Belgian Judgment on Surrogate Motherhood

A lower court sitting in Belgium has recently been faced with a case of international surrogate motherhood. Two men married in Belgium had contracted with a woman living in California, who gave birth to twins in December 2008. One of the men was the biological father of the twins. In accordance with the laws of California, the birth certificate of the twins had been established mentioning the names of the two spouses as fathers. When the parents came back with their twin daughters in Belgium, the local authorities refused to give any effect to the birth certificate, in effect denying the existence of any parent-children relationship. The parents challenged this refusal before the Court of First Instance sitting in Huy.

In an opinion issued on the 22nd of March and yet unpublished, the court denied the request. Noting that what was at stake was not so much the recognition in Belgium of the decision by which the Superior Court in California had authorized, prior to the birth of the children, that the birth certificates mention the names of the two fathers, but rather the recognition of the birth certificates proper, the court applied the test laid down in Article 27 of the Code of Private International law, under which foreign acts relating to the personal status may only be recognized in Belgium provided they comply with the requirements of the national law which would be applicable to the relationship under Belgian rules. The court focused its ruling on one specific requirement of Article 27, i.e. public policy, mentioning the issue of *fraus legis* only briefly.

The parents had argued that since Belgian law allows the adoption of a child by two persons of the same sex, recognition of the birth certificates could not be held to be contrary to fundamental principles of the Belgian legal order. The court did not follow the parents. It first held that it should consider not only the birth certificates, but also the whole history of the dealings between the parents and the surrogate mother. The court thus examined the contract which had been concluded between the parties and noted that while such contract was invalid as a matter of Belgian law, it was uncertain whether public policy could defeat such a contract validly concluded under foreign law. Turning to two important

international conventions in force in Belgium, the court found that the practice of surrogate motherhood raised questions both under the Convention of the Rights of Children and under the European Convention on Human Rights. As to the first Convention, the court relied specifically on Article 7, which grants each child the right to know and be cared for by his or her parents. Turning to Article 3 of the European Convention, the court found that the fact that a surrogate mother is paid for her services is difficult to reconcile with human dignity. The Court also noted that countries which tolerate surrogacy arrangements insist on the absence of commercial motives for such arrangements. The court concluded on this basis that giving effect to the Californian birth certificates would violate fundamental principles and hence be contrary to public policy.

It is not yet known whether this ruling will be appealed. In any case, the parents will have to find an alternative solution to be recognized as such. They could turn to adoption, although this could prove difficult given that they have already had extensive contacts with the children. This is much probably not the last time a court is faced with this issue in Belgium.

Editors' note: Patrick Wautelet is a professor of law at Liege University.

Regulation EC nº 4/2009, Art. 40

Article 40

Invoking a recognised decision

1. A party who wishes to invoke in another Member State a decision recognised within the meaning of Article 17(1) or recognised pursuant to Section 2 shall produce a copy of the decision which satisfies the conditions necessary to establish its authenticity.

2. If necessary, the court before which the recognised decision is invoked may ask the party invoking the recognised decision to produce an extract issued by the court of origin using the form set out in Annex I or in Annex II, as the case may be.

The court of origin shall also issue such an extract at the request of any

interested party.

3. Where necessary, the party invoking the recognised decision shall provide a transliteration or a translation of the content of the form referred to in paragraph 2 into the official language of the Member State concerned or, where there are several official languages in that Member State, into the official language or one of the official languages of court proceedings of the place where the recognised decision is invoked, in accordance with the law of that
Member State, or into another language that the Member State concerned has indicated it can accept. Each Member State may indicate the official language or languages of the institutions of the European Union other than its own which it can accept for the completion of the form.

4. Any translation under this Article must be done by a person qualified to do translations in one of the Member States.

What does art. 40, Regulation 4/2009, mean? Let's take its factual assumption: a party who wishes to invoke in a Member State a decision recognised in another Member State. The different language versions of the Regulation do not aid to determine which is the situation the rule aims to regulate. In a first reading, it evokes the banned *exequatur on exequatur*, enforcement on enforcement. This would be the case of, for example, invoking in Spain a German resolution that has already been recognized in France. But is this really so? We follow Prof. Santiago Alvarez, *La Ley 31 July 2009,* when he rejects this opinion arguing several reasons. To start with, from a systematic point of view, because the rule refers to a situation contemplated by the preceding sections (recognition and execution without any intermediate procedure, and declaration of enforceability of the resolution). This could result at first sight from the first paragraph: "The party wishing to invoke in another Member State a decision recognized within the meaning of Article 17, paragraph 1, or under section 2 …".

Second, the rule speaks of the "court of origin" as the court which will issue an extract using the form set out in Annex I or in Annex II, as the case may be. The definition of art. 2.1. No. 9) of the Regulation states that the "court of origin" is the one which has given the decision to be enforced, and not the court that would

have issued a decision on recognition (unnecessary, on the other hand, for resolutions of Section 1). That is, art. 40 only refers to the court of origin and to another Member State: not to an intermediate State (one might say, the State where a first recognition took place). Accepting this, the assumption would be that when a resolution of a Member State is invoked in another Member State in the context of art. 17.1 and Art. 23.1, for purposes other than its recognition (Section 1) or a declaration of enforceability (Section 2) –for instance, to ask for its amendment-, the invoking part must be equipped with an authentic copy, either of the extract foreseen by the forms; or, where appropriate, of the translations.

The term "Member State" is equated in other rules -such as art. 44, referring to legal aid- to any Member State or Member State other than the Member State of origin (and not necessarily a 'third' Member State). The concept of "decision recognized" is more complex to integrate into the proposed interpretation: but this seems to be due to its strangeness to our usual terminology; the difficulty would be overcome if we succeed to understand that automatic recognition has both an active and a passive dimension (a recognizable decision, a recognized decision- except opposition in the cases of Section 2). In any case, art 40 itself speaks of "… The party wishing *to invoke in another Member State* a recognized decision …"; and not "… The party wishing to invoke a decision *recognized in another Member State* …". In this case, the order of the statement's elements is not innocuous.

Nonrecognition of Foreign Defamation Judgments

In recent years, there has been much debatein Congress and in the several states concerning what effect foreign judgments should be given by United States courts that do not comport with the First Amendment to the United States Constitution. In such cases of "libel tourism," a plaintiff chooses to sue for defamation in a foreign state that has lower standards of proof for defamation.

Even though such a defamation claim would not be successful if pled in a United States court due to the First Amendment, the libel tourist seeks to enforce the judgment rendered abroad in the United States. Put another way, the libel tourist seeks to sneak around the First Amendment by bringing the case as an enforcement proceeding. Such actions are governed in many states by the Uniform Foreign-Country Money Judgments Recognition Act. California's version of the Uniform Foreign-Country Money Judgments Recognition Act (Cal. Code Civil Proc. 1716-1717) was amended last year to provide as follows:

> *1716. … (c) A court of this state is not required to recognize a foreign-country judgment if …(9) The judgment includes recovery for a claim of defamation unless the court determines that the defamation law applied by the foreign court provided at least as much protection for freedom of speech and the press as provided by both the United States and California Constitutions….*
>
> *1717…. (c) If a judgment was rendered in an action for defamation in a foreign country against a person who is a resident of California or a person or entity amenable to jurisdiction in California, and declaratory relief with respect to liability for the judgment or a determination that the judgment is not recognizable in California under Section 1716 is sought, a court has jurisdiction to determine the declaratory relief action as well as personal jurisdiction over the person or entity who obtained the foreign-country judgment if both of the following apply:*
>
> *(1) The publication at issue was published in California.*
>
> *(2) The person who is a resident, or the person or entity who is amenable to jurisdiction in California, either (A) has assets in California that might be subject to an enforcement proceeding to satisfy the foreign-country defamation judgment, or (B) may have to take actions in California to comply with the foreign-country defamation judgment….*

As an empirical matter, I wonder what impact this will have on California cases. As a jurisdictional matter, it is interesting to see that California has presumably expanded its view of personal jurisdiction to cover these cases in the declaratory judgment context. In any event, it shows that there still remains conflict of laws activity in state legislatures.

Two New Books

Two new books on private international law have recently been published in Canada.

The first is a new textbook: Stephen G.A. Pitel & Nicholas S. Rafferty, *Conflict of Laws* (Toronto: Irwin Law Inc., 2010). Though I say it myself, for those in other countries this book should serve as a useful comparative reference to the Canadian law on the subject. More information is available here.

The second is the third edition of the Canadian casebook in the area: Nicholas S. Rafferty, general editor, *Private International Law in Common Law Canada: Cases, Text, and Materials*, 3d ed. *(*Toronto: Emond Montgomery Publications Limited, 2010). There are seven contributors to the casebook: Professors Nicholas Rafferty, Joost Blom, Elizabeth Edinger, Genevieve Saumier, Stephen Pitel, Janet Walker and Catherine Walsh. More information is available here.

New Book: Foreign Currency Claims in the Conflict of Laws

Hart Publishing has published the second title in its Studies in Private International Law series, *Foreign Currency Claims in the Conflict of Laws* by Professor Vaughan Black of the Schulich School of Law at Dalhousie University. More information is available here.

The web page for the book advises us that "This book takes a comparative look at how common law courts have addressed damages claims when foreign currencies are involved, and at statutory responses to that issue. It describes the practices of UK, Commonwealth and American courts in this field and draws both on

principles of private international law and of damages assessment to analyse current practice."

My congratulations to my Canadian colleague.

Summer Academy on International Dispute Resolution

The Heidelberg Center for International Dispute Resolution in cooperation with the International Chamber of Commerce (ICC) and the German Institution of Arbitration (DIS) will hold its 7th Summer Academy on International Dispute Resolution at the **University of Heidelberg, Germany**, from **16 to 19 June 2010**.

Under the guidance of renowned international speakers, the participants will immerse themselves in **Alternative Dispute Resolution** and **International Commercial Arbitration**. Course language will be English.

The Summer Academy includes a social program, featuring such events as a welcome reception, weather and number of participants permitting, a boat trip and a summer party. Thus, the participants can get in touch with the speakers and the organizers and enjoy the historic atmosphere of Heidelberg.

List of Speakers:

Christian **Duve** (Attorney at Law, Partner, Freshfields Bruckhaus Deringer) – Peter **Kraft** (Attorney at Law, DIS) – Herbert **Kronke** (Professor of Law, University of Heidelberg) – Patricia **Nacimiento** (Attorney at Law, Partner, White & Case) – Jan Heiner **Nedden** (Counsel, ICC International Court of Arbitration) – Dirk **Otto** (Attorney at Law, Partner, Norton Rose) – Michael **Polkinghorne** (Avocat au Barreau de Paris, Solicitor, Partner, White & Case) – Peter **Tochtermann** (Judge)

Further information on the program as well as a registration form can be found here.

Commission's Timetable for 2010-2014

The Commission has just published its Action Plan implementing the Stockholm Programme. It contains a timetable of the Commission's actions until 2014. Here are those regarding conflict issues (if I did not miss any):

Legislative Proposals

2010

– Legislative Proposal for the revision of Regulation (EC) No 44/2001 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters (Brussels I)
– Proposal for a Regulation on the conflicts of laws in matters concerning matrimonial property rights, including the question of jurisdiction and mutual recognition, and for Regulation on the property consequences of the separation of couples from other types of unions
– Proposal for a Regulation on improving the efficiency of the enforcement of judgements in the European Union: the attachment of bank accounts

2011

– Proposal for a Regulation amending Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, including establishment of common minimum standards in relation to the recognition of decisions on parental responsibility, following a report on its application (2011-2013)
– Regulation on limitation periods on cross border road traffic accidents

2012

– Proposal for Regulation amending Regulation (EC) No 1346/2000 on insolvency proceedings, following a report on its application (2012-2013)

2013

– Legislative proposal on mutual recognition of the effects of certain civil status documents (e.g. relating to birth, affiliation, adoption, name)
– Proposal for a Regulation on improving the efficiency of the enforcement of judgements in the European Union: transparency of debtor's assets
– Legislative proposal for dispensing with the formalities for the legalisation of documents between the Member States

2014

– Legislative proposal aimed at improving the consistency of existing Union legislation in the field of civil procedural law

Green Papers and Reports

2010

– Green paper on the free circulation of the documents: civil status documents, authentic acts and the simplification of legalisation
– Report on the assignment of claims under Regulation (EC) No 593/2008 on the law applicable to contractual relations (Rome I)

2011

– Report on application of Regulation (EC) No 1393/2007 on service of documents in civil and commercial matters, if necessary followed by a proposal for revision which could include the establishment of common minimum standards (2011-2012)
– Report on the application of Regulation (EC) No 805/2008 on the European Enforcement Order for uncontested claims

2012

– Report on application of Regulation (EC) No 1206/2001 on the taking of evidence in civil and commercial matters, if necessary followed by a proposal for revision which could include the establishment of common minimum standards

(2012-2013)
– Report on the application of Regulation (EC) No 804/2007 on the applicable law on noncontractual obligations (Rome II)
– Report on the functioning of the present EU regime on civil procedural law across borders

2013

– Report on application of Regulation (EC) No 861/2007 establishing a European Small Claims Procedure
– Report on application of Regulation (EC) No 1896/2006 creating a European order for payment procedure
– Report on the applicable law on insurance contracts under Regulation (EC) No 593/2008 on the law applicable to contractual relations (Rome I)
– Green paper on the minimum standards for civil procedures and necessary follow up

2014

– Report on the application of the 2000 Hague Convention on the International Protection of Adults, assessing also the need for additional proposals as regards vulnerable adults
– Green paper on private international law aspects, including applicable law, relating to companies, associations and other legal persons

The Action Plan also provides for other acts such as Practice Guides, Fact Sheets and Compendia, some of which deal with conflict issues.

European Commission Plan for 2010-2014

The European Commission has published yesterday its plan to deliver justice, freedom and security to citizens in the next four years.

Here are 3 of the 10 concrete actions included in the plan which will be of interest for readers of this blog:

> ***4. More legal certainty for international marriages***
>
> *Following an EU proposal to allow international couples to choose which country's law applies to their divorce (IP/10/347, MEMO/10/100), the Commission will make a similar proposal this year on which law will apply when it comes to the division of couples' property during these proceedings (legislative proposal, 2010).*
>
> ***5. Less administrative burdens for citizens***
>
> *Europeans who want to get married, adopt a child or change their civil status should not face additional administrative burdens if they are outside their home country. For example, a Finnish woman who falls in love with a man from the UK would have to submit a certificate of no impediment from the UK to get married. The UK does not provide such documents. To avoid these kinds of situations, the Commission will propose a law for the mutual recognition of certain civil status documents (legislative proposal, 2013).*
>
> ***6. Helping businesses to operate cross-border***
>
> *If companies are to invest and operate cross-border, they need to have trust in Europe's Single Market – especially in today's economic context. At present, companies only recover 37% of cross-border debts while more than 60% of cross-border debts cannot be enforced. To address this problem and stimulate the incentive to do business cross-border, the Commission will propose legislation on a European "attachment" of bank accounts. This measure will ensure that money that is owed does not disappear (legislative proposal, 2010).*
>
> *Legal certainty is crucial for motivating businesses to do commerce across borders. If you know the rules of the country where you would like to do business, you will be much more willing to offer your services/goods rather than studying different 27 regimes. These 27 contractual regimes will remain. The Commission is preparing an additional and optional contract law instrument – something similar to the US Uniform Commercial Code. Companies could then choose to apply this instrument to their contractual relations – no matter in which EU country they have their business (Communication, 2010).*

The full text of the Communication of the Commission can be found here.

Thanks to Lea Salvini for the tip-off

Gaudemet-Tallon on Jurisdiction and Judgments

The much awaited fourth edition of Professor Gaudemet-Tallon's authoritative work on the European law of jurisdiction and judgments has just been published.

It is the leading French text on the topic. It only deals with civil and commercial matters, i.e. the Brussels I Regulation, the 1968 Brussels Convention, and the two Lugano Conventions.

The abstract and the table of contents can be found here.

Borchers on Punitive Damages

Patrick J. Borchers, who is the Dean of Creighton University School of Law, has posted *Punitive Damages, Forum Shopping and the Conflict of Laws* on SSRN. The abstract reads:

> *Few issues have as profound an impact on civil litigation as the availability and dimensions of punitive damages. States, however, vary considerably on whether punitive damages are allowed, the quantum and burden of proof necessary to establish liability for them, their insurability and the standard of appellate review of their award. Because of the high stakes involved, all three of the traditional branches of the discipline of the conflict of laws — jurisdiction,*

choice of law and judgment recognition — are directly involved. Civil plaintiffs naturally seek to find courts that will be hospitable to their attempted assertion of punitive damage liability and civil defendants are equally anxious to avoid such courts. The practice of attempting to find a friendly court is known colloquially as "forum shopping." This article examines how the branches of the conflict of laws are implicated in this high stakes battle and also examines what implications the Supreme Court's decision in State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003) has for conflicts issues in the punitive damage wars.

The paper, which is forthcoming in the *Louisiana Law Review*, can be downloaded here.