EuGVVO und Schiedsfähigkeit von Beschlussmängelstreitigkeiten – Implikationen für den europäischen Wettbewerb der Gesellschaftsrechte" – the English abstract reads as follows:

Art. 22 (2) Brussels I Regulation establishes an exclusive jurisdiction of a Member State's court for proceedings which have as their object, among others, the nullity or the dissolution of companies and the validity of the decisions of their organs. This jurisdiction depends on where the company's seat is located. For determining this seat the court has to apply its rules of International Private Law (lex fori). Although Germany generally adheres to the real seat theory, the OLG Frankfurt a.M. (Higher Regional Court) decided that a private limited company's statutory seat is the relevant factor for determining the exclusive jurisdiction.

Since the freedom of establishment, as interpreted by the Court of Justice of the European Union, promoted corporate mobility there is an increasing demand for settling disputes not in the state of incorporation, but in the country where the major business operations take place. Therefore, the article examines the possibility of arbitration proceedings on the nullity and avoidance of decisions taken by shareholders' meetings in an international context.

Finally, based on the experience with the state competition for corporate

charters in the USA, the impact of a jurisdiction's courts and the admissibility of arbitration proceedings is analysed within the context of regulatory competition in company law in Europe.

- ***Veronika Gärtner:*** "Internationale Zuständigkeit deutscher Gerichte bei isoliertem Versorgungsausgleichsverfahren" **–** the English abstract reads as follows:

Until recently, German law did not know an explicit rule on international jurisdiction with regard to proceedings dealing with the adjustment of pension rights between divorced spouses. The Federal Court of Justice held in several judgments that international jurisdiction with regard to the adjustment of pension rights followed – also in cases where those proceedings are initiated independently from divorce proceedings – the rules of international jurisdiction with regard to the divorce proceedings due to the strong link between both issues.

With reference to this case law, the Regional Court of Karlsruhe held in its decision of 17 August 2009 (16 UF 99/09) that German courts lacked international jurisdiction with regard to (independent) proceedings on the adjustment of domestic pension rights between two Portuguese divorced spouses habitually resident in Portugal, based on the argumentation that Art. 3 Brussels II bis Regulation had to be applied analogously with regard to the question of international jurisdiction. Due to the fact that the requirements of this provision were not met, German courts were – according to the Higher Regional Court Karlsruhe – not competent to rule on the adjustment of the (German) pension rights.

This result is undoubtedly incorrect under the present legal situation: With effect of 1 September 2009 – in the course of a general revision of the procedural rules in family law and non-contentious cases – a new rule has been introduced stating explicitly that German courts have international jurisdiction with regard to proceedings on the adjustment of pension rights inter alia in cases concerning domestic (pension) rights (§ 102 Nr. 2 FamFG).

However, the author argues that also before the entry into force of this new rule, the Regional Court of Karlsruhe should have answered the question of

international jurisdiction in the affirmative: First, it is argued that the court's reference to Art. 3 Brussels II bis Regulation was misplaced since – as Recital No. 8 of the Brussels II bis Regulation illustrates – "ancillary measures" – and therefore also proceedings on the adjustment of pension rights of divorced spouses – are not included into the scope of application of Brussels II bis.

Further, the author argues that the negation of international jurisdiction in cases concerning domestic (pension) rights leads to a denial of justice. Therefore it is argued that international jurisdiction could – and should – have been assumed on the basis of general principles of jurisdiction.

- ***Gerhard Hohloch/ Ilka Klöckner:*** "Versorgungsausgleich mit Auslandsberührung – vom alten zum neuen Recht – Korrektur eines Irrwegs" – the English abstract reads as follows:

On the 11th of February 2009, the Federal Supreme Court of Justice has had its first opportunity to decide whether or not the Dutch provisions on pension rights adjustment were to be regarded as equivalent to the German "Versorgungsausgleich" (VA) in the matter of Art. 17 III 1 EGBGB. Though until then this was generally accepted, the Court decided to deviate from the established opinion. In the course of the 2009 Reform, Art. 17 III EGBGB was revised and significantly restricted regarding its field of application. According to this new regulation, German law must now be applicable in order for the plaintiff to successfully be able to claim an adjustment of pension rights in Germany. Starting off with a critical examination of the Supreme Court's decisions, the authors then point out the impact of the Court's adjudication on the interpretation and the application of the new Art. 17 III EGBGB.

- ***Pippa Rogerson*:** Forum Shopping and Brussels II bis (on: High Court of Justice, 19.4.2010 – [2010] EWHC 843 (Fam) – JKN v JCN)

Sometimes real life cases focus academic attention on important issues of principle. In JKN v JCN a husband and wife from New York had been living in London for 12 years and had four young children together. Then they returned to New York where they are all now residing for the foreseeable future. The marriage has broken down and a divorce, financial settlement and

arrangements for the children are required. Which court should deal with these matters? The wife commenced proceedings in England under Brussels II bis and the husband in New York. The parties had both UK and US citizenship and the husband at that time was still resident in England. Both parties were pursuing proceedings in a court which provided that party with some advantages. Ideally, the parties should come to a settlement without needing the court's determination. If not, preferably a single court should adjudicate matters. This is achieved within the EU by the lis pendens rule in Brussels II bis. However, there is no similar regime operating with non-Member States. A proliferation of judgments over the same matter is wasteful of the parties' time and assets as well as of the courts' resources. It also leads to problems of enforcement of possibly irreconcilable judgments.

- **Axel Kunze/ Dirk Otto:** "Internationale Zwangsvollstreckungszuständigkeit, rechtliche Grenzen und Gegenmaßnahmen" (on: New York Court of Appeals, Opinion v. 4.6.2009) – the English abstract reads as follows:

A New York Court recently ruled that courts in New York have international competence to order the cross-border attachment of rights and securities held by a foreign party with a foreign bank abroad as long as the foreign bank carries out business in the state of New York. This decision potentially exposes foreign banks operating in New York state to attachment disputes. The article describes the impact of the decision and compares it with the legal situation in Germany and other EU countries. The authors come to the conclusion that under German law, EU law as well as under the Lugano Convention a court may not order the attachment of claims located in other countries. In order to limit the risk for banks from being caught in the middle, the authors suggest contractual arrangements that would enable banks to "vouch in" customers into disputes before U.S. courts to ensure that banks are not liable if they comply with U.S. rulings. On the other hand customers could initiate legal steps in their home jurisdiction to prevent a bank from transferring assets/securities abroad; such an injunction would also be recognized by U.S. courts.

- ***Bartosz Sujecki*:** "Zur Anerkennung und Vollstreckung von deutschen Kostenfestsetzungsbeschlüssen für einstweilige Verfügungen in den

Niederlanden" – the English abstract reads as follows:

The Dutch Supreme Court (Hoge Raad) had to give an answer to the question whether a German decision on the amount of cost (Kostenfestsetzungsbeschluss) related to an interim injunction (einstweilige Verfügung) can be recognized and enforced in the Netherlands. Since the German interim injunction was given in an ex parte procedure and the cost decision was not contested by the defendant, the question arose whether such an uncontested decision can be qualified as a "decision" according to article 32 of the Brussels I Regulation and can be enforced in the Netherlands. This paper discusses and analyzes the decision of the Dutch Supreme Court.

- ***Gerhard Hohloch:*** "Feststellungsentscheidungen im Eltern-Kind-Verhältnis – Zur Anwendbarkeit von MSA, KSÜ und EuEheVO" – the English abstract reads as follows:

The article discusses the Austrian Supreme Court's order issued on May 8th 2008, concerning the applicability of the 1961 Hague Convention "[…] on the protection of minors" on declaratory actions in statutory custody cases. It refers to the international jurisdiction rules (including "Regulation Brussels IIa") as well as to the conflict of law rules. As the significance of the Court's assessment extends beyond the Austrian-German border, the main emphasis is put on how the problems of the case at issue are to be treated in Germany, and furthermore on the impact the 1996 Hague Convention "[…] on the protection of Children" – which is expected to come into force soon – will have on the legal situation in Germany and in Austria.

- ***Oliver L. Knöfel:*** "Nordische Zeugnispflicht – Grenzüberschreitende Zivilrechtshilfe à la scandinave" **–** the English abstract reads as follows:

The article gives an overview of the mechanisms of judicial assistance in the taking of evidence abroad in civil matters as maintained by the five Nordic Countries (Denmark, Finland, Iceland, Norway, Sweden). In Central and Western Europe, it is little-known that the Nordic Countries have, since the 1970s, erected an autochthonous system of judicial assistance differing quite significantly from the long-standing habits of taking evidence abroad as established by the Hague Conference or recently by the European Union.

According to specific reciprocal legislation, Nordic residents are obliged to appear before the courts of any Nordic country, and to give evidence. Thus, there is hardly any need to have a foreign Nordic witness examined by her home court according to a letter rogatory, or to take evidence directly on foreign soil. The article aims at exploring this extraordinary mode of international judicial co-operation with special reference to Swedish procedural law. It is shown that the Nordic mechanism is a product of a very high level of convergence in the field of civil procedure, and that this is due to a common core of Nordic legal cultures.

- ***Reinhard Giesen*** on a decision of the Norwegian Supreme Court on the applicable law with regard to defamation: "Das Recht auf freie Meinungsäußerung und der Schutz der persönlichen Ehre im Kontext unterschiedlicher Kulturen" (on: Norges Høyesterett, 2.12.2009 – HR-2009-2266-A)
- ***Kurt Siehr*** on the Austrian Supreme Court's decision of 18 September 2009 dealing with the question of the applicability of Brussels II bis with regard to the return of abducted children – in particular in cases where the child is over 16 years old : "Zum persönlichen Anwendungsbereich des Haager Kindesentführungsübereinkommens von 1980 und der EuEheVO "Kind" oder "Nicht-Kind" – das ist hier die Frage!" (on: Austrian Supreme Court, 18.9.2009 – 6 Ob 181/09z)
- ***Erik Jayme*** on the inaugural lecture held by Professor Martin Gebauer in Tübingen on 16 July 2010

The French Revision of Prescription: A Model for Louisiana?

François-Xavier Licari, Professor at the University of Metz, and Benjamin West Janke, of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, have posted "The

French Revision of Prescription: a Model for Louisiana?" on SSRN. The paper has also been publised at the Tulane Law Review, vol. 85, p. 1 (2010).

Here is the abstract

Though the draftsmanship of the French and Louisiana Civil Codes is generally celebrated, prescription in both Codes is notoriously defective. Located at the end of both Codes as almost an afterthought, the titles of prescription do not share the same general, relative style contained elsewhere. Part of the cause of the prescription title's shortcoming is attributable to the content.

The provisions that ring loudest are spelled out in numbers rather than letters. Numbers are blind, arbitrary, cold, and inanimate – ace of society accelerates, prescription becomes anachronistic. It is worth questioning whether the very nature of prescription eludes the capacity for codification.

Prescription's inherent difficulties have created turmoil for both the French and Louisiana civilian systems. Both have struggled with the arbitrariness of any one particular prescriptive period, attempting to balance objectivism against subjectivism, relativity against certainty, and generality against particularity. Though both France and Louisiana began with what might be considered excessively long general periods of prescription, the French and Louisiana legislatures either whittled down the general period or chiseled out particular actions from it. Over time, these piecemeal amendments eviscerated the core components of the doctrine, causing a desperate need for substantial revision.

In 2008, the French legislature took the necessary step and drastically reformed prescription. The general period is now shorter and unified (five years); there are new grounds for suspension (including codified contra non valentem); and a long-stop period is introduced. Louisiana has yet to make any substantial reform to prescription, and revision is long overdue.

This essay will outline the faults in Louisiana and France's original prescriptive regimes and identify the main innovative trends in the French revision. It then will offer a critical appraisal of the French revision, endorse it as a basis for a Louisiana revision, and discuss how Louisiana jurisprudence is uniquely positioned to integrate the revision in French law. We offer the following as a true dialogue from both the French and Louisiana perspectives about the continuing influence of the French Civil Code in Louisiana, the nature of prescription and its

placement in a Civil Code, and the unique opportunity for the Louisiana experience to influence the interpretation of the French revision.

Dane on the Natural Law Challenge to Choice of Law

Perry Dane, who is a Professor of Law at the Rutgers School of Law – Camden, has posted The Natural Law Challenge to Choice of Law on SSRN. The abstract reads:

> *Would a jurisdiction supremely confident that some or all of its own municipal law rests on natural law and universal legal truth ever have a good, purely principled, reason to look to ordinary choice of law principles and apply the substantive law of another place in a case involving foreign elements? This essay, a chapter in an upcoming volume on "The Role of Ethics in International Law," suggests several such reasons, some of them grounded in the natural law tradition itself and in sustained analysis of the relationship between natural law (if such a thing exists) and positive law. The essay also suggests at least a rough analogy between the jurisprudential challenges of choice of law and the theological challenges of interreligious encounter. It ends with a short effort apply the general argument to the specific question of the inter-jurisdictional recognition of same-sex marriages.*

The paper is forthcoming in *The Role of Ethics in International Law*, Donald Earl Childress III, ed., Cambridge University Press, 2010.

Belgian Reference for a Preliminary Ruling on Art. 6 of the Rome Convention

As pointed out by our friend *Federico Garau* over at the Conflictus Legum blog, **the Belgian Supreme Court** (*Hof van Cassatie/Cour de Cassation*) **has made a preliminary reference to the ECJ, with regard to the interpretation of Art. 6 (individual employment contracts) of the 1980 Rome Convention on the law applicable to contractual obligations**.

The case (the second, to the best of my knowledge, to be made pursuant to the two 1988 Protocols on the interpretation of the Convention by the Court of Justice, after the *ICF* case, no. C-133/08), was lodged on 29 July 2010 under **C-384/10, *Jan Voogsgeerd v Navimer SA***.

> ***Questions referred***
>
> *Must the country in which the place of business is situated through which an employee was engaged, within the meaning of Article 6(2)(b) of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, 1 be taken to mean the country in which the place of business of the employer is situated through which, according to the contract of employment, the employee was engaged, or the country in which the place of business of the employer is situated with which the employee is connected for his actual employment, even though that employee does not habitually carry out his work in any one country?*
>
> *Must the place to which an employee who does not habitually carry out his work in any one country is obliged to report and where he receives administrative briefings, as well as instructions for the performance of his work, be deemed to be the place of actual employment within the meaning of the first question?*
>
> *Must the place of business with which the employee is connected for his actual employment within the meaning of the first question satisfy certain formal requirements such as, inter alia, the possession of legal personality, or does the*

existence of a de facto place of business suffice for that purpose?

Can the place of business of another company, with which the corporate employer is connected, serve as the place of business within the meaning of the third question, even though the authority of the employer has not been transferred to that other company?

The referring decision is available on the *Juridat* database (under no. S.09.0013.N), and can be downloaded as a .pdf file here.

Issue 2010/3 Nederlands Internationaal Privaatrecht

The third issue of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* is dedicated to the proposal for a new Dutch Act on Private International Law that will be incorporated in Book 10 of the Dutch Civil Code. It includes a critical general review, and contributions on private international law rules on marriages and the consequences for public policy and human rights; the regulation of overriding mandatory rules; the regulation of *fait accompli*; methods of interpretation in the light of Europeanization and internationalization; and party autonomy and the law of names.

- A.P.M.J. Vonken, Boek 10 BW: meer – incomplete – consolidatie dan codificatie van het Nederlandse internationaal privaatrecht. Een bekommernisvolle bespiegeling over een legislatieve IPR-surplace, p. 399-409. The English abstract reads:

In recent decades European private international law (PIL) has undoubtedly made progress. This is largely due to the fact that a number of legislators have either codified part or all of their national PIL rules or adopted treaties and regulations drawn up by, e.g., the Hague Conference on Private International Law and the European Union. Recently, the Dutch legislator has also introduced a codification

or, more precisely, a 'consolidation' covering an incomplete set of topics on the field of choice of law. I will argue that this Dutch project should be amended and supplemented to include the areas of international civil procedure (e.g., jurisdiction and the recognition and enforcement of foreign judgments) and to cover a more complete ruling of all kinds of choice of law issues for the sake of legal practice. Finally, I will propose some amendments and refinements to specific rules contained in this consolidation project.

- Susan Rutten, Aanpassing van het huwelijksrecht; gevolgen voor de openbare orde en mensenrechten in het IPR, p. 410-420. The English abstract reads:

The Dutch government is considering to take on problems of integration caused by the immigration of spouses through amending the rules governing marriage. The objective is to prevent immigrants living in the Netherlands from marrying abroad merely for the purpose of enabling their new spouse to acquire legal residence in the Netherlands. With this in mind, the government intends to raise the minimum age for marrying; to prohibit the conclusion of marriages between cousins; and to tighten the rules governing the recognition of foreign polygamous marriages. The plans will also affect rules of private international marital law, as well as the use of the public policy exception. In this article, the author examines whether the government's tentative proposals respect human rights, in particular the right to marry. Furthermore, she questions whether the public-policy exception is a suitable technique for warding off undesirable foreign marriages. The introduction and codification in the Dutch Civil Code of a new book on private international law provide an opportunity for the legislator to legally define the concept of public policy. An express reference could be made to the effect that human rights are part of our public policy, since human rights, because of their nature, are in any case seen as fundamental principles. The above proposals by the government also prompt us to be aware of the risk of public policy being used or abused for interests other than those for which the exception was intended, where it is invoked to safeguard rules of which it is less evident that they may be seen as fundamental.

- Cathalijne van der Plas, Het leerstuk van de voorrangsregels gecodificeerd in boek 10: werking(ssfeer), p. 421-429. The English

abstract reads:

Draft book 10 of the Dutch Civil Code contains a general conflict of laws provision in Article 10:7 on super mandatory rules (lois de police). Many international instruments, in particular several Hague Conventions and the Rome I and II Regulations, provide for the application of such special rules of a mandatory nature in addition to, or in derogation from, applicable private law. It nevertheless makes sense for the Dutch legislature also to provide for a domestic conflict of laws rule on the application of super mandatory rules, because not all areas of private law have been covered (as yet) by international instruments: notably parts of family law and the law of succession, the law of property, and of corporations. Some aspects of the application of super mandatory rules which remain uncertain in connection with the Rome I and II Regulations have been made explicit by the legislature, in particular the principle that the application of a law pursuant to rules of PIL includes super mandatory rules of that lex causae. Article 10:7 also allows for the application of super mandatory rules of third countries, which goes beyond the room for the application of such rules under Article 9 of the Rome I Regulation. It is submitted that the test which a court must apply when deciding whether the application of foreign public or administrative rules of law is justified and bears a resemblance to the tests under EU case law for determining whether some national rule infringes the free circulation of assets, capital and persons. EU case law provides examples of compelling public interests which could justify the application of a super mandatory rule in a specific situation. However, the Dutch courts will have the freedom to decide on the tests to be applied, and it remains to be seen how the new Article 10:7 will work out in specific cases.

- M.H. ten Wolde, De mysteries van het *fait accompli* en Boek 10 BW, p. 430-436. The English abstract reads:

Article 9 of draft Book 10 of the Civil Code introduces a new fait accompli (an accomplished fact) exception to be used in every area of conflict of laws: 'In the Netherlands, the same legal consequences may be attached to a fact to which legal consequences are attributed under the law which is applicable under the private international law of a foreign state, also when this contravenes the law which is applicable according to Dutch private international law, in as far as not

attaching those consequences would constitute an unacceptable violation of the legitimate expectations of the parties or of legal certainty.' This provision aims to adjust the result of applying a Dutch conflict of law rule in the event that such a result is unacceptable since the parties involved assumed that a foreign conflict rule that referred the case to a different law was in fact applicable. The question arises whether the consequences attributed to a fact or act according to a foreign conflict of law rule may be accepted, even if those consequences do not arise under the law which is applicable according to Dutch conflict of law rules. In such a case Dutch conflict rules should yield in favour of the foreign conflict rule, but subject to the condition that the parties rightfully believed that their legal position was determined by the closely connected foreign conflict rules in question. Moreover, not granting such effects has to constitute an unacceptable violation of the legitimate expectations of the parties or of legal certainty It is remarkable that the fait accompli exception is codified as an universal exception to all conflict rules since it has never been regarded as such in the case law or literature. Among scholars it is mainly seen as a concept that helps to discover the applicable law. The legislator bases the exception of Article 9 on the principle of legitimate expectations as expressed in the Sabah case decided by the Supreme Court and on legal certainty. However, in the Sabah case the court dealt with a completely different problem, namely that of Dutch conflict rules succeeding each other in time. The author argues that the mentioned principle cannot, without any good reason, be extended to the question of the conflict between Dutch conflict rules and foreign conflict rules. Besides this, there is no valid reason to protect parties who deliberately cross the border to a foreign country against their unfamiliarity with the law (including confict of law) of that country. The reality of international legal practice is that a legal position as a consequence of differing conflict rules may have a different content in one country than in another. Parties should be aware of this fact. International legal practice does not need a fait accompli exception. It is advisable to delete Article 9 from Book 10 Civil Code.

- A.E. Oderkerk, Een lappendeken van interpretatiemethoden in de context van het Ontwerp Boek 10 BW – De invloed van Europeanisering en internationalisering van het IPR, p. 437-446. The English abstract reads:

In the Dutch Proposal on Private International Law (Book 10 of the Dutch Civil Code), a 'General Part' containing provisions on topics like public policy,

internationally mandatory provisions, party autonomy, capacity et cetera has been included. However, unlike in some foreign private international law Acts, general provisions on interpretation and/or characterisation have been deliberately omitted. In this article it is argued that it would have been useful and possible to introduce such provisions. Useful because different methods (of a general, European or international background) of interpretation and characterisation have to be applied to different (groups of) provisions of this Book and it will not be obvious to practitioners which method will have to be applied when and how. Possible since – as will be shown – guidelines on which methods of interpretation and characterisation are to be applied and in which context can be laid down.

- Emilie C. Maclaine Pont, Partijautonomie in het 'nieuwe' internationale namenrecht, p. 447-455. The English abstract reads:

Recently, a bill has been prepared by the Dutch legislature in order to consolidate the rules of Dutch private international law. This 'Book 10 of the Dutch Civil Code' includes personal status issues. More specifically, this article focuses on surnames. In two judgments – Garcia Avello *and* Grunkin-Paul – *the Court of Justice of the EU provided incentives for the Member States to reconsider their rules regarding surnames concerning conflict of law rules and the recognition of surnames. The question is whether the Dutch regulations as laid down in the new 'Book 10 of the Dutch Civil Code' are in conformity with these decisions. This article reaches the conclusion that this question must be answered in the negative and recommends some adjustments to the current bill with the introduction of a choice of law clause.*

Complutense PIL Seminar to be held in March 2011. Call for

papers

A new edition of the International Seminar on Private International Law (Universidad Complutense de Madrid) will be held on March 2011, the 24 (Thursday, morning and afternoon sessions) and 25 (just morning session). The place, as usual, will be the faculty of Law at the Universidad Complutense of Madrid.

For this edition, which is already the fifth, a general approach under the title "Trends in the evolution of private international law" has been preferred. The proposed theme is therefore a broad one, the organizers (Prof. Fernández Rozas and de Miguel Asensio) wanting to provoke reflection on recent developments and future prospects in three different areas of Private International Law: patrimonial law, familiy law, and inter-regional law.

As in previous editions the seminar will count with several general lectures, but it is open to teachers and specialists, either Spanish or foreigners, who wish to present papers on issues related to one of the main themes. Those wanting to participate should promptly contact Professor Carmen Otero García Castrillón by email (cocastri@der.ucm.es) indicating a title for their contribution. The deadline is December 15, 2010.

The inclusion of papers in the 2010 volume of the Anuario Español de Derecho Internacional Privado will be subject to prior scientific evaluation of each work, according to general criteria applicable to the publication of academic articles in the journal. In any case, the written version of the papers must be sent before April 1, 2011; this deadline is non-extendable due to the closure requirements of the Yearbook. Contributions shall not exceed 25 pages in Word format (double-spaced on DIN A-4, and Times New Roman 12 for text and 10 for footnotes pages).

Third Issue of 2010's Belgian PIL e-journal

The third issue of the Belgian e-journal on private international law Tijdschrift@ipr.be / Revue@dipr.be was just released.

It is a bilingual journal (French/Dutch) on private international law which essentially reports European and Belgian cases addressing issues of private international law, and also offers academic articles.

The issue can be freely downloaded here.

Update: London Arbitration Feast

Further to my post of last week, just to note that the start time of next week's BIICL seminar on the Supreme Court has been moved 15 minutes earlier to 5:15pm on Wednesday 24 November. This is to enable those attending to continue their arbitration themed evening by making the short journey to the LSE to hear Professor Jan Paulsson and Alexis Mourre discuss the subject of "Unilaterally Appointed Arbitrators – A Good Idea?" from 7:15pm.