Essays in Honour of Michael Bogdan

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Swedish Supreme Court announced in 1991 (NJA 1991 p. 21). In this case, a married couple of Moroccan origin, habitually resident in Sweden, applied for permission to adopt a child that they had under kafala care. The husband had dual citizenship (Swedish and Moroccan) and the wife was a Moroccan citizen. The kafala care, which the Swedish Supreme Court qualified as "custody in accordance with Moroccan customary law" without using the term kafala, had been registered in the Moroccan judicial system. This definition seems surprising considering that at the time, Sweden had ratified the UN Convention on the Rights of the Child that explicitly mentions care under kafala.

The case concerned the application of the Swedish Law (no. 1971:796) on International Legal Regulations Concerning Adoption (LIA). An application for permission to adopt, according to LIA, is governed by Swedish law (§ 2). However, if the child's country of origin does not authorise adoption (which is the case in Morocco), the court must determine whether an authorisation to adopt will result in significant harm to the child in the child's country of origin. According to the Supreme Court, because the child was firmly integrated into the applicant's family, an authorisation to adopt was not to be seen as rendering such harm to the child. The Supreme Court did not determine the status of kafala under Swedish law. However, the Court did not reject the kafala entrustment. On the contrary, kafala was regarded as a foundation for integrating the child into the family of the applicants.

The 1996 Haag Convention has dramatically changed the legal situation in Sweden with regard to kafala. The Convention provides for the recognition of kafala entrustment emerging from a Contracting State. In these cases, Sweden is obliged to recognise a kafala care arrangement as a measure of parental responsibility. On the other hand, the 1996 Haag Convention does not regulate whether a kafala placement may be followed by an adoption in Sweden. That question needs to be analysed as an application for permission to adopt, governed by the general rules in LIA. Swedish law lacks rules and decisions on the impact of a kafala care arrangement outside the scope of 1996 Haag Convention, for example in immigration cases invoked by kafala as a foundation for family reunification.[42]

[42] In immigration cases it is uncertain whether kafala constitutes the type of required relationship; see, among other cases, Case no. UM 7119-08, The Administrative Court of Stockholm (Migration Court).

Fraude à la loi and European Private International Law

1. Problem

In the winter term of 1956/57 I attended the lectures of Leo Raape (1878-1964) on private international law at the University of Hamburg.[1] I was shocked to learn that in international cases, parties to a contract may avoid German mandatory rules by a choosing foreign law as the applicable law, and that the plaintiff may shop for a forum and select the one best suited for his claim. Meanwhile, Michael Bogdan and I have to teach students these "shocking" facts and to convince them that local law is only one system of law among other systems, and that international cases are governed by special rules called conflict-of-law rules.

In the late 1950s Leo Raape also struggled with *fraude à la loi* in private international law and finally accepted the prohibition on evading the governing law by fixing some artificial facts and circumstance.[2] *Ordre public*, as he admitted, is not enough because foreign law may also be evaded, and such a manoeuvre is not covered by the public-policy clause.[3] Today, more than fifty years later, the problem has to be solved as to whether a special provision on *fraude à la loi* should be included into the general part of a future European Code of Private International Law.

2. Existing codifications with provisions on prohibition of *fraude à la loi*

Most codifications do not provide for the prohibition of *fraude à la loi*. They seem to be satisfied with a general clause on public policy. However, there are exceptions.

[1] Gerhard Kegel, "Leo Raape und das IPR der Gegenwart": RabelsZ 30 (1966) 1 – 16.

[2] Leo Raape, *Internationales Privatrecht*, 4th ed. Berlin and Frankfurt/Main 1955, 123 et seq.; the same 5th ed. 1961, 127 et seq.

[3] Raape, *supra* N. 2, 126 and (5th ed.) 132. Different from Raape (3d ed. 1950) 86 et seq., 90.

2.1 National codifications

National codifications of private international law may have general clauses on *fraude à la loi* or special ones for specific cases only.

a) General clauses

Very few national codes on private international law deal with *fraude à la loi* in a general clause of its prohibition. The most recent example is Article 18 of the Belgian *Code de droit international privé* of 2004. This article reads:

> Pour la determination du droit applicable en une matière où les personnes ne disposent pas librement de leurs droits, il n'est pas tenu compte des faits et des actes constitués dans le seul but d'échapper à l'application du droit désigné par la présente loi.

This clause deals with *every* evasion of law and not only the evasion of *local* law, as did the French proposal of 1951 for a statute of private international law.[4] This proposal never became law. Article 25 of the proposal provided the following text:

> Nul ne peut se prévaloir d'une situation juridique créée en application d'une loi étrangère qui n'a été rendue compétente que par une fraude à la loi française.

Other statutory provisions are contained in some statutes of Africa, Asia and Latin America. Some of them deal with the evasion of local law[5], but other countries prohibit the evasion of every law, also that of a foreign state.[6]

It is interesting to note that most modern codifications of private international law mention only public policy, and do not deal with *fraude à la loi*, for example:

[4] "Projet de loi relative au droit international privé adopté par la Commission plénière", in: *Travaux de la Commission de réforme du Code civil, Année 1949-1950*. Paris 1951, 801 et seq.; also in: Alexander N. Makarov, *Quellen des Internationalen Privatrechts*, 2nd ed. Berlin/Tübingen 1953, Volume I, France (métropolitaine) p. 13 et seq. – As to this project, see: Alexander N. Makarov, "Der allgemeine Teil des internationalen Privatrechts im Entwurf des neuen französischen Kodifikationswerkes", in: *Festschrift für Martin Wolff*, Tübingen 1952, 247-269 (259 -260).

[5] Congo-Brazzaville: Art. 829 Code de la famille; Mexico: Art. 15 No. 1 Código civil; Nicaragua: Art. VI No. 22 Código civil; Togo: Art. 725 Code de la famille. All provisions are reproduced in: Jan Kropholler/Hilmar Krüger/Wolfgang Riering/Jürgen Samtleben/Kurt Siehr, *Außereuropäische IPR-Gesetze*, Hamburg/Würzburg 1999. Macao: Art. 19 Código civil de Macao, *Yearbook of PIL II (2000)* 389 et seq.

[6] Angola: Art. 21 Código civil; Burkina Faso: Art. 1011 Code des personnes et de la famille; Mozambique: Art. 21 Código civil; Tunisia: Art. 30 Code de droit international privé; Uzbekistan: Art. 1162 Civil code. All these provisions are reproduced in: Kropholler/Krüger/Riering/Samtleben/Siehr, last note.

the Netherlands: Codification of 2011; Poland: Statute of 2011; China: Statute of 2010; Turkey: Statute of 2007; Japan: Horei of 2006; Bulgaria: Statute of 2005, Estonia: Statute of 2002; Slovenia: Statute of 1999; Venezuela: Statute of 1998; Principality of Liechtenstein: Statute of 1996; Italy: Statute of 1995; Rumania: Statute of 1992; and Quebec: Codification of 1991.

b) Special clauses

A typical special clause for the prohibition of evasion of law is Article 45 (2) of the Swiss Statute of Private International Law of 1987/1998:

> Sind Braut oder Bräutigam Schweizer Bürger oder haben beide Wohnsitz in der Schweiz, so wird die im Ausland geschlossene Ehe anerkannt, wenn der Abschluss nicht in der offenbaren Absicht ins Ausland verlegt worden ist, die Vorschriften des schweizerischen Rechts über die Ehegültigkeit zu umgehen.

This provision has at least three particularities: (1) it is unilateral as far as it concerns only evasion of local law; (2) it is limited to marriage of persons with close connections to local (Swiss) law; and (3) it is of very restrictive application because it does not concern homosexual marriages as, according to Article 45 (3) of the Swiss PIL Statute, these marriages (celebrated e.g. in Belgium or the Netherlands) are recognised in Switzerland as registered partnerships only.

In matrimonial property law and the law of succession, evasion of the *lex successionis* by shifting property to countries where the *lex rei sitae* applies is prevented by correctly adding the value of this property located abroad to the value of all matrimonial property to be equalised or of the entire estate to be distributed.[7]

2.2 International conventions

There is no convention in which a general clause of *fraude à la loi* has been stipulated and applied in practice. But there are international conventions which deal with some sort of evasion of law. Such a convention is the 1980 Hague Convention on Civil Aspects of International Child Abduction.[8] This convention is designed to prevent application of the law of the country of origin by moving the child to another country in which custody may be awarded to

[7] Kurt Siehr, "Vermögensstatut und Geldausgleich im IPR", in: *Balancing of Interests. Liber Amicorum Peter Hay*, Frankfurt/Main 2005, 389-401.

[8] Hague Conference on Private International Law (ed.), Recueil des Conventions, Collection of Conventions (1951-2009), The Hague 2009, No. 28.

the abducting parent. This aim is reinforced by the Brussels II – Regulation of the European Union.[9]

The reason for this reluctance may have been the reluctance to add another general clause which may lead to uncertainty and discretion in uniform application of European law.

2.3 European directives and regulations

a) Directives

Several directives on European consumer law provide that the parties cannot escape the application of European consumer protection by choosing the law of a third state as the applicable law.[10] One example may be mentioned. Article 6 (2) of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts[11] provides as follows:

> Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.

This and similar provisions in other directives have three features in common. (1) The law of a third country (not being a Member State) has been chosen by the parties. (2) The law chosen is less protective than the minimum standard of European consumer law.[12] (3) The contract must have a close connection with the territory of a Member State.[13] This sort of "European public policy" is not limited to the violation of the *lex fori*, but is extended to the law of every Member State which may be applicable without the choice by the parties.

b) Regulations

No European regulation provides a general clause on *fraude à la loi*. However, there are different devices to fight such behaviour. Article 3 (3) and (4) of Rome I – Regulation reads:

[9] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ EU of 23 December 2003, No L 338, p. 1.

[10] These provisions are enumerated in Article 45b EGBGB; see: Erik Jayme /Rainer Hausmann (eds.), *Internationales Privat- und Verfahrensrecht Textausgabe*, 16th ed. Munich 2012, No. 1, p. 38.

[11] OJ EEC of 21 April 1993, No. L 095, p. 29.

[12] This protection is limited to consumer law of the respective directive.

[13] The "close connection" is defined by Article 46b § 2 and § 4 EGBGB.

> (3) Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.
>
> (4) Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

Article 3 (3) of the Rome I Regulation deals with local contracts (not international contracts) and limits a choice-of-law clause (*kollisionsrechtliche Rechtswahl;* Partei*autonomie*) to a simple contract which cannot derogate from mandatory rules of private law (*sachrechtliche* Privat*autonomie*). Article 3 (4) of the Rome I Regulation is the expression of a "European public policy" already mentioned (*supra* II 3 a) and refers to basic principles of Community law from which derogation is not allowed, even in international contracts with the choice of the law of a non-Member State.

The other special provision eliminating the evasion of law is found in the Brussels II Regulation. In child abduction cases, the abducted child should be returned as quickly as possible, but under the 1980 Hague Abduction Convention the country to which the child has been abducted has the last word in the matter. If this country declines to order the return of the child, it may start custody proceedings and award custody to the abducting parent. This is different in the European Union. If a child has been abducted within the European Union, the court decisions of the Member State from which the child has been abducted must be recognised and enforced in the Member State to which the child has been abducted according to Articles 11 (8), 40 (1) (b) and 42 of the Brussels II Regulation. The Member State of origin has the last word.

A general clause prohibiting *fraude à la loi* has been avoided so far. The European legislator must have been afraid of instituting another clause giving wide discretion to courts.[14]

[14] This has already been articulated by Werner Niederer, "Das Gesellschaftsrecht", in Max Gutzwiller/Werner Niederer, *Beiträge zum Haager Internationalprivatrecht 1951*, Fribourg 1953, 105-190 (127/28).

3. Case law

In order to evaluate all these statutory provisions, a look at certain cases of alleged *fraude à la loi* should be considered. Two types of cases can be distinguished: cases without and with forum shopping.

3.1 Cases without forum shopping

a) Contract law

Holidays may be relaxing for the physical body; however, they can certainly have a weakening effect on the brains of some vacationing people. These people gather in foreign countries, in resorts reserved for foreigners, and forget that they are guests in the host country. There they conclude contracts and acquire objects they really do not need. At home, in cooler regions, they regret their contracts concluded abroad and want to rescind them. Naïve as they are, they assume that the law of their home country governs the matter, and are disappointed when they learn that foreign law is applicable. They then accuse the plaintiff of evading the law by having inserted into the contract a choice-of-law clause providing the application of foreign law. In the past these choice-of-law clauses have been upheld by the courts[15], and today the consumer is protected either by Article 6 (2) of the Rome I Regulation, by Articles 6 (3) and 3 (4) of the Rome I Regulation or by national law of a Member State which has implemented European directives.

Here is one example taken from German jurisdiction.[16] A German party, who was on vacation in the Spanish Canary Islands, was contacted by a person who was selling rights for use of immovable property on a timeshare basis. The German party got an offer for a timeshare contract with respect to immovable property in the Canaries, made an advance payment and promised to pay the rest when back at home in Germany. When he got the bill from the seller, a company on the Isle of Man, he refused to pay, and withdrew his acceptance or cancelled the contract governed by the law of the Isle of Man, which is not bound by European private law. Today this case would be solved as follows:

– The buyer is a consumer habitually resident in Germany, a Member State of the EU.

– However, the contract is not governed by Article 6 (1) and (2) of the Rome I Regulation, because Article 6 (4) (c) of the Rome I Regulation expressly excludes contracts relating to the right to use immovable properties on a timeshare basis from Article 6 (1) and (2) of the Rome I Regulation.

– Article 6 (3) of the Rome I Regulation refers to Articles 3 and 4 of the Rome I Regulation.

– According to Article 4 (1) (c) or (3) of the Rome I Regulation (depending on the type of contract), the contract is likely to be governed by the Spanish *lex rei sitae* unless the applicable law has been chosen by the parties.

– The parties stipulated a choice-of-law clause and chose, according to Article 3 (1) of the Rome I Regulation, the law on the Isle of Man as governing the contract. The Isle of Man, as an internally self-governing dependent territory of the British Crown, is not part of the EU.

– This choice-of-law clause is valid and not restricted according to Article 3 (3) or (4) of the Rome I Regulation, because not "all other elements relevant to the situation at the time of choice are located in one or more Member States". The seller as the characteristically performing party is established outside the EU. Therefore, the buyer is not protected by European private law as provided by the implementation of the Timeshare Directive,[17] especially not by rights to withdraw the contract.

– There are no overriding mandatory provisions of the German forum to be applied under Article 9 (2) of the Rome I Regulation and no such provision of the law of the country where the obligations arising out of the contract have to be performed [Article 9 (3) of the Rome I Regulation]. The rights given to the buyer under the Timeshare Directive are not overriding mandatory provisions of German law.

– Finally, there is no violation of public policy (Article 21 of the Rome I Regulation).

There is no room for *fraude à la loi* in contract law.[18] The law may be chosen, but there are certain limits. Apart from Articles 9 and 21 of the Rome I Regulation, in a purely local contract the parties cannot eliminate local mandatory law by choosing foreign law as applicable law [Article 3 (3) of the Rome I Regulation] and in a purely "European" contract (all elements are located in the EU) parties cannot eliminate European law by choosing the law of a third state as law governing [Article 3 (4) of the Rome I Regulation].

[15] OLG Hamm 1.12.1988, IPRax 1990, 242 with note by Heinz-Peter Mansel at p. 220 = IPRspr. 1988 No. 21b; LG Stade 19.4.1989, IPRspr. 1989 No. 39; LG Koblenz 13.6.1989, IPRspr. 1989 No. 43;

[16] BGH 19.3.1997, BGHZ 135, 124 = IPRspr. 1997 No. 34; OLG Celle 26.7.2001, IPRspr. 2001 N. 31.

[17] Directive 2008/122/EC of the European Parliament and the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, OJ EU of 3 February 2009, No. L, p. 33.

[18] More generally for any choice of law, Kathrin Kroll-Ludwigs, *Die Rolle der Parteiautonomie im europäischen Kollisionsrecht*, Tübingen 2013, 522 et seq,

b) Family law

The classical case of *fraude à la loi* in divorce cases is the case of De Ferrari c. Dame de Ferrari.[19] A French woman, Ms. Gensoul, married an Italian gentleman, Mr. De Ferrari, in 1893. As a result of this this marriage, Mrs. De Ferrari lost her French nationality and became Italian. Six years later, in 1899, the *Tribunale di Genova* recognised and certified (by *omologazione*) that the spouses De Ferrari separated by consensus (Article 158 *Codice civile*) and that they were allowed to live apart from each other. Mrs. De Ferrari returned to France and recovered her French nationality by a decree of the French President according to Article 18 of the *Code civil*. In 1916 Mrs. De Ferrari made use of Article 14 of the *Code civil* and brought a lawsuit against her husband and requested conversion of the separation into a divorce according to Article 310 of the *Code civil*, version of 1908. The *Tribunal civil de Lyon* and the *Cour d'appel de Lyon* converted the separation into a divorce,[20] and the *Cour de cassation* refused to do it. Article 310 of the *Code civil* applies only if there has been a *contentious* separation because of marital misbehaviour. This kind of separation cannot be substituted with a foreign separation by *consent*. This decision is also important, not because the *lex fori* has been avoided, but because *foreign* law governing the marriage had to be evaded.

c) Succession law

Already very early in the 19th century parties tried to "play *piano, pianissimo*" on the instrument of private international law. One of the first recorded cases was decided by the Court of Appeal of Genua in 1896.[21] An Italian citizen became an Austrian one, thereby losing his Italian citizenship, and according to his will and testament, he left his estate to the charitable institution *Beneficenza di Trieste* and not to his *natural* children, who had rights to a legitimate portion under Italian law (Article 743 *Codice civile* 1865), but no inheritance rights under Austrian law (§ 730 *ABGB* 1811). The naturalisation was held to be a *fraude à la loi*; the naturalisation was not recognised and the children of the deceased were protected. All scholars annotating this decision correctly

[19] Cass. 6.7.1922, Revue de droit international privé 18 (1922/23) 444 with note by Antoine Pillet = Clunet 49 (1922) 714 and André Morillot, *De la conversion en divorce d'un régime de separation de corps consensuel établi à étranger* 545-548 = Recueil Sirey 1923, I, 5 with note by Ch. Lyon-Caen = Bertrand Ancel/Yves Lequette, *Les grands arrêts de la jurisprudence française de droit international privé*, 5th ed. Paris 2006, No. 12.

[20] Tribunal civil de Lyon 29.7.1916 and Cour d'appel de Lyon 26.6.1917, *Revue de droit international privé* 18 (1922/23) 444 and 448.

[21] Corte d'appello di Genova 15.6.1896, Foro italiano 1896, I, 760 with note by V. Capellini = *Giurisprudenza italiana* 1896, I, 2, 805 with note by Carlo Francesco Gabba = Clunet 25 (1898) 969 with note by A. Chrétien.

disagreed.[22] In succession cases there is no reliance to be protected: *Viventis non datur haereditas*.

Eighty years later the famous case *Hirsch* v. *Cohen* was decided by the Swiss Federal Court.[23] The British citizen Albert Cohen passed away at his last domicile in Zürich, Switzerland. In his will he opted for English law applicable to succession rights, nominated his second wife as his sole heir and did not provide anything for his daughter Evelyn Hirsch-Leapman of Geneva, child of his first marriage. The Federal Court decided that the deceased validly chose his national law according to Swiss private international law [Articles 22 (2) and 32 Swiss statute on private international law of 1891], that English law does not provide for a forced share for the deceased's children, and that such a rule of foreign law does not violate Swiss public policy. This decision was heavily criticised in Switzerland,[24] but was confirmed by the new Swiss statute on Private International Law of 1987 [Article 90 (2) *IPRG*].[25] In addition, according to the European Regulation on Succession the law of the deceased, national law may be chosen (Article 22) and this choice also governs the question of forced shares (Article 23 lit. h).[26]

One of the basic principles of the EU Succession Regulation is the principle of "unity" of the entire estate (*Nachlasseinheit*), governed by the same law and avoiding the fragmentation of succession with respect to movable and immovable property. What happens, however, if a German owner invested in real property located in the USA made a will disinheriting his children, and if his American estate is later claimed to be a separate estate without forced shares (*Pflichtteil*) of the children of the deceased owner? Under German succession law there is no problem, because the forced share (*Pflichtteil*) is a money claim only and has to be computed according to the value of the *entire* estate, including property

[22] *Supra* last note.

[23] Bundesgericht 17.8.1976. BGE 102 II 136. Generally affirming Hans Hanisch, "Professio iuris, réserve légale und Pflichtteil", in: *Mélanges Guy Flattet*, Lausanne 1985, 473-489 (477-483); Frank Vischer/Andreas von Planta, *Internationales Privatrecht*, 2d ed. Basel 1962, 142-143.

[24] Andreas Bucher, "Das neue internationale Erbrecht": Schweizerische Zeitschrift für Beurkundungs- und Grundbuchrecht 69 (1988) 145-159 (149-150); Heinz Hausheer, "Erbrecht": Zeitschrift des Bernischen Juristenvereins 114 (1978) 187-195 (193-195); Pierre Lalive, note in: *Schweizerisches Jahrbuch für internationales Recht XXXIII* (1977) 338-340.

[25] Basler Kommentar *IPRG (- Anton K. Schnyder/Manuel Liatowitsch)*, 2nd ed. Basel 2007, Art. 90, marginal note 19 with some exceptions; Bernard Dutoit, *Droit international privé suisse, Commentaire de la loi fédérale du 18 décembre 1987*, 4th ed. Basel 2005, Art. 90, marginal note 5; Zürcher Kommentar zum IPRG (- Anton Heini). Art. 90, marginal note 16; still uncertain Andreas Bucher in. Andreas Bucher (ed.), *Commentaire romand, Loi sur le droit international privé, Convention de Lugano*, Basel 2011, Art. 90, marginal note 7.

[26] Anatol Dutta, "Das neue internationale Erbrecht der Europäischen Union – Eine erste Lektüre der Erbrechtsverordnung": Zeitschrift für das gesamte Familienrecht (FamRZ) 2013, 4 – 15 (8 f.).

located abroad.[27] Under Swiss law the problem is more difficult to solve because the forced share is a forced share in the estate (*Noterbrecht*) and not only a money claim; Article 86 (2) of the Swiss Statute on PIL gives jurisdiction to the country which claims exclusive jurisdiction for real property located in this country. The *de cuius* according to Swiss law may sue the heir under the relevant American state law and ask for transfer of the American estate (*Erbschaftsklage*) according to Articles 598 et seq. of the Swiss Civil Code.

3.2 Cases with forum shopping

The easiest way to avoid unpleasant local law is to shop for a forum and have the law of the forum state applied.

a) Contract: formalities

In German substantive law, some contracts have to be notarised by a German notary public. A German notary is normally a full-fledged lawyer who does more than merely certify the identity of a certain person. While performing this duty the notary must be neutral, advise her clients of the importance of the notarised transaction, and lastly approve the transaction with her seal. Notarising by Swiss notaries public is much cheaper, because in some Swiss cantons, they are not lawyers but persons with some basic juridical knowledge. Therefore, some parties avoid the expensive advice of German notaries, go to Basel or Zürich, have their transaction notarised by local Swiss notaries making use of Article 11 *EGBGB* (*locus regit actum*), and return home with the conviction that they had a great time in Switzerland, made a valid transaction and saved a lot of money. In former times the transfer of shares in a German company with limited liability (*GmbH*) had to be notarised [§ 15 (3) *GmbH-Gesetz*]. Swiss notaries were held to be able to do the same.[28] Whether German courts will continue to follow this liberal attitude is still uncertain, because the *GmbH-Gesetz* has been amended and notaries have to give notice to the commercial register (§ 40 *GmbH-Gesetz*); it is doubtful whether this can be done by foreign notaries.[29]

[27] Siehr, *supra* N. 7.

[28] Bundesgerichtshof 16.2.1981, Neue Juristische Wochenschrift 1981, 1160 = IPRspr. 1981 No. 10b (notary of Zürich); *Oberlandesgericht Frankfurt/Main* 25.1.2005, IPRspr. 2005 No. 8 (notary of Basel).

[29] Landgericht Frankfurt/Main 7.10.2009, Neue Juristische Wochenschrift 2010, 683 = Deutsche Notar-Zeitschrift (DNotZ) 2010. 949 with comments by Walter Bayer, "Privatschriftliche Abtretungen deutscher GmbH-Anteile in der Schweiz": DNotZ 2009, 887-894 = Betriebs-Berater (BB) 2009, 2500 with comments by Peter Kindler, "Keine Geltung des Ortsstatuts für Gesellschaftsanteilsabtretungen im Ausland": Betriebs-Berater 2010, 74-77.

b) Paternity

H, a French citizen of the Jewish faith, passed away in Switzerland in 1999 and left, in addition to his natural son A (born 1955), his heirs B and others. A has not been recognised by H and no paternity suit has been brought against him. A is registered in the Swiss personal register as offspring of mother F and of an unknown father. In order to participate as heir in the distribution of the estate of H, A had to prove his descent from H through a paternity suit. As such a suit already prescribed under Swiss law (Article 308 Civil Code old version: one year after birth of the child), A went to Israel, initiated a paternity suit against the administrator and executor of the estate of H. In addition, A got a court decision both confirming his Israeli nationality and, supported by a DNA test provided by Swiss authorities by way of international judicial assistance, establishing a father-child relationship between H and A. Back in Switzerland, A applied to amend the Swiss personal register mentioning that A is the son of H. The personal register approved this application but the administrative court of the canton Vaud rejected it, because A evaded Swiss law (Article 308 Civil Code) by bringing a paternity suit in his national state of Israel. The Swiss Federal Court (*Bundesgericht*) vacated the judgment of the administrative court and ordered the amendment of the personal register because the Israeli court decision has to be recognised and the time limits of Article 308 Civil Code are not provisions of Swiss public policy.[30] According to Swiss private international law, the Israeli courts of the child's national state also have jurisdiction (Article 70 of the Statute on PIL), and according to this *favor recognitionis* the foreign judgment has to be recognised. There is no *fraude à la loi*.

c) Marriage and divorce law

In former and still in present times, the law of marriage and divorce is the most important field of any evasion of local law unfavourable to the spouse still bound by marriage.

In 1869, the merchant Heinrich Schliemann (1822-1890), born in Germany, doing business in St. Petersburg/Russia and an American citizen by naturalisation, went to Indianapolis, divorced his wife still living in St. Petersburg, married Sophia Engastromenou of Athens, and then excavated

[30] *Tribunal fédéral* 6.4.2004, BGE 130 III 723 = Semaine judiciaire 2005, 61 = Die Praxis 2005, 665. – Similar with respect to a claim contesting paternity *(Anfechtung der Vaterschaft)* which had expired under German law but not yet under the law of Ghana: Oberlandesgericht Hamburg 22.7.2011, Informationsdienst für die familienrechtliche Praxis (FamRBint) 2012, 5.

the ancient city of Troy.[31] He did not care whether the divorce was recognised in Russia, because he did not return to Russia but went to Greece (Athens, Mycenae) and the Ottoman Empire, where he discovered Troy at the hill of Hissarlik.

Some years later, on 1 August 1874, a French court separated the couple of Prince Bauffremont and his wife Marie-Henriette-Valentine, but could not divorce them because at this time French law did not provide for divorce. Princess Bauffremont, however, wanted to marry the Romanian prince Georges Bibesco, domiciled in Paris, and therefore needed the termination of marriage with Prince Bauffremont. She must have consulted a French lawyer and received this information: As a separated wife, you are free to establish a separate domicile. Go to the German duchy of Sachsen-Altenburg, apply for naturalisation, and then according to Prussian law (*Allgemeines Landrecht* II, 1, § 734), all Catholics separated from their spouse are deemed to be divorced and can remarry in Prussia. So she did. She became German by naturalisation in the Duchy of Sachsen-Altenburg on 3 May 1875 and married Prince Georges Bibesco in Berlin on 24 October 1875.[32] This marriage in Berlin was not recognised in France because the Princess Bauffremont was not allowed, without authorisation by her husband, to become naturalised in a foreign country (Article 215 *Code civil*) and the second marriage was void because of *fraude à la loi*.[33]

Similar evasions of strict local law prohibiting divorce have been recorded in Italy[34] and Austria.[35]

[31] Leo Deubel, *Heinrich Schliemann. Eine Biographie mit Selbstzeugnissen und Bilddokumenten*, München 1979, 229 et seq.

[32] The document of naturalisation of 3 May 1875 and the marriage certificate of 24 October 1875 are reproduced in French translation by J.-E. Labbé, "Une femme mariée à un Français et judiciairement séparée de corps peut-elle se faire naturaliser en pays étranger sans l'autorisation de son mari, ou de justice?" Clunet 2 (1875) 409-421 (409-410), and by Daniel de Folleville, *De la naturalisation en pays étranger des femmes séparées de corps en France*, Paris 1876, 14 and 16.

[33] Cass. 18.3.1878. Recueil Sirey 1878, I, 183 with note by J.-E. *Labbé* = Recueil Dalloz 1878, I, 201 = Clunet 5 (1878) 505 = *Ancel/Lequette*, supra N. 19, No. 6. – The French court did not pay regard to the newly enacted German legislation according to which a court decision was necessary to transform a separation into a divorce. See *F. von Holtzendorff*, Une femme française séparée de corps peut se faire naturaliser en pays étranger, notamment en Allemagne, sans autorisation maritale, et y contracter un second mariage – Affaire de Bauffremont: Clunet 3 (1876) 5-15 (14-15), and *A. Stölzel*, De la validité du second marriage d'une femme séparée de corps: Clunet 3 (1876) 260-261, referring to § 77 of the German Gesetz of 6 February 1876, über die Beurkundung des Personenstandes und die Eheschliessung: Reichs-Gesetzblatt 1876, 23 et seq.

[34] *Carlo Francesco Gabba*, Esecutorietà in Italia di sentenze estere in materia personale in generale e di sentenze di divorzio fra due già cittadini italiani in particolare, in *C.F.Gabba*, Nuove questioni di diritto civile, 2d ed. Torino 1914, 199-218.

[35] *Wilhelm Fuchs*, Die sogenannten Siebenbürgischen Ehen und andere Arten der Wiederverehelichung geschiedener österreichischer Katholiken, Wien 1889.

The stateless architect Friedrich Arnd had more imagination. He married his first German wife Therese in 1863 on the Island of Helgoland, which at this time was still British.[36] In the 1880s Helene Böhlau (1856-1940), daughter of the publisher Hermann Böhlau and a popular author since 1882, fell in love with Friedrich Arnd and they decided to get married. In order to terminate his first marriage with Therese, Mr. Arnd became naturalised in the Ottoman Empire, converted to Islam and repudiated Therese in Constantinople on 26 November 1886. In 1887 Helene Böhlau and Friedrich Arnd (now: Omar al Raschid Bey) married and in 1888 they established their domicile in Munich. Arnd's first wife Therese went to a German court and asked for a sentence confirming the existence of her marriage with Friedrich Arnd/Omar al Raschid Bey. After a lengthy trial[37], the Court of Appeal of Munich finally gave judgment for the defendant: the divorce by repudiation was not based on a judgment and § 328 of the Code of Civil Procedure was not applicable; with respect to recognition, Prussian law applied because of the domicile of the plaintiff in Berlin. In addition, under Prussian law divorces by consent were known (*Allgemeines Landrecht* II, 1, § 716); the plaintiff agreed to the divorce by the defendant and therefore the repudiation had to be recognised.[38] The Court of Appeal of Munich expressly refused to apply the principle of *in fraudem legis* and applied German local law before unification by the *BGB*.[39] – Whether such a liberal attitude could be achieved today is still unclear. In Germany, German law would be applicable as the law of the last common habitual residence, and according to German law there is no unilateral termination of marriage by repudiation – if the husband is German and his Muslim wife took part in the repudiation in Jordan.[40] In Switzerland, the unilateral repudiation is more likely to be recognised if the repudiation is qualified as a "foreign decree of divorce" within Article 65 (1) of the Swiss Statute on PIL

[36] Heligoland became the German Helgoland by Article XII of the Agreement of 1 July 1890 between Germany and great Britain respecting Zanzibar, Heligoland and the Spheres of Influence of the two Countries in Africa, The Consolidated Treaty Series 173 (1890) 271. See also Gesetz vom 15 Dezember 1890 betreffend die Vereinigung von Helgoland mit dem Deutschen Reich: Reichs-Gesetzblatt 1890, 207.

[37] Landgericht München 28.9./26.10.1904, Niemeyers Zeitschrift für Internationales Privat- und Öffentliches Recht (NiemZ) 14 (1904) 585; Oberlandesgericht München 24.3.1905, NiemZ 16 (1906) 34; Bayerisches Oberstes Landesgericht 29.9.1905, NiemZ 16 (1906) 286.

[38] Oberlandesgericht München 22.11.1909, NiemZ 20 (1910) 529.

[39] Oberlandesgericht München 24.3.1905, supra N. 37, at p. 37.

[40] Bayerisches Oberstes Landesgericht 12.9.2002, Zeitschrift für das gesamte Familienrecht (FamRZ) 2003, 381 = Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts im Jahre 2002 (IPRspr. 2002) No. 207. – The Gesetz of 17.12.2008 über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG) does not change the situation because §§ 107 et seq only deal with the recognition of foreign *judgments*.

and if the defendant applies for recognition under Article 65 (2) lit. c of the Swiss Statute on PIL.[41]

In 1932, the famous theatre director Max Reinhardt (1873-1943) was already ahead of his time. While in Riga, Latvia, he established his domicile in Latvia, got a divorce from his first wife Else Helms in this country[42] and could marry the actress Helene Thimig (1889-1974) in 1935. I do not know whether this divorce decree had been recognised in Germany. At any rate, The divorce was recognised by the civil registrar who registered his second marriage.

Max Reinhardt was ahead of his time insofar as after the Second World War, couples of Italy, Spain and New York escaped their restricted national or local legislation and went to a marriage paradise, got a divorce in this paradise and applied for registration of their divorce at home. This sort of forum shopping was finally recognised at home.[43] Today, spouses make use of the European Regulation Brussels II, especially in those Member States in which a divorce is not quickly achieved. Couples establish a common habitual residence in Romania and get a *diversion rapid* which is recognised in Italy, because neither jurisdiction of the divorce court nor the law applied by this tribunal can be reviewed in Italy. At least for divorces by consent, the Brussels II Regulation favours the law of that Member State in which a divorce is quickly, cheaply and conclusively pronounced.

d) Procedural law

Very often parties are persuaded to sue abroad because, as Lord Denning put it: "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into the courts, he stands to win a fortune."[44] However, it is not only for reasons of substantive law that parties choose to shop around, but also for reasons of the law of civil procedure, especially the law of evidence and because of either speedy or lengthy trials. In the case of

[41] Basler Kommentar IPRG (- *Lukas Bopp*), Art. 65, marginal notes 5, 15 and 18.

[42] Lettländischer Senat 30-6.1932, Juristische Wochenschrift 1932, 3844 with note by Ernst Frankenstein. See also the decisions of *Oberlandesgericht Königsberg* 21.3.1935, Zeitschrift für Standesamtswesen (StAZ) 1937, 261 = IPRspr. 1935-1944 No. 10, and of 15.10.1937, StAZ 1937, 435, on non-recognition of Latvian divorces in Germany.

[43] Germany: Bundesverfassungsgericht 4.5.,1971, Entscheidungen des Bundesverfassungsgerichts 31, 58 = Rabels Zeitschrift für ausländisches und internationales Privatrecht 36 (1972) 145 = IPRspr. 1971 No. 39, correcting *Bundesgerichtshof 12.2.1964*, BGHZ 41, 136 = IPRspr. 1964-1965 No. 74. See also Friedrich K. Juenger, "The German Constitutional Court and the Conflict of Laws": American Journal of Comparative Law 20 (1972) 290-298. – New York: *Rosenstiel* v. *Rosenstiel*, 209 N.E.2d 709 (N.Y.1965). – Switzerland: *Bundesgericht 11.7.1968*; BGE 94 II 65 (*Cardo* c. *Cardo*), correcting *Bundesgericht 29.6.1933*, BGE 59 II 113 (*Schmidlin* gegen *Schmidlin*).

[44] *Smith Kline & French* v. *Bloch*, [1983] 2 All E. R. 72. 74 (C.A.).

Maharanee of Baroda v. *Wildenstein* the Maharanee brought a claim against Mr. Wildenstein by serving him personally on the race court of Ascot.[45] She preferred an English trial with cross-examined expert witnesses over French proceedings with court-appointed experts who had to tell the court whether the painting "La Poésie", sold to her by the Paris Gallery Wildenstein as the work of François Boucher, was a fake or genuine. Italian debtors, on the other hand, prefer to bring a "torpedo" suit for a declaratory judgment in Italy in order to block a quicker foreign judgment by the creditor for payment against them.[46]

4. European Code of Private International Law

4.1 Doctrine in Europe

In their studies, treatises or law review articles, most European scholars of private international law deal with *fraude* à la loi[47], *Gesetzesumgehung*[48], *frode alla legge*[49],

[45] *Maharanee of Baroda* v. *Wildenstein* [1972] 2 Q.B. 283 (C.A.). She served Mr. Wildenstein on the race court of Ascot and thereby got personal jurisdiction over Mr. Wildenstein. Because of Art. 3 of the Brussels I Regulation, this is no longer possible in the European Union.

[46] *Michael Bodgan*, "The Brussels/Lugano Lis Pendens Rule and the 'Italian Torpedo'": Scandinavian Studies in Law 51 (2007) 89-97. Recently, on 25 October 2012 (C-133/11), the ECJ decided that a negative declaratory law suit may also be brought at the place of tort (Article 5 no. 3, Brussels I Regulation): Europäische Zeitschrift für Wirtschaftsrecht 2012, 950. See also Francesca Ferrari, "Le *torpedo* e la recente giurisprudenza della Corte de giustizia", *Rivista trimestrale di diritto e procedura civilie* 67 (2013) 1125-1147 (1138 et seq); Corte di cassazione 28 May 2013 (yet unpublished).

[47] Belgium: from François Laurent, *Droit civil international*, tome V, Bruxelles/Paris 1880, nos. 180 et seq., to Johan Erauw, *Internationaal privaatrecht*, Mechelen 2009, 379 et seq., and Johan Erauw/Marc Fallon and others (-Michael Traest) (eds.), *Het Wetboek Internationaal Privaatrecht bekommentarieerd*, Antwerpen 2006, 97 et seq. (commentary of Article 18 Code de DIP); France: from Julien Verplaetse, *La fraude à la loi en droit international privé*, Paris 1938, and Bernard Audit, *La fraude à la loi*, Paris 1974, 224 et seq., to Henri Batiffol/Paul Lagarde, *Traité de droit international privé*, volume 1, 8th ed. Paris 1993, nos. 370-375, and Pierre Mayer/Vincent Heuzé, *Droit international privé*, 10th ed. Paris 2010, 192-198. Rechtsvergleichend Michael Rütten, *Gesetzesumgehung im internationalen Privatrecht*, Zürich 2003.

[48] Austria: from Fritz Schwind, *Internationales Privatrecht*, Wien 1990, nos. 148 and 169, to Bea Verschraegen, *Internationales Privatrecht, Ein systematischer Überblick*, Wien 2012, 272; Germany: from Arthur Nussbaum, *Deutsches internationales Privatrecht*, Tübingen 1932, § 11, and Gustav Römer, *Gesetzesumgehung im deutschen Internationalen Privatrecht*, Berlin 1955, to Gerhard Kegel/Klaus Schurig, *Internationales Privatrecht*, 9. Aufl. München 2004, § 14; Switzerland: from Adolf F. Schnitzer, *Handbuch des Internationalen Privatrechts*, Zürich/Leipzig 1937, 115-117, to Andreas Bucher/Andrea Bonomi, *Droit international privé*, 2d ed. Basel 2004, nos. 394-397, and François Knoepfler/Philippe Schweizer/Simon Othenin-Girard, *Droit international privé Suisse*, 3rd ed. Berne 2005, 165-170.

[49] From Giuseppe Ottolenghi, *La frode alla legge e la questione dei divorzi fra ialiani naturalizzati all'estero*, Torino 1909; and Edoardo Vitta, *Diritto internazionale privato*, Vol. I, Torino 1972, 436-448, to Tito Ballarino/Andrea Bonomi, *Diritto internazionale privato*, 2nd ed. Padova 1996, 267-268.

wetsontduiking[50] or *fraude de ley*[51]. All these authors agree in five respects:
– There is no statutory or conventional provision prohibiting evasion of law.
– They describe the phenomenon of evasion of law as forum shopping, changing the connecting factors or choosing the applicable law.
– There is no common solution to fight the evasion of law in private international law.
– Evasion of law is different from violating public policy insofar as the evasion directed against the manipulation of conflicts rules and public policy concerns only the application of unbearable foreign law.
– The solution must be found in the correct interpretation of private international law and of international civil procedure law.
Scholars, courts and the legislator also found some solutions for the problem of evasion of law and applied different remedies, *inter alia* the following:
– Limitation of choice of law with respect to European consumer law and mandatory rule of the forum state and third countries [Articles 3 (3) and (4), 9 and 21, Rome I Regulation],
– No unilateral change of the applicable law if, before that change, a common connecting factor was decisive (Article 8 b, Rom III Regulation),
– Return of an illegally abducted child to the country of origin (Articles 9 et seq. and 42, Brussels II Regulation),
– Correct substitution or no substitution of a local institution by a foreign institution (form of legal transaction, kind of separation),
– General or special exception clauses may lead to a correct solution (Article 5, Hague Maintenance Protocol 2007).
– There is no *fraude à la loi* if the plaintiff starts a law suit in a foreign country recognised by the forum state or if the person chooses a law which may be chosen according to the *lex fori*.
Today private international law is more flexible than in former times. Party autonomy, common connecting factors, and exception clauses make a general clause unnecessary. This is also true for evasion of local law as well as for evasion of foreign law.

[50] From Jan Kosters, *Het internationaal burgerlijk recht in Nederland*, Haarlem 1917, 169- 178., to Luc Strikwerda, *Inleiding tot het Nederlandse Internationaal Privaatrecht*, 9th ed. Deventer 2008, nos. 152 and 200:
[51] From Mariano Aguilar Navarro, *Lecciones de derecho internacional privado*, Vol I/tomo II, 2nd ed. Madrid 1964, 79 et seq., to Alfonso-Luis Calvo Caravaca/Javier Carrascosa González, *Derecho internacional privado*, Vol. 1, Granada 2011, 344 et seq.

4.2 Proposals for European PIL

a) Ernst Frankenstein's Projet d'un Code européen de DIP
Ernst Frankenstein (1881-1959) was the first scholar who envisaged a uniform European Code of PIL and who submitted a draft for codification in 1950.[52] Article 17 of this Code provides the following text:

> Sauf les dispositions contraires du présent Code, chacun est libre de changer les conditions de fait don't résultent sa loi personnelle ou la loi applicable à ses rapports juridiques.
> L'exception de la fraude à la loi n'est admise que dans les cas expressément prévue dans ce Code.

In the special part, Frankenstein mentions eight articles in which, because of *fraude à la loi*, a change of the applicable law is not recognised: change of personal law before or after the birth of a child for purposes of establishment of a relationship with the parents [Articles 179 and 180 (2)], change of personal law of the child for purposes of the mother-child relationship [Article 191 (2)], change of personal law of the debtor of maintenance for the child [Article 210 (1)], change of the personal law of a legal person (Article 237), change of personal law of the heir in order to receive inalienable family property because of *substitutions fideicommissaires* (Article 336), change of personal law of the testator in order to deprive a person of the forced share [Article 345 (2) sent. 2], and change of personal law of the surviving party of a mutual will (Article 358 sent. 2).

b) Other proposals for a European Code of PIL
In his paper on *lex ferenda europea* Kurt Siehr raised doubts as to whether it might be a good idea to include a general provision on *fraude à la loi* in a European Code.[53] He proposed not to include such a general provision and, if necessary, to prohibit the evasion of law in special cases.
Karl F. Kreuzer did not mention the problem at all in his Viennese lecture.[54] From this it may be gathered that he also considers a general clause on evasion of law not to be very useful.

[52] Ernst Frankenstein, *Projet d'un code européen de droit international privé*, Leiden 1950.
[53] Kurt Siehr, "General Problems of Private International Law in Modern Codifications – *De lege lata and de lege europea ferenda*": *Yearbook of Private International law VII (2005)* 17 – 61 (57-58, 61).
[54] Karl F. Kreuzer, "Was gehört in den Allgemeinen Teil eines Europäischen Kollisionsrechtes", in: Brigitta Jud/Walter H. Rechberger/Gerte Reichelt (eds.), *Kollisionsrecht in der Europäischen Union, Neue Fragen des Internationalen Privat- und Zivilverfahrensrechtes*, Wien 2008, 1 – 62.

Nor does Paul Lagarde propose a general provision on *fraude à la loi* in his *Embryo de règlement portant Code européen de DIP*.[55]

In 2012 Timo Nehne published his thesis on *Methodik und allgemeine Lehren des europäischen Internationalen Privatrechts* and made some proposals concerning general problems of European private international law, especially on qualification, preliminary qu.estions and *renvoi*.[56] He did not deal with *fraude à la loi*.

5. Summary

A future European Code of Private International Law should not provide a general prohibition of *fraude à la loi*. Evasion of law can be properly fought by other means, especially through use of flexible connecting factors, exception clauses and limitation of choice-of-law rules.

[55] Paul Lagarde, "Embryon der Règlement portant Code européen de droit international privé": RabelsZ 75 (2011) 673-676 (674-675).

[56] Timo Nehne, *Methodik und allgemeine Lehren des europäischen Internationalen Privatrechts*, Tübingen 2012, 333 ff.

LEGAL THEORIES OF PRIVATE INTERNATIONAL LAW OVERVIEW AND PRACTICAL IMPLICATIONS FOR INTERNET REGULATION

1. Introduction

More than one article has commenced by noting how the discipline of private international law (or 'conflict of laws') has been described in colourful, expressive and (occasionally) somewhat derogatory language. For example, Dane opens one of his interesting works by noting how in 1953, Prosser described the discipline (and more specifically the area of choice of law) as "a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon."[2] Other, (almost?) equally expressive descriptions can be found, such as Cavers' description of the history of this legal field as "Six Centuries of Frustration",[3] and the proposition of a resemblance to a psychiatric ward – i.e. "a place of odd fixations and schizophrenic visions [...] abound[...] with purported cures to alleged diseases, and questions about which are crazier."[4]

It is because of Professor Bogdan that I have ended up being one of those frustrated eccentric professors in the dismal swamp-like psychiatric ward called private international law. In fact, my very first exposure to "the swamp" was through a lecture given by Professor Bogdan in the mid-90s, when I was an undergraduate student in the newly established program in *Rättsvetenskap* (Jurisprudence) at Luleå Tekniska Universitet, known then as Luleå Tekniska Högskola. The fact that I can still recall aspects of the content of that lecture, and the fact that it left such a lasting impression on me, bear testament to Professor Bogdan's superior ability as a teacher.

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[2] Perry Dane, *A companion to philosophy of law and legal theory* (2d ed. 2010) at 197, referring to William Prosser, *Interstate Publication*, 51 Mich. L. Rev. 959 9 (1953) at 971.

[3] David F. Cavers, *The Choice of Law Process* (1st ed. 1965) at 1.

[4] Perry Dane, *A companion to philosophy of law and legal theory* (2d ed. 2010) at 197.