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The Development of the Public Policy Barrier to Judgment Recognition Within the European Community

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for family law. Here, the movement is only just beginning.[91]

IV. Conclusion

So far, in international family and child law as discussed in this paper, unification achieved in Europe during the last 100 years has been limited almost completely to private international law rules. During the second half of the twentieth century, the 1961 Hague Protection of Minors Convention and the European Custody Convention represented first steps towards unification. After a long phase without any further progress, this is now about to change. The EC has entered the scene of private international law, and the Hague Conference has elaborated a modern instrument for child protection matters. With the Brussels II a Regulation and soon also the 1996 Hague Child Protection Convention, there will be a set of almost identical rules for cases within the EC and in relation to third States, offering unified rules on jurisdiction, applicable law, recognition, enforcement and co-operation across frontiers. For child abduction cases, the 1980 Hague Convention with its 80 Contracting States provides a solid and successful legal basis. The co-operation mechanisms established by the Child Protection Convention and the Brussels II a Regulation supplement and strengthen the Child Abduction Convention, and the fact that in the future, there will normally only be one State at a time having jurisdiction over a particular child will also contribute to reducing cross-border complications created by irreconcilable judgments. Even in the area of substantive law, there is now a modern instrument – the European Contact Convention – aiming at the unification of an important aspect of international child law, namely contact between parents and children. The work of the Commission on European Family law might pave the way towards further unification of substantive law. Last but not least, cross-border co-operation of courts, central and other authorities has now been provided with a structured legal basis by Brussels II a and the 1996 Convention and waits to be filled with life.

[91] For a fundamental discussion whether or not family law in Europe could and should be unified or harmonised, see the proceedings of the 2002 Utrecht Conference (*supra* note 85).

How uniform is uniform law?

The Development of the Public Policy Barrier to Judgment Recognition Within the European Community*

*Peter Hay***

Introduction

"National public policy" can be a convenient label for the reluctance, for whatever reason, to give up a national solution in favor of Community law and policy. It cuts across all areas of Community endeavor, as such landmark decisions as *Cassis de Dijon*,[1] *Centros*,[2] and *Van Duyn*[3] illustrate. National public policy concerns also present a barrier to attempts to harmonize areas of substantive law. Depending on the subject, national and Community interests of different strengths may be involved, and attempts to generalize seem therefore futile. The following remarks thus have a more modest, more limited focus: the current role of public policy in trans-border litigation, particularly in judgment recognition. In the future, public policy concerns may play an increasingly important role in choice of law, beginning now with the Rome II-Regulation.[4]

Traditional Defenses to Judgment Recognition And Integrated Legal Systems

In traditional international practice, states condition foreign judgment recognition on a number of considerations, among them: the positive evaluation of the rendering court's jurisdic-

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[1] ECJ 20 February 1979 – Case 120/78 – *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein ("Cassis de Dijon")*, [1979] ECR 649.

[2] ECJ 9 March 1999 – Case C-212/97 – *Centros Ltd. v. Erhvervs-og Salskabsstyrelson*, [1999] ECR I-1459.

[3] ECJ 4 December 1974 – Case 41/74 – *Van Duyn v. Home Office*, [1974] ECR 1337.

[4] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II"), OJ 2007, L 199/40. This Regulation, as well as the current Rome Convention (soon-to-be "Rome-I" Regulation) on the law applicable to contractual obligations, provides rules of "universal", not only intra-EU applicability. As a result, the law of a non-EU state may well become applicable in a given case. In such a setting, the public policy exception retains more of its traditional importance than it does in the case of intra-EU judgment recognition under discussion here. For brief comment on the Rome-II Regulation, see *Hay*, Contemporary Approaches to Non-Contractual Obligations in Private International Law (Conflict of Laws) and the European Community's "Rome II" Regulation = [2007] EuLF I-137, at I-149 – I-150.

tion, the fairness of its procedures, possibly a review of the corrections of the rendering court's decision in substance and as a matter of conflicts law (*révision au fond*), possibly also on the existence of reciprocity – all measured by the standards of the *lex fori*, – and ultimately on the absence of objections on local public policy grounds.

The absence of "free movement of judgments" is especially troublesome for multi-system, integrated entities, such as federations. The U.S. Constitution's "Full Faith and Credit Clause"[5] and the more recent jurisprudence of the Canadian Supreme Court[6] thus mandate interstate/interprovince recognition of judgments. This automatically eliminates reciprocity requirements. However, a review of the rendering court's jurisdiction and the fairness of its procedures is still permitted unless precluded because of the parties' participation in the first proceeding (*res judicata*). Or, put differently, these defenses are only available when the foreign judgment issued by default. The public policy defense generally is not available in respect of money judgments because of the *merger*-doctrine of the Common Law:[7] the judgment merges the underlying claim, only enforcement of the claim for money is now at issue, and that does not offend public policy. The defense is thus mainly relevant when the judgment seeks enforcement of a command or prohibition, e.g. of an injunction.

The Brussels Convention, now Regulation,[8] has been called Europe's "Full Faith and Credit Clause."[9] This understates. The European recognition command is *stronger* because it is combined with jurisdictional bases that must be observed by rendering courts with respect to EC defendants. Review of jurisdiction is excluded,[10] even for default judgments,[11] except with respect to limited categories of cases,[12] as is a *révision au fond*,[13] and reciprocity becomes irrelevant. What remains are the defenses for violation of procedural "due process" (in American terms) or of the recognizing state's public policy.

Public Policy and Procedural Due Process in EC Recognition Practice: The Defenses of Articles. 34(1) and 34(2)

Art. 34(2)[14] particularizes one public policy concern: one that may be said to be part of "procedural due process." The defendant must have received notice and documents about the impending proceeding in sufficient time to defend himself. This seems rather limited: what about other aspects of "due process," such as the fair conduct of the trial after proper service? Does Art. 34(2) embody, in a wider sense, the right to a fair trial, to "a day in court," as it is enshrined in the European Convention of Human Rights (ECHR) which, through Art. 6 of the Treaty of European Union (TEU), is now part of primary Community law? This question will be revisited below.

Seemingly, only limited room remains for the *general* public policy defense of Art. 34(1),[15] especially also because substantively wrong decisions of the rendering court, even with respect to Community law,[16] are excluded from the recognizing court's review. But judgments do not merge the underlying claim in civilian practice as they do in the Common Law.[17] The recognizing court thus sees for what the judgment stands and whether its recognition and enforcement would violate its public policy. Does this circumstance again enlarge the danger of non-recognition on public policy grounds?

"Public policy," as used in Art. 34(1) is itself subject to interpretation by the Court of Justice (ECJ) under Art. 234 of the Treaty on the European Community (TEC). It has been variously suggested that the term refers to *national* public policy, for which the ECJ defines limits,[18] or that the ECJ give a

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5 U.S. Const. Art. IV, Sec. 1.

6 *Morguard Investments v. De Savoye*, [1990] 3 S.C.R. 1077; *Saldanha v. Beals*, [2003] 3 S.C.R. 416, extending *Morguard* to foreign country judgments, subject to defenses.

7 See *Scoles/Hay/Borchers/Symeonides*, Conflict of Laws §§ 24.1-2, 24.3 n. 10 (4th ed. 2004). See also *infra* at n. 52.

8 Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I"), OJ 2001 L 012 at 1, as amended by Commission Regulation 1490/2002, [2002] OJ C. 225. References without further identification are to the Brussels-I Regulation.

9 Early contributions include: *Hay*, The Common Market Preliminary Draft Convention on the Recognition and Enforcements and Recognition of Judgments, 16 Am.J.Comp.L. 149 (1968); *Bartlett*, Full Faith and Credit Comes to the Common Market, 24 Int'l & Comp. L. Q. 44 (1975) (both with respect to the Brussels Convention).

10 The remedy against improper assertions of jurisdiction is appeal, including submission to the ECJ under Art. 234, not collateral attack in the recognition proceeding. Arts. 35(3), 41, 45(2). Adoption of this rule "belongs to the greatest achievements of European law of civil procedure." *Leipold*, Neue Erkenntnisse des EuGH und des BGH zum anerkennungsrechtlichen ordre public, *FS Stoll*, 625, 642 (2001) (author's transl.). Art. 35(3) forbids review of the rendering court's jurisdiction by indirection, viz. by invocation of the public policy-defense of Art. 34(1); for criticism of this rule and of a decision of the European Court confirming it (in *Kronbach*, *infra* n. 19), see *Piekenbrock*, Kann der Ausschluß des ordre public in Art. 28 Abs. 3 EuGVÜ ausnahmslos gelten?, [2000] IPRax 364.

11 *But see* BGH, 6 May 2004, IX ZB 43/03, *unalex* DE-38: when the foreign default judgment was allegedly procured by fraud (a violation of the forum's public policy under Art. 34(1)), the judgment debtor may also raise those defenses that could have been raised in the rendering court.

12 *E.g.*, with respect to consumer transactions: Arts. 15-17. See also Arts. 3-14 (insurance) and 32 (exclusive jurisdiction) in combination with Art. 35(1).

13 Arts. 36, 45(2).

14 Art. 34(2): "A judgment shall not be recognized: (…) (2) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defense, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; (…)".

15 Art. 34(1): "A judgment shall not be recognized: (1) if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought; (…)" As *Leipold*, *supra* n. 10, notes (at 635 *et seq.*), Art. 34(1) does not posit a "weaker" concept of public policy than presented by national law, *e.g.,* Art. 6 of the German EGBGB, put one of a more limited sphere of application.

16 *Martiny*, Die Zukunft des europäischen ordre public im Internationalen Privat- und Zivilverfahrensrecht, in: *Coester/Martiny/v. Sachsen Gessaphe* (eds.), Privatrecht in Europa – *FS Sonnenberger* 523, 537 (2004); *Leipold* , *supra* n. 10, at 634; ECJ 11 May 2000 – Case C-38/98 – *Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento*, [2000] ECR I-2973, at No. 32 *et seq*. = [2000/01] EuLF (E) 133. The rule is the same in the United States: litigation in the first forum precludes relitigation of the same issue in the second forum, even when the first forum allegedly failed in its constitutional obligation: *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939). See *Scoles/Hay/Borcher/Symeonides*, *supra* n. 7, §§ 24. 2 (at 1263-64), 24.29 (at 1304).

17 *Supra* at n. 8 and *infra* at n. 52.

18 See *Stürner*, Anerkennungsrechtlicher und europäischer Ordre Public als Schranke der Vollstreckbarerklärung – der Bundesgerichtshof und die Staatlichkeit in der Europäischen Union, in: *Canaris/Heldrich/Hopt/ Roxin/Schmidt/Widmaier* (eds.), 50 Jahre Bundesgerichtshof 677, 688 (2000). The provision refers to the public policy of "the Member State," but the term "public policy" itself requires interpretation.

Community-law content to the concept. The ECJ's *Krombach* decision[19] discussed at length the defendant's right to a fair trial (which the French court's refusal to allow a defense by counsel without personal physical appearance had not ensured). The Court invoked, inter alia, Art. 6 of the ECHR,[20] now part of primary Community law. The BGH, in response, based its decision of non-recognition on the German *ordre public*, of which Art. 6 ECHR is also part – both as Treaty law and now as Community law.[21] In what sense was Art. 34(1) used by the ECJ? In *Krombach* it made no difference because the standards were the same. If they were not, Community law would define limits to the refusal to follow the recognition command. It is another question whether a Community public policy standard requires a particular result in choice of law, for instance non-application of the otherwise applicable law in favor of another. If the reference, then, is primarily to national law, non-recognition is limited by still other factors: Community law provides some limits to party autonomy in choice of law (*e.g.*, for consumer transactions), thereby reducing the possibility of judgments violative of protective local public policy;[22] basic civil and human rights apply in all Member States as part of the ECHR, now also integrated into Community law; there is an emerging European system of values[23] and progressing harmonization of substantive and private international law.

National case law is testimony to the limited role of the public policy defense in recognition practice. The overwhelming majority of decisions reject the judgment debtor's defense, primarily because of failure to raise his procedural or substantive defenses in the rendering state.[24] That these cases arose in the first place probably resulted from the Brussels Convention's allocation of the lodging and hearing of defenses to the recognizing state's court of first instance.[25] Raising the public policy defense became an automatic response to the commencement of an enforcement procedure. With the Brussels I Regulation's allocation of this function to courts of appeal,[26] the volume of "test balloons" will diminish.

The few cases of non-recognition primarily involved clear-cut cases of Art. 34(2) violations.[27] Even here, some decisions are surprisingly restrained and forgiving, for instance, when the French Cour de Cassation thought that an opportunity, *after the fact*, to contest an English "freezing injunction" that had issued without notice or a hearing, was enough to satisfy the "procedural due process" requirement that underlies Art. 34(2).[28] *Schlosser* suggests that this decision may not comport with the ECJ's decision in *Denilauler*,[29] excluding provisional orders in non-adversary proceedings from the recognition command.[30]

In Article 34(1) cases, the courts are unanimous that a violation of the *ordre public* occurs only when *basic, essential* norms and values of the forum's legal system would be violated by the recognition of the foreign judgment. The German BGH stressed that the prohibition of a *révision au fond* of Art. 36 indeed requires such a narrow view of the public policy exception.[31] Thus, for instance, there is no violation when the foreign legal system does not provide for an appellate remedy,[32] when the money judgment (support) can be viewed independently from the status determination (parent of an illegitimate child),[33] when the foreign appellate procedures precluded the raising of issues that could have been raised in the court below,[34] or when the judgment was based on the exercise of exorbitant jurisdiction over a non-EU defendant,[35] even though such exercise is prescribed as against EU defendants. Public policy also did not preclude recognition when the defendant had received the documents initiating suit (thus satisfying Art. 34(2)), but had not defended, and then had not received any further notice about the progress of the case and of the default judgment subsequently

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19 ECJ 28 March 2000 – Case C-7/98 – *Krombach v. Bamberski*, , [2000] ECR I-1935 = [2000/01] EuLF (E) 129. For comment, see *Geimer*, in: [2000] ZIP 863, and *infra* following n. 21, and n. 43.

20 See also *Gundel*, Der einheitliche Grundrechtsraum Europa und seine Grenzen: Zur EMRK-konformen Interpretation des Ordre-public-Vorbehalts des EuGVÜ durch den EuGH, 10 EWS 442 (2000).

21 See *Geimer, supra* n. 19.

22 *Martiny*, *supra* n. 16, at 339.

23 *Leipold*, *supra* n. 10, at 645. The reference here is not to European Community Law, but rather to a common European law or European common law and, with it, to common notions of public policy. See also *Stürner*, *supra* n. 18, at 682 *et seq.; Heini*, Randfragen der Rechtsanwendung durch internationale Schiedsgerichte, *FS Stoll* 619, at 624 (2001).

24 *But see supra* n. 11.

25 See *Stadler,* Die Revision des Brüsseler und des Luganer Übereinkommens über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen, in *Gottwald* (ed.), Revision des EuGVÜ – Neues Schiedsverfahrensrecht 37, 43 *et seq.* (2000).

26 For references to approving and critical reactions in the literature, see *Martiny, supra* n. 16, at 529 n. 35. The automatic mechanism of the European Enforcement Order Regulation ([2004] OJ L 143 at 15) will further limit the debtor's ability to pursue remedies or to raise defenses in the state of enforcement. As *Geimer* notes (Internationales Prozessrecht No. 3182 (5th ed. 2005)), the new mechanism may, for practical purposes, widen the jurisdiction of the state of rendition by providing a strong incentive (at the risk of preclusion upon default) for the defendant to appear in the proceeding in the first state and to pursue his remedies there.

27 E.g., *Maronier v. Larmer*, 29 June 2002, A2/2001/1263 (C.A., Civil Div., England and Wales, *unalex* UK-10 (no sufficient notice); OLG Köln , 12 April 1989, 13 W 73/88, *unalex* DE-358 (substituted service by means of *remise au parquet* insuffient).

28 Cour de Cassation, 30 June 2004, 01-03248 & 01-15452, *unalex* FR-66.

29 ECJ 21 May 1980 – Case 125/79 – *Denilauler v. SNC Couchet Frères*, [1980] ECR 1553. See also next n.

30 *Schlosser*, Anerkennung und Vollstreckbarerklärung englischer „freezing injunctions," [2006] IPRax 300, 305.

The German BGH followed *Denilauler* in its decision of 21 December 2006, XI ZB 150/05, 7 = [2007] EuLF I-98 and II-55.For the view that the ECJ should reconsider *Denilauler* because of that decision's effect of limiting the efficacy and value of measures of provisional relief, see the annotation by *Simons/Calabresi-Scholz* = [2007] EuLF I-98, at 99 and II-57, at 58.

31 BGH, 23 June 2005, IX ZB 64/04, (*unalex* DE-317). Other illustrative decisions are: BGH, 6 October 2005, IX ZB 360/02, = [2005] EuLF I-220, II-148, *unalex* DE-472; Italian Corte di Cassazione, 18 May 1995, -5451, *unalex* IT-81; same, 3 March 1999, - 1769, *unalex* IT-103; OLG Dresden, 7 July 2004, 3 W 0745/04, *unalex* DE-464. As *Stürner* notes, *supra* n. 18, at 688-89: "In the context of an ordre public review, there is ultimately always a *révision au fond*. But its objective is not review for substantive legality (Art. 34, para. 3, Brussels Convention) but the determination whether the national ordre public has been impaired. Such an impairment will be tolerable when the law underlying the foreign decision conforms to EU law." (Author's transl.).

32 Cour de Cassation (FR), 17 January 2006, – 03-14483 = [2006] EuLF I-155, II-91, *unalex* FR-320.

33 Cour de Cassation (FR), 7 June 1995, -93-18360, *unalex* FR-158.

34 Cour de Cassation (FR), 20 November 1979, -78-15437, *unalex* FR-105.

35 OLG Köln, 12 January 2004, 16 W 20/03, *unalex* DE-470.

entered against him.[36] These decisions take Art. 34(2) literally: when the "due process" requirement established by it has been satisfied at the beginning of the suit, the burden to inform himself shifts to the defendant.

The foreign judgment must enable the recognizing court to determine, within the limits of the forbidden substantive review, whether the judgment comports with the requirements of the Regulation. If it was entered without any statement of reasons, public policy concerns may preclude its recognition.[37] But documents will suffice from which the reasons for the decision can be determined.[38]

Recognition will be *denied* when the foreign judgment touches upon the sovereign functions of the recognizing state. This is the case when recognition would enforce foreign criminal sanctions[39] or when an antisuit injunction is sought to preclude the recognizing court's exercise of jurisdiction.[40] In connection with antisuit injunctions the question arises how the rendering court can give them efficacy (in addition to holding the offending party in contempt)? The answer of the English Court of Appeal was to deny recognition, on public policy grounds, to the foreign judgment that had been obtained in violation of its antisuit injunction.[41] Here, the foreign judgment did not seek to limit English jurisdiction (such as when an injunction had been directed against England) nor was there anything else wrong with the judgment within the meaning of the (then) Brussels Convention. Non-recognition sanctioned the non-complying party in ways not provided for by the Convention. Query whether recognition would have constituted an unacceptable result, incompatible with basic legal values of the English forum, to paraphrase the standard now adopted by most courts? Nor does the preference to be given a forum judgment over an inconsistent foreign judgment, whether earlier or later, provided for by (now) Art. 34(3), cover this case: the provisions of Art. 34(3) and (4) address inconsistent judgments *on the merits.* Arguably, the decision therefore did not conform to the recognition command of the (then) Convention. The aggrieved party should have been left more appropriately to private remedies for damages.

Providing "Procedural Due Process" Beyond Art. 34(2)

There are situations, and cases, that straddle the ambits of Art. 34 No. 1 and No. 2. To illustrate: The German Court of Appeal of Zweibrücken based a decision in 2005 on both, Article 34(2) and 34(1).[42] The documents commencing suit had not been served in time to permit a defense and the judgment debtor did not in fact have knowledge of the Dutch proceeding until served with the enforcement order. This lack of notice calls for non-recognition of the judgment pursuant to Art. 34(2) (recognized as early as *Krombach*[43]), but subject to the condition that the party did not pursue a remedy against the default judgment that was still available in the state of rendition. Such an opportunity may or may not have existed, but even if it had – the Court concluded – the result would be the same In these circumstances, Art. 34(1) would call for non-recognition because to require the judgment debtor to pursue "remedies or an interlocutory order" at this late stage (after issuance of the enforcement order) would constitute a "manifest violation" [*offensichtliche Verletzung*] of an essential legal principle of the recognizing state.[44] The conflicting norms are Art. 103, para. 1 of the German Constitution (*Grundgesetz* – GG) and Art. 6 of the EHRC: on the basis of the latter, the Court derived the "general principle of Community law" ([*den*] *allgemeinen gemeinschaftsrechtlichen Grundsatz*) that everyone has a right to a fair procedure.[45]

If, as the Court had assumed, the enforcement order had in fact reached the debtor so late that time limits for the pursuit of remedies had meanwhile expired, non-recognition would indeed follow from Art. 34(2) and the "general principle" of a right to be heard. The extension of the principle – through resort to Art. 34(1) – to encompass cases in which the pursuit of an existing remedy involves procedural hardship is not as clear as the Court presents it. There may well be a violation of the *German* ordre public, but the question is whether there is indeed a *Community law standard* identical with it, as the Court asserts, or, if not, whether the German standard falls within the *limits set by Community law* (an approach that comports with a more limited reading of the ECJ's approach in *Krombach*).

As presently framed, Art. 34(2) is the only guarantor of a "procedural due process right." It is surely correct that procedural due process protection must be more far-reaching than that, in particular that there must be safeguards for a fair trial

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[36] OLG Köln, 12 January 2004, 16 W 20/03, *unalex* DE-470; OLG Frankfurt, 16 December 2004, 20 W 507/04, *unalex* DE-451. This result seems harsh, even if analytically correct, when applied to claims subsequently added to the prayer for relief without additional notice of this fact to the defendant. Similarly: *Stürner*, *supra* n. 18, at 687. *Stürner* also seems to suggest that the defendant might be precluded anyway if American rules of claim preclusion were to apply. *Id.*, at 682. This suggestion, however, makes assumptions about the applicable rules of *res judicata* which may not hold true.

[37] Cour d'Appel Colmar, 19 October 2006, 2A 05/01147, *unalex* FR-409.

[38] Cour de Cassation (FR), 20 September 2006, *unalex* 04-11635; Cour d'Appel Colmar, 28 April 2005, 2 A 04/02368, *unalex* FR-393.

[39] See Cour d'Appel Colmar, 13 May 2005, -03/03276, *unalex* FR-352 (Lugano Convention). This notion has venerable roots: "The courts of no country execute the penal laws of another." *The Antelope*, 23 U.S. (10 Wheat.) 66, 123, 6 L.Ed. 268 (1825) (Marshall, C.J.).

[40] *See* Cour de Cassation (FR), 30 June 2006, -01-03248 & 01-15452, *unalex* FR-66 (*obiter*).

[41] *Phillip Alexander Securities and Futures Ltd. v. Bamberger*, Court of Appeal (Civil Division), 12 July 1996, *unalex* UK-129.

In 2007, the House of Lords referred the preliminary question to the ECJ whether "it is consistent with the Brussels I Regulation for the court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement." *West Tankers Inc. v. RAS Riunione Adriatica di Sicurta SpA and others,* [2007] UKHL 4 = [2007] EuLF I-24. If the ECJ should answer in the negative, antisuit injunctions should not issue in the first place and, if they had issued anyway, would therefore not justify denial of recognition of an ensuing foreign judgment. In contrast, should antisuit injunctions be consistent with Brussels-I, the question becomes the one addressed in the text: what is the appropriate remedy if the injunction was ignored and a foreign judgment was obtained?

[42] OLG Zweibrücken, 10 May 2005, 3 W 165/04, [2005] IPRspr. No. 151, 409; [2005] RIW 779; [2006] IPRax 487. Noted with approval by *Roth*, Illusion und Realität im europäischen Zivilprozessrecht, [2006] IPRax 466.

[43] *Supra* n. 19.

[44] *Id.*, at para. 26.

[45] *Id.*, at para. 28.

(under penalty of non-recognition of an ensuing judgment) after its commencement, not just notice at its beginning. Even the requirement for initial notice cannot be applied literally in all cases, as the circumstances of the case and the reasoning of the Court in the *Zweibrücken* decision illustrate. However, a broadening of Art. 34(2) safeguards through assertions of non-uniform *national* ordre public notions under Art. 34(1) seems problematical. Given the express (and limiting) language of Art. 34(2),[46] it is Art. 34(1) itself that must be the source of broader procedural due process of rights[47] (of which Art. 34(2) is then but one express application). The definition of safeguards – *i.e.*, the content of the *right to be heard* for purposes of Brussels-I recognition law – must ultimately come from the ECJ as the result of a reference to it under Art. 234 TEC.

English Judgments Awarding or Recognizing Punitive Damages or Contingent Fees

English law and practice do not share the Continent's aversion to exemplary or punitive damages, at least not to the same extent. An English judgment may therefore award exemplary or "aggravated" damages (under English[48] or third-country law) against an EC (or, for that matter, a non-EC) defendant or recognize, in England, a third-country judgment awarding such damages. May it be refused recognition in another Member State for purposes of enforcement against the defendant's assets there? The same questions arise, to give another illustration, with respect to "contingent" or "conditional" fees, recognized in American and English law, but rejected in Continental systems.[49]

As to the second case – prior recognition of an American judgment with a punitive damage award in England –, *Kegel's* famous statement "*exequatur sur exequatur ne vaut*"[50] speaks from the Continental perspective: an exequatur authorizes, by means of an order, the enforcement of the *foreign* judgment; it does not transform the foreign judgment into a domestic one or substitute a domestic one for it. When enforcement of the exequatur is sought in another EC state, it is therefore not a case of *judgment recognition*. A new exequatur must be sought for the original foreign judgment.

In the Common Law, a foreign judgment originally was not enforced by exequatur. It represented a *claim* upon which (assuming no defenses relating to the original court's jurisdiction, the conduct of the case, and so forth) a *domestic judgment* was issued.

English practice[51] has been modified. It provides, by statute, for the registration of Commonwealth judgments and of those of designated foreign nations. A registered judgment can be enforced like an English judgment – registration thus is still not quite the equivalent of a Continental exequatur.

A judgment not entitled to registration continues to be recognized and enforced according to the Common Law method. American judgments are not entitled to registration, their recognition in England thus is by suit on the judgment. English recognition of an American judgment thus is not a Continental-type exequatur but a *judgment* and as such should be entitled to recognition in other EC Member States under Brussels I. May recognition be denied because the original judgment, underlying the English judgment, contained punitive damages as part of its award and would not have been recognized directly in the forum because violative of its public policy?

In this connection, another Common Law concept becomes important – the *merger* doctrine.

A money judgment *merges* the claim – the claim is "gone," only the money judgment remains.[52] Since an award of money as such is not offensive, judgments have been recognized – where there was a command in favor of recognition, as in the United States – when money had been awarded in the first state in violation of a legal prohibition of the recognizing state.[53] A command to recognize of course also exists under Brussels I. Will the *merger* doctrine, which merges the claim, represented by a hypothetical American judgment, in the English judgment, remove any objections to any punitive-damage or contingent-fee portions of the underlying American judgment/claim? Would not consideration of the *elements* of the (new) English judgment and, with it, the disregard of the merger doctrine that characterizes Anglo-American judgments thinking be a forbidden *révision au fond*? Where is the line between permissible and impermissible review?

The question is much the same in the first case – the entry of an original English judgment – when the element considered offensive by the recognizing state was part of the original claim (*e.g.*, a conditional fee) that is now merged in the judgment, as distinguished from an award of exemplary damages by the court as an addition to the compensatory damages that constituted the claim.

In the work on the Rome II Regulation[54] there was an effort, ultimately not successful, to declare punitive damages to be against *Community* public policy. The Regulation's Introductory Recital 32 now acknowledges the aversion of many states against punitive damages and expressly authorizes the refusal to award them under the law otherwise applicable law under the Regulation. The Recital thus interprets Rome II's general public policy provision (Art. 26) and thereby assuages doubts as to whether punitive damages sufficiently impinge upon basic legal values to justify resort to Art. 26. Nothing similar exists in the (much earlier) Brussels-I framework.

If punitive damage rules of the otherwise applicable law may

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46 Reproduced in n. 14, *supra.*

47 Accord: *Roth*, *supra* n. 42.

48 See *Rookes v. Barnard*, [1964] 1 All E.R. 367 (H.L.).

49 See *Pisani*, Grenzen des anerkennungsrechtlichen *ordre-public*-Vorbehalts im EuGVÜ am Beispiel englischer *conditional fee agreements*, [2001] IPRax 293, particularly with respect to English and German law. For American law, see the brief description in *Hay*, Law of the United States No. 155 (2nd ed. 2005).

50 *FS für Müller-Freienfels* 314 (1986).

51 See *Scoles/Hay/Borchers/Symeonides*, *supra* n. 7, § 24.38; *Bunge,* Zivilprozess und Zwangsvollstreckung in England und Schottland 43 *et seq*. (2nd ed. 2005),

52 *See Scoles/Hay/Borchers/Symeonides, supra* n. 7, §§ 24.1, 24. 3; *Hay, supra* n. 49, No. 213.

53 See, *e.g., Fauntleroy v. Lum,* 210 U.S. 230 (1908).

54 *Supra n.* 4.

be disregarded on public policy grounds, it should not matter that punitive damages present themselves in the form of a judgment. Nor should it matter whether the judgment merges the underlying claim or considers it to be independent from the resultant judgment. And, finally, it should also make no difference whether the punitive damage award – in the initial illustrations – is part of an English judgment on an original cause of action or of a claim for the recognition of an American judgment. In all cases, it is not the English judgment (or its preclusive effects for English purposes) that is under review or drawn into question: it is the *effect* of its recognition on the essential values of the recognizing court's legal system:[55] and that system rejects punitive damages, as shown by the approach to them in choice of law.[56]

Is the Public Policy-Exception Dispensable?

It has been urged to abandon the public policy exception because unnecessary in view of converging European values.[57] Its abandonment within the CIS-States on the basis of the 1992 Kiev Agreement is cited as an example.[58] Indeed, as experience with the Brussels Convention and Regulation has shown, the public policy of the recognizing state has been successfully invoked in only a handful of cases to-date and litigation involving it, successful or unsuccessful, will decrease with the shift of review from the trial to the appellate level.

But non-use or non-applicability (as also in the United States) does not necessarily require abandonment – just to clean up the document, as it were. Infringement of sovereign functions of the recognizing state remain thinkable and a few borderline areas remain, in which there are still strongly held differences among member states. Punitive damages are one example, an award of contingent fees is another. Moreover, the convergence of national values and the emergence of commonly held European values, noted earlier,[59] must also be seen in the context of a larger and growing Community. To have the public policy defense on the books, assuming its continued narrow interpretation by national courts, thus continues to seem useful.

[55] See *Stürner*, *supra* n. 18.

[56] See, *e.g.*, Art. 40(3) EGBGB (German Conflicts Statute).

It is another question whether punitive damages should be rejected in all circumstances because, by definition, non-compensatory and because punishment and deterrence are inappropriate in the context of private litigation, but should remain the province of the criminal law system. As *Stürner* shows, *supra* n. 18, at 679 with further references, German courts have resorted to notions of exemplary damages to achieve deterrence or disgorgement of gains, for instance in the context of media delicts. See also *Hay*, Entschädigung und andere Zwecke, *FS Stoll* 521 (2001).

[57] See *R. Wagner*, Vom Brüsseler Übereinkommen über die Brüssel I-Verordnung zum Europäischen Vollstreckungstitel, [2002] IPRax 75, 89 *et seq.*, with references; *Martiny, supra* n. 16, at 541 *et seq.*

[58] *Laptew*, Abschaffung der anerkennungsrechtlichen Ordre public-Kontrolle in Osteuropa: Vorbild für die EU?, [2004] IPRax 495.

[59] See *supra* at n. 23.

PRIVATE INTERNATIONAL LAW AND INTERNATIONAL CIVIL PROCEDURE

Civil Procedure

OGH (AT) 23 October 2007 – 3 Ob 178/07h
Brussels I Regulation Article 1(1) – Legal title under private law created by an administrative court – Declaration of enforceability – Legal nature of a claim for reimbursement of costs

Article 1(1) Brussels I Regulation encompasses all claims under private law. The judicial organisation is thereby irrelevant. Also legal titles under private law created by an administrative court are enforceable according to the Brussels I Regulation. (*Headnote of the Court*)

For the full text of the decision, please refer to section II of this issue, at 129.

BGH (DE) 17 October 2007 – XII ZR 146/05
Brussels I Regulation Article 5(2) – The concept of "matters relating to maintenance" – Autonomous interpretation – Compensation of tax disadvantages – Limited real income splitting according to German tax law

The concept of "matters relating to maintenance" within Article 5(2) Brussels I Regulation has to be interpreted in an autonomous way.

An action by a person entitled to maintenance against his or her divorced or permanently separated spouse for the compensation of disadvantages incurred due to a limited real income splitting according to German tax law is a matter relating to maintenance within the meaning of this provision. (*Headnotes of the Court*)