

**CARTESIO AND GRUNKIN-PAUL:  
MUTUAL RECOGNITION AS A VESTED RIGHTS THEORY  
BASED ON PARTY AUTONOMY IN PRIVATE LAW**

Jan-Jaap Kuipers\*

**I. INTRODUCTION: PRIVATE INTERNATIONAL LAW AND  
COMMUNITY LAW**

PIL lawyers often submit that their topic is neglected by Community lawyers.<sup>1</sup> It is true that the EEC Treaty merely made one reference to PIL, stipulating that member states will enter with each other into negotiations concerning the simplification of recognition and enforcement of judicial decisions,<sup>2</sup> which resulted in the Brussels I Convention.<sup>3</sup> The 1980 Convention on the Law applicable to Contractual Obligations even had no direct basis in the EEC Treaty. Member states simply desired to continue the unification of PIL as set in motion by the Brussels I Convention in the field of applicable law.<sup>4</sup> Striking was that both instruments were international conventions and not Community instruments. With the small role PIL has played in the early years of the Community in the back of our mind, it seems not self-evident to search for an explanation of the *Cartesio* and *Garcia Avello* decisions in PIL. In recent years however, the Community interest in PIL has been growing. The Treaty of Amsterdam introduced the first direct PIL competence: the Community is empowered to take measures in the field of PIL when this is necessary for the internal market (art. 65 EC). The Treaty of Nice lowered, save in family matters, the voting requirements from unanimity to qualified majority voting. The Lisbon Treaty will continue this trend: art. 81 TFEU empowers the Community to take legislative measures in particular when necessary for the internal market.<sup>5</sup> Anno 2009, the Brussels and Rome Conventions have been transformed into regulations and more codification projects

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<sup>1</sup> J. BASEDOW, "The Communitarisation of the Conflict of laws under the Treaty of Amsterdam", in: *Common Market Law Review*, 2000, vol. 37, pp. 687-708; H. JESSURUN d'OLIVERIA, "The EU and a Metamorphosis of Private International Law", in: J. FAWCETT ed., *Reform and Development of Private International Law: Essays in honour of Sir Peter North*, Oxford, Oxford University Press, 2002, pp. 111-136, at p. 119. K. BOELE-WOELKI and R. VAN OOIK, "The Communitarization of Private International Law", *Yearbook of Private International Law*, 2002, vol. 4, pp. 1-36.

<sup>2</sup> Art. 220 EEC (currently 293 EC)

<sup>3</sup> OJ L 299/32 (1972).

<sup>4</sup> OJ L 266/19 (1980), compare the 3<sup>rd</sup> recital of the preamble.

<sup>5</sup> G. DE GROOT and J.-J. KUIPERS, "The New Provisions on Private International Law in the Treaty of Lisbon", *Maastricht Journal of European and Comparative Law*, 2008, vol. 15, (1) pp. 109-114.

have been undertaken by the EC.<sup>6</sup>

There is still a long way to go. In a number of judgments on the Brussels I Regulation the ECJ has far from rebutted the old criticism that Community lawyers have a poor understanding of PIL. The Court seems more concerned with the mandatory nature of the Regulation rather than preserving its underlying PIL rationale.<sup>7</sup> The growing interest of the Community in PIL is however quite understandable. The general consensus seems to be that, despite calls for the creation of a European Civil Code,<sup>8</sup> the Community has no competence to introduce a comprehensive codification.<sup>9</sup> Even the Commission has acknowledged that some areas of private law will not be harmonised in the near future, or even never.<sup>10</sup> Such areas will essentially be governed by national private law. Private international law constitutes a good alternative for harmonisation of private laws since it is able to enhance legal certainty while at the same time does not necessitate any change of substantive and is therefore better able to respect legal diversity.<sup>11</sup> The absence or impossibility of positive harmonisation of private law does however not exclude the possibility of negative harmonisation. In other words, although a certain rule is completely national in nature it still has to be in conformity with (primary) Community law.<sup>12</sup>

The application of a conflict of law rule will not in all cases be compatible with the exercise of the fundamental freedoms or European Citizenship. If member states apply to every situation their own conflict of law rule, it

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<sup>6</sup> For example: *Proposal for a Council Regulation of 15 December 2005 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations* COM (2005) 649 final and the *Green Paper on succession and wills* COM (2005) 65 final.

<sup>7</sup> J. HARRIS, "Understanding the English response to the Europeanisation of Private International Law", *Journal of Private International Law*, 2008, vol. 4, pp. 347-395.

<sup>8</sup> European Parliament Resolution Pb C 158/400 (1989). See: M. RÖTTINGER, "Towards a European Code Napoléon/ABGB/BGB? Recent EC Activities for a European Contract Law", *European Law Journal*, 2006, vol. 12, pp. 807-827.

<sup>9</sup> W. VAN GERVEN, "The ECJ Case law as a Means of Unification of Private Law?", in: A. Hartkamp (ed.), *Towards a European Civil Code*, Nijmegen, Ars Aequi Libri, 2005, p. 102.

<sup>10</sup> Commissioner Vitorino: "*Il existe certains domaines du droit civil en du droit pénal, tant en ce qui concerne le fond que la procédure, qui ne seront pas harmonisés pendant très longtemps entre les membres de l'Union européenne, et peut-être même jamais*", quoted in: O. REMIEN, "Private International Law, the European Community and its Emerging Area of Freedom, Security and Justice", *Common Market Law Review*, 2001, vol. 26, p. 63.

<sup>11</sup> H. MUIR-WATT, "European Integration, legal diversity and the Conflict of Laws", *Edinburgh Law Review*, 2005, vol. 9, pp. 6-31.

<sup>12</sup> ECJ, Case C-120/95, *Decker*, 1998 ECR I-1831, para. 22-23; ECJ, Case C-446/03, *Marks & Spencer*, 2005 ECR I-10837, par. 29.

might occur that a situation is lawful in one member state but not recognised, or even unlawful in another member state. The application of the Savignian conflict of law rule, based on the localisation of the centre of gravity or natural seat of a legal relationship, to rights duly formed seems not apt to deal with these problems satisfactorily. Member states do not always agree about what constitutes the natural seat of a legal relationship. They apply their own conflict of law norms to determine whether a right has been validly created. The resulting legal uncertainty is detrimental for a common European justice area. This critique does not mean that PIL as such is inadequate. The Savignian, multilateral conflict of law rule is merely one conception of PIL and could be complemented or replaced by others.

Connection may be sought with the principle of mutual recognition. In the free movement of goods, mutual recognition means that if a French manufacturer can lawfully market its goods in France it should in principle also be allowed to do the same in Germany. Similarly, one could argue that if a situation is lawful in France, it should in principle also be lawful in Germany. Rights acquired in one jurisdiction should in principle also be sustained in other jurisdictions. The rebirth of acquired, or vested rights fits into the changing paradigm of PIL. Due to increasing globalisation individuals are increasingly replacing a strong link with one state with several looser links to different states. Recent technological developments have provided the individual with more factual possibilities to escape the state model, leading to a stronger private autonomy. With the increased possibility to circumvent the conflict of law rules of states and the interference of public law considerations becoming more and more an exception, the decline of the conflict of law rule has been set in.<sup>13</sup>

In the next sections it will be demonstrated that the ECJ case law relating to the transfer of undertakings and concerning surname law is neither of a completely Community law, nor national company law but also not really (traditional) PIL nature. It will be explored to what extent a vested rights doctrine can be retrieved in the court's decisions and what possible general conclusions can be drawn for private law. By referring to academic interpretations of the ECJ case law, it will be demonstrated that the PIL perspective has often been neglected.

## **II. THE CASE OF COMPANY LAW: A RIGHT TO ENTER, NOT TO EXIT?**

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<sup>13</sup> C. PAMBOUKIS, "La renaissance-métamorphose de la méthode de reconnaissance", *Revue Critique de Droit International Privé*, 2008, vol. 97, pp. 513-560, at p. 519.

The core principle of the Brussels Convention and the Brussels I Regulation is the mutual recognition of judgments between member states. Member states cannot apply their own substantive law to check the content of a judgment rendered in another member state.<sup>14</sup> The Treaty of Lisbon would have incorporated mutual recognition as guiding principle for PIL in a common European Justice Area. One of the core pillars of European PIL is thus the confidence in the conflict of law mechanism of other member states. With this idea in the back of our mind it might be interesting to shortly revisit the case law of the ECJ concerning the freedom of establishment of companies and analyse the role of mutual confidence. Art. 48 in conjunction with art. 43 confers upon companies or firms that are formed in accordance with the law of a member state and have their registered office, central administration or principal place of business within the Community the freedom of establishment.<sup>15</sup> The article does however not provide for a clear-cut right of transfer.<sup>16</sup>

In *Daily Mail* a company desired to move its headquarters from the United Kingdom to the Netherlands, but this was opposed by the UK authorities.<sup>17</sup> The Court held that, with a view to the widely differing connecting factors between the member states, Community law as it stood did therefore not confer a right upon Daily Mail, incorporated under the legislation of England, and having its registered office there to transfer its central management and control to the Netherlands.

In *Centros* the Court held the refusal to register a branch of companies duly formed under the law of another member state to be a restriction on the freedom of establishment.<sup>18</sup> The host member state (Denmark) could not impose upon a company which had been duly formed in England its own substantive company law. Although Denmark was allowed to impose

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<sup>14</sup> The Brussels I Regulation provides for a narrow public policy exception to refuse a foreign judgment. Usually this will require a breach of fundamental rights, such as art. 6 ECHR. Case C-7/98, *Krombach*, 2000 ECR I-1935; Case C-394/07, *Gambazzi*, 2009 ECR I-0000, see: as well in the UK: Court of Appeal, *Maronier v Larmer*, 2002 EWCA Civ 774.

<sup>15</sup> The incorporation theory declares the *lex societatis* (law applicable to the company) to be the law of the place where company is registered, whereas the real seat doctrine declares the law of the place applicable where the company has its main centre of business. See: S. RAMMELOO, *Corporations in Private International Law: A European Perspective*, Oxford, Oxford University Press, 2001.

<sup>16</sup> A proposal for the 14<sup>th</sup> Company Law Directive on the transfer of undertakings is in the pipeline. See: Draft Report with recommendations to the Commission on cross-borders transfers of company seats (2008/2196(INI)).

<sup>17</sup> ECJ, Case 81/87, *Daily Mail v. UK*, 1988 ECR 5483.

<sup>18</sup> *Centros*, para. 20 and 21.

safeguards to avoid evasion of its laws, the refusal did not pass the suitability test. The registration of a branch of a company that carried out business in the UK would have equally deprived Danish creditors of their protection.<sup>19</sup>

In *Überseering*, a company was denied legal standing as plaintiff in a legal proceeding because after a transfer of ownership it had moved its actual centre of business from the Netherlands to Germany.<sup>20</sup> The shift of actual centre of business without any change in legal personality was possible under Dutch PIL, but not under German. The Court held that a company duly set up under the legislation of one member state can ‘transfer its registered office or its actual centre of administration to another member state without losing its legal personality under the law of the member state of incorporation, and, in certain circumstances, the rules relating to that transfer, are determined by the national law in accordance with which the company was incorporated’.<sup>21</sup>

In *Inspire Art* the Netherlands sought to impose additional registration requirements upon pseudo foreign companies, including a minimum capital requirement.<sup>22</sup> The additional requirements failed the proportionality test: potential creditors were already sufficiently warned by the fact that Inspire Art held itself out as a company governed by the law of England and not by the law of the Netherlands.<sup>23</sup> The Court favoured self-help: potential creditors in the Netherlands should apparently know that the minimum capital requirements in England are significantly more lenient than in the Netherlands and could therefore take appropriate securities to ascertain the fulfilment of Inspire Arts obligations.

In its judgments the ECJ did not seem to attach much importance to the distinction between primary and secondary establishment, nor to the intention of the undertaking to evade stricter standards in the host member state. The essence of the internal market is that individuals can take advantage of differences between national legislations. Academic commentators predicted a regulatory competition, or a race to the bottom whereby member states would try to attract as many companies as possible by offering the most lenient standards.<sup>24</sup> It is true that after the judgments

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<sup>19</sup> *Centros*, par. 35.

<sup>20</sup> ECJ, Case C-208/00, *Überseering*, 2002 ECR I-9919.

<sup>21</sup> *Cartesio*, par. 107.

<sup>22</sup> ECJ, Case C-167/01, *Inspire Art*, 2003 ECR I-10155.

<sup>23</sup> *Inspire Art*, par. 135.

<sup>24</sup> On the debate: M. SIEMS, “Convergence, competition, Centros and Conflicts of Law: European Company Law in the 21<sup>st</sup> Century”, *European Law Review*, 2002, vol.

member states started revising their company and private international laws. For example, in the Netherlands the European developments were specifically named as reason for the proposal to make the limited liability company (BV) more internationally competitive by abolishing the minimum capital requirement and introducing in general more flexibility.<sup>25</sup>

### III. REAL SEAT DOCTRINE 'BURIED ALIVE'

The decisions in *Centros*, *Überseering*, and *Inspire Art* made many question whether *Daily Mail* was still standing. Did the ECJ, despite its vow to respect the plurality of connecting factors, not give the dead blow to the real seat doctrine or at least give preference to the incorporation theory?<sup>26</sup> The Austrian *Oberste Gerichtshof* (Supreme Court, OGH) answered that question apparently in the affirmative. The OGH held, without making a reference to the ECJ, the application of the real seat doctrine to companies established in other member states to be incompatible with the freedom of establishment.<sup>27</sup> There seemed to be a broad consensus that the rationale of

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27, pp. 47-59; G. SPINDLER and O. BERNER, "Inspire Art - Der europäische Wettbewerb um das Gesellschaftsrecht ist endgültig eröffnet", *Recht der internationalen Wirtschaft*, 2003, p. 949; C. KIRCHNER, R. PAINTER and W. KAAL, *Regulatory Competition in EU Corporate Law After Inspire Art: Unbundling Delaware's Product for Europe*, University of Illinois Law & Economics Research Paper no. LE04-001 (2004); E. KIENINGER, "The Legal Framework of Regulatory Competition Based on Company Mobility: EU and US Compared", *German Law Journal*, 2005, vol. 6, pp. 741-770; J. McCAHERY, "Harmonisation in European Company Law: The Political Economy of Economic Integration", in: D. CURTIN *et al.* (eds.), *European Integration and Law*, Antwerpen, Intersentia, 2006, pp. 155-194.

<sup>25</sup> Memorie van Toelichting, Wijziging van Boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van de regeling voor besloten vennootschappen met beperkte aansprakelijkheid (Wet vereenvoudiging en flexibilisering bv-recht), Tweede Kamer der Staten Generaal 2006-2007, 31 058, no. 3. At the time of writing, the bill was still pending in the Tweede Kamer (House of Commons).

<sup>26</sup> H. HALHUBER, "Das ende der Sitztheorie als Kompetenztheorie- Das Urteil des Europäischen Gerichtshofs in der Rechtssache C- 208-00 (*Überseering*)", *Zeitschrift für Europäisches Privatrecht*, 2003, vol. 8, pp. 418-438 S. RAMMELOO, "Vrij verkeer van rechtspersonen in Europa na HvJ EG *Überseering*. Ipr-zetelleercontroverse beslecht?", *Nederlands Internationaal Privaatrecht*, 2003, pp. 134-144; S. RAMMELOO, "Vrij verkeer van rechtspersonen in Europa na HvJ EG *Inspire Art*: zetelleercontroverse beslecht!", *Nederlands Internationaal Privaatrecht*, 2004, pp. 283-295. S. RAMMELOO, "Freedom of Establishment for Legal Persons in Europe Accomplished", *Maastricht Journal of European and Comparative Law*, 2004, vol. 11, pp. 398-413. For an overview: H. MUIR-WATT, Case Note to *Inspire Art*, *Revue Critique de Droit International Privé*, 2004, vol 93, pp. 151-184.

<sup>27</sup> OGH, Beschluss v. July 15, 1999 -- 6 Ob 123/99 b, 'Der Begriff "Ansässigkeit" setze eine enge wirtschaftliche Verbindung mit der Gemeinschaft voraus, es müsse somit Hauptverwaltung oder Hauptniederlassung in einem Mitgliedstaat, nicht notwendig

the ECJ with regard to host member state also affected the position on the member state of origin. The distinction made by the Court between restrictions imposed by host member state and the member state of origin was found unconvincing.<sup>28</sup> It even led an AG to conclude that the distinction was artificial and found no support in the wording of the judgments.<sup>29</sup> Although the Court reaffirmed in *Überseering* and *Inspire Art* its distinction between the relation of the company with the member state of incorporation and the member state of registration, it could not count on academic approval. To quote a leading textbook on EU law:

“Although the ECJ distinguished the *Daily Mail* case on its facts (where the restriction on the company’s right to retain legal personality in the event of a transfer of registered office or centre of administration was imposed by the member state of incorporation), the reality is that the reasoning in *Überseering* clearly moves away from the underlying broad rationale in *Daily Mail*”.<sup>30</sup>

A Hungarian law professor therefore decided to set up a company (Cartesio) and test the compatibility of a Hungarian law providing the loss of Hungarian legal personality in the case of transfer of the real seat of an undertaking abroad. Would the ECJ in *Cartesio* abandon *Daily Mail*?

#### IV. CARTESIO

In *Cartesio* a company wished to transfer its real seat from Hungary to Italy whilst retaining its incorporation in Hungary and thus without changing the *lex societatis*.<sup>31</sup> Hungary provided in such cases for the loss of Hungarian legal personality and required the prior winding up and liquidation of the company.<sup>32</sup> AG Maduro concluded that art. 43 in conjunction with art. 48

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aber im Gründungsstaat, begründet sein.’ see: M. HEIDINGER, “Austria: Company Law – Branch Office”, *Journal of International Banking Law*, 2000, vol. 15, p. 8. More correct is the decision of the German BGH, Bundesgerichtshof 13 March 2003 (BGHZ 154/185): “Diese Anknüpfungsregel (Sitztheorie) werde durch die im EG-Vertrag geregelte Niederlassungsfreiheit nicht verdrängt”.

<sup>28</sup> W. RINGE, “No freedom of migration for European Companies?”, *European Business Law Review*, 2005, vol. 16, pp. 621-642.

<sup>29</sup> AG COLOMER in *Überseering*, par. 37.

<sup>30</sup> P. CRAIG and G. de BURCA, *EU Law: Text, Cases and Materials*, 4th ed., Oxford, Oxford University Press, 2007, p. 810.

<sup>31</sup> ECJ, Case C-216-06 *Cartesio*, 2008 ECR I-0000.

<sup>32</sup> There is confusion as to whether Hungary adheres to the real seat or incorporation doctrine. See: V. KOROM and P. METZINGER, “Freedom of Establishment for Companies: The European Court of Justice Confirms and Refines its *Daily Mail* Decision in the *Cartesio*”; ECJ, Case C-210/06, *European Company and Financial Law*

precluded “national rules which make it impossible for a company constituted under national law to transfer its operational headquarters to another member state”.<sup>33</sup> The AG however formulated a reply to a question different than posed by the referring court and answered by the ECJ. What was at stake was not whether Hungary could prevent the establishment of Cartesio in Italy, but whether Hungary could provide for the loss of Hungarian legal personality. The refusal of the right to maintain Hungarian law as *lex societatis* did in itself not prevent the relocation to Italy. The AG argued that the case law on the right to establishment evolved since *Daily Mail* and repeated the well-known criticism that the distinction between laws that restrict the freedom of establishment in the member state of origin and the host member state was unconvincing. He added that in particular the distinction did not fit in the general analytical framework of the Court with regard to arts. 43 and 48 EC. The emphasis on the laws that restrict the freedom of establishment rather than the rights of the individual is the key as to why the AG was not followed by the Court.

The Court pointed out that while in *Überseering* Dutch law (incorporation theory) provided for a right of to the company to transfer its actual centre of business abroad, Hungarian law did not.

“Consequently, in accordance with Article 48 EC, in the absence of a uniform Community law definition of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company, the question whether Article 43 EC applies to a company which seeks to rely on the fundamental freedom enshrined in that article – like the question whether a natural person is a national of a member state, hence entitled to enjoy that freedom – is a preliminary matter which, as Community law now stands, can only be resolved by the applicable national law. In consequence, the question whether the company is faced with a restriction on the freedom of establishment, within the meaning of Article 43 EC, can arise only if it has been established, in the light of the conditions laid down in Article 48 EC, that the company actually has a right to that freedom”.<sup>34</sup>

So the power of a member state to define the connecting factor to

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*Review*, 2009, vol. 6 (1), pp. 125-161, at pp. 141-144. For the present purposes it is sufficient that Hungary did not foresee in the transfer of real seat without changing legal personality.

<sup>33</sup> AG MADURO in *Cartesio*, par. 35.

<sup>34</sup> *Cartesio*, par. 109.



determine whether a company is regarded as incorporated under its laws includes the power to refuse a company governed by its law to retain that status if it desires to re-establish in another member state by moving its real seat. Did the ECJ then fully confirm *Daily Mail*? Not really, in an *obiter dictum* the Court continued that the power to define the connecting factor did not place the rules on transfer of undertakings outside the scope of Community law. Those rules came under the scrutiny of the freedom of establishment to the extent that the law of the member state of origin allows for a transfer. Contrary to *Daily Mail* the Court held that the winding-up or liquidation of the company prior to a transfer to another member state would violate the freedom of establishment if it could not be justified by an overriding public interest.<sup>35</sup>

A lot can be said about the judgment.<sup>36</sup> The impossibility under the law of the member state of incorporation to re-establish an undertaking in another member states can be easily circumvented by performing a so-called vertical merger in reverse.<sup>37</sup> If Hungarian law would not provide for the possibility of re-incorporation in Italy, Cartesio could simply establish an empty shell in Italy and subsequently merge the two legal entities whereby the Hungarian company would transfer all of its assets and be completely absorbed by the Italian company. The ECJ held in *Sevic Systems* that the commercial registrar of the member state of the first undertaking (empty shell) is obliged to register a cross-border merger by dissolution without liquidation of one company and transfer of the whole of its assets to another company if such registration is possible when both companies are established within the member state involved.<sup>38</sup> Cartesio would of course then have to accept that the *lex societatis* of the new legal entity is to be determined by Italian law, and will presumably be Italian.

The Court explicitly draws a parallel with the status of natural persons. Art.

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<sup>35</sup> *Cartesio*, par. 112-113.

<sup>36</sup> P. BEHRENS, "Cartesio bestätigt, aber korrigiert Daily Mail", *Europäische Zeitschrift für Wirtschaftsrecht*, 2009, vol. 20, V. M. PIEßKALLA, "EuGH: Verhinderbare Gesellschaftssitzverlegung in einen anderen Mitgliedstaat als den Gründungsmitgliedstaat – Cartesio", *Europäische Zeitschrift für Wirtschaftsrecht*, 2009, vol. 20, pp. 75-83; C. GERNER- BEUERLE and M. SCHILLING, "The Mysteries of Freedom of Establishment after Cartesio", 2009, available at SSRN: <http://ssrn.com/abstract=1340964>, KOROM/ METZINGER, *supra* note 32. Unfortunately, it is beyond the scope of this paper to discuss the various interpretations of *Cartesio*.

<sup>37</sup> U. KLINKE, "European Company Law and the ECJ: The Court's judgments in the years 2001-2004", *European Company and Financial Law Review*, 2005, pp. 275-304.

<sup>38</sup> It is assumed that the registration of a vertical merger without liquidation of one of the parties is possible under Italian law.

43 however guarantees for individuals also the right to exit. The discrepancy in the approach towards the home member state in cases relating to the establishment of legal and natural persons has been found unconvincing.<sup>39</sup> The analogy between legal and natural persons can however not fully be maintained. Unlike natural persons, legal persons are creatures of law and only exist by grace of the national law. It is very well possible for an individual to have multiple nationalities, but it would be highly infeasible for a company to have multiple 'nationalities' and subsequently be governed by various laws. Although one can require companies to give up their legal nationality, one cannot require citizens to give up their nationality when moving to another member state. It is for this reason the ECJ does not prohibit member states from refusing a company to retain legal personality under its laws when the company moves beyond the boundaries of the jurisdiction involved.

*Cartesio* could invoke a right against Hungary since Hungary already recognised all privileges resulting from incorporation under Hungarian law.<sup>40</sup> Has the ECJ by refining, but in the main confirming *Daily Mail* implicitly overturned *Centros*? Is regulatory competition now dead? The wide interpretation of *Centros* and *Überseering* as nails to the coffin of the real seat doctrine can certainly no longer be maintained, but that interpretation was incorrect anyway. What the Court did in those cases was oblige the host member state to recognise a company duly set up under the laws of another member state. As the section below will demonstrate, the decision of the Court in *Cartesio* is in harmony with *Centros* and in harmony with the approach the Court takes in the area of surname law.

## V. THE VESTED RIGHTS THEORY REBORN

A company duly set up under the law of one member state shall be recognised in other member states. The language of the Court might sound familiar to the older generation of common lawyers. It seems the revival of a PIL doctrine declared dead many years ago. It was the Frisian scholar Ulrik Huber (1636-1694) who developed the idea that comity (fellowship of

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<sup>39</sup> PIEßKALLA *supra* note 36, p. 82.

<sup>40</sup> There might be situations conceivable where a right against the home member state can be invoked. For example when a tax scheme allows for the off-set of losses incurred by subsidiaries for the benefit of the parent company, this right would also apply to subsidiaries set up and operating in other member states. The home member state of the parent is then bound to recognise the capacity of the subsidiary awarded by the home member state of the subsidiary. ECJ, Case C-446/03, *Marks & Spencer plc v HM's Inspector of Taxes* 2005 ECR I-10837.

nations)<sup>41</sup> and the general pressure of international commerce required that acts duly performed in one jurisdiction shall be sustained in other jurisdictions. This idea became very influential in common law jurisdictions, in the form of the vested rights doctrine.<sup>42</sup> There has never been a universal conception of the vested rights doctrine.<sup>43</sup> In England the theory was most notably promulgated by Dicey who presumed that in English courts the applicable law was always English, but that English law would enforce rights duly acquired under foreign law unless this would violate English public policy.<sup>44</sup> In the United States, Beale favoured the universal recognition of rights created by the appropriate law.<sup>45</sup> Unlike Dicey, Beale formulated a rule to determine the law that created those rights: the law of the place where the last legal act necessary for the completion of the right took place.<sup>46</sup> The vested rights theory was also influential in French academia.<sup>47</sup> For Pillet the enforcement of a vested right was not a conflict of laws; at stake was not the question which jurisdiction was entitled to create it, but under what conditions a right had to be recognised in a jurisdiction different from which created it.<sup>48</sup> Pillet created in addition to the acquired rights doctrine a full system for designating the applicable law.<sup>49</sup>

## VI. VESTED RIGHTS AND MUTUAL RECOGNITION

The vested rights doctrine has some striking similarities with the principle

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<sup>41</sup> H. YNTEMA, "The Comity Doctrine", in: E. VON CAEMMERER, A. NIKISCH and K. ZWEIGERT, (eds.), *Vom Deutschen zum Europäischen Recht, Festschrift für Hans Dölle*, Tübingen, Mohr Siebeck, bd. II, 1963, pp. 65-72.

<sup>42</sup> P.M. NORTH and J.J. FAWCETT, *Cheshire and North Private International Law*, 11th ed., London, Butterworths, 1987, p. 21; L. STRIKWERDA, *Fries recht in Amerika. Over Ulrik Huber, Josph Story en internationale contracten*, *Groninger Opmerkingen en Medelingen IV*, 1987, p. 55.

<sup>43</sup> J. MAURY, "Règles générales des conflits de lois", *Recueil des Cours*, 1936, vol. 57, p. 329.

<sup>44</sup> A. DICEY, "On Private International Law as a Branch of the Law of England", *Law Quarterly Review*, 1890, vol. 6, pp. 1-21 and pp. 113-137, at pp. 114-118.

<sup>45</sup> J. BEALE, "Dicey's Conflict of Laws", *Harvard Law Review*, 1986, vol. 10, p. 168.

<sup>46</sup> R. MICHAELS, "EU Law as Private International Law? The Country-of-Origin Principle and Vested Rights Theory", *Journal of Private International Law*, 2006, vol. 2, pp. 195-242, at p. 215.

<sup>47</sup> H. MUIR-WATT, "Quelques remarques sur la théorie anglo-américaine des droits acquis", *Revue Critique de droit international privé*, 1986, pp. 425-455.

<sup>48</sup> A. PILLET, *Traité pratique de droit international privé I*, Paris, Sirey, 1923.

<sup>49</sup> MICHAELS, *supra* note 46, p. 216.

of mutual recognition.<sup>50</sup> In essence, the principle of mutual recognition combined with a country of origin principle is nothing more than the inability of the host member state to apply its legislation to a situation when that situation is already covered by the legislation of the home member state.<sup>51</sup> Neither the principle of mutual recognition nor the vested rights doctrine determines by itself the applicable law.<sup>52</sup> The fact that Germany cannot apply its beer purity laws to French imports does not mean French law is applicable, but rather that Germany cannot apply its legislation to French beer when that legislation is more restrictive than French legislation. Vested rights can seem circular. The question that duly acquired rights have to be respected does not answer the question according to which law the rights have to be established. An additional concept that can determine the competent legal order(s) is therefore necessary. Similarly, it is not in the scope of the principle of mutual recognition and vested rights to completely replace the otherwise applicable law. Regulatory gaps may therefore occur.<sup>53</sup> Finally, from a political legitimacy perspective it can be argued that both doctrines do not necessarily attribute regulatory competence to the member state with the largest regulatory interest. Was the regulatory interest of Germany to control the sale of spirits on its territory not larger than the regulatory interest of France to promote exports?<sup>54</sup> Did Denmark not have a larger

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<sup>50</sup> E. JAYME and C. KOHLER, "Europäisches Kollisionsrecht 2001: Anerkennungsprinzip statt IPR?", *IPRax*, 2001, vol. 21, pp. 501-514; J. ISRAEL, "Europees internationaal privaatrecht", *Nederlands Internationaal Privaatrecht*, 2001, vol. 19, pp. 135-149; M. FALLON and J. MEEUSEN, "Private International Law in the European Union and the Exception of Mutual Recognition", *Yearbook of Private International Law*, 2002, vol. 4 pp. 37-66 ; M. BOGDAN, *Concise introduction to EU Private International Law*, Groningen, Europa Law Publishing, 2006, pp. 26-30. For the general influence of Community law upon PIL: W. ROTH, "Der Einfluß des Europäischen Gemeinschaftsrechts auf das Internationale Privatrecht", *RabelsZ*, 1991, vol. 55 pp. 623-673; L. RADICATI DI BROZOLO, "L'influence sur les conflits de lois des principes de droit communautaire en matière de liberté de circulation", *Revue Critique de Droit International Privé*, 1993, vol. 82, pp. 401-423.

<sup>51</sup> *Commission Communication on Mutual Recognition*, OJ C256/2 [2008]. J. WEILER, "The Transformation of Europe", *Yale Law Journal*, 1991, vol. 100, pp. 2403-2483; R. STEFFENSON, *The EU's Exportation of Mutual Recognition: A Case of Transatlantic Policy Transfer?*, EUI Working Paper 2002/73; F. KOSTORIS PADOA SCHIOPPA, *The Principle of Mutual Recognition in the European Integration Process*, New York, Palgrave Macmillan, 2005.

<sup>52</sup> J. ISRAEL and K. SAARLOOS, *Europees Internationaal Privaat- en procesrecht*, in: A.S. HARTKAMP, C.H. SIEBURG, L.A.D. KEUS (eds.) *Serie Onderneming en Recht deel 42-II*, Deventer, Kluwer, 2007, pp. 629-698, at p. 651.

<sup>53</sup> MICHAELS, *supra* note 46, 230.

<sup>54</sup> Case 120/78 *REWE-Zentral v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

regulatory interest in the registration of the Danish branch of an English company that factually carried out no business in the United Kingdom?

For Michaels mutual recognition demonstrates a paradigm shift in PIL. The country of origin principle “is a choice-of-law principle albeit not one according to classical conflict of laws but a new form of vested rights principle”.<sup>55</sup> Although it is beyond doubt that the vested rights doctrine is a PIL principle, one can doubt whether vested rights are really a new form of mutual recognition. Mutual recognition concerns public law rules, or since the divide between public and private in Community law seems to be fading more and more,<sup>56</sup> rules concerning administrative authorisations, prudential supervision or product quality.<sup>57</sup>

Community law is in principle not interested in origin or national classification of a rule. Rather the ECJ establishes the restrictive effects of a rule on the internal market. So, why would Community law care about the public/private distinction, especially since there is on the continent no common consensus about what is public and what is private and moreover, the distinction as such is rejected by the common law traditions?<sup>58</sup> The meaning of the public/private divide should be interpreted in the light of the original objective of the Community: the creation of an internal market by the elimination of artificially created obstacles to trade. Community law thus, with the exception of competition laws, principally did not address horizontal relations but was addressed to member states. Mutual recognition was developed in this framework. Starting with *Defrenne II*,<sup>59</sup> where the ECJ held that the non-discrimination principle embodied in art. 141 EC also applied in a contract between two private

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<sup>55</sup> R. MICHAELS, “The New European Choice-of-Law Revolution”, *Tulane Law Review*, 2008, vol. 82, pp. 1607-1644, at p. 1628.

<sup>56</sup> D. KENNEDY, “The Stages of Decline of the Public/Private Distinction”, *University of Pennsylvania Law Review*, 1982, pp. 1349-1357; M. LOUGHLIN, *The idea of public law*, Oxford, Oxford University Press, 2004; D. WYATT, *Horizontal Effect of Fundamental Freedoms and the Right to Equality after Viking and Mangold, and the Implications for Community Competence*, Oxford Legal Studies Research Paper No. 20/2008. The distinction between public and private is also fading from the rulemaking lens: P. VERBRUGGEN, *The Public-Private divide in Community law: Exchanging Public and Private law functions across the divide*, EUI Term Paper (2009), not published but available with author.

<sup>57</sup> H. MUIR-WATT, “The Conflict of Laws as a Regulatory Tool”, in: F. CAFAGGI (ed.), *The Institutional Framework of European Private Law*, Volume II, Oxford, Oxford University Press, 2006, pp. 107-148, at p. 110.

<sup>58</sup> M. HEIDEMANN, “Private Law in Europe: The Public/Private Dichotomy Revisited”, *European Business Law Review*, 2009, vol. 20, pp. 119-139.

<sup>59</sup> ECJ, Case 43/75, *Defrenne II*, 1975 ECR 455.

parties, the influence of Community law in private law was gradually acknowledged. The Court first recognised in the nineties the direct applicability of art. 39 EC in a purely private dispute<sup>60</sup> and later accepted the same with regard to the freedom of establishment.<sup>61</sup> Also regulations can be directly applied between two individuals.<sup>62</sup> Despite the growing acknowledgement of the role of private law it is clear that the Community lacks a general competence in private law.

Indeed the public/private distinction is on itself of little value, but its underlying rationale helps to explain why we should approach rules concerning administrative authorisations, prudential supervision or product quality different from rules exclusively interfering with private relations. Public laws are by definition mandatory and its application can therefore not be evaded by private parties. Rules in private law, even when they are mandatory, can be avoided by parties to an international contract. In *Ablstom Atlantique* the ECJ held that rules whose application can be avoided by the parties by a simple choice of law are not able to constitute a restriction to the internal market.<sup>63</sup> Artificially created obstacles to trade created by 'public laws' cannot not be effectively struck down by private parties, which creates the need for an instrument such as mutual recognition, but this does not apply to large parts of private law, where private autonomy is able to avoid the application of restrictive laws.<sup>64</sup> Mutual recognition can therefore not fulfil the same role in private laws as it does with respect to public laws.

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<sup>60</sup> ECJ, Case C-415/93, *Bosman*, 1995 I-4921; ECJ, Case C-281/98, *Angonese*, 2000 ECR I-4139.

<sup>61</sup> ECJ, Case C-438-05, *Viking*, 2007 ECR I-10779. The prevailing opinion is that the Court attributed also in *Laval* direct horizontal effect to art. 49, see: D. WYATT, *Horizontal Effect of Fundamental Freedoms and the Right to Equality after Viking and Mangold, and the Implications for Community Competence*, Oxford Legal Studies Research Paper No. 20/2008, N. REICH, "The Public/Private Divide in European Law", pp. 9-10 (forthcoming), but critical: J.-J. KUIPERS, "The Social Dumping Debate in Luxembourg: The Laval Case before the European Court of Justice", *Cambridge Student Law Review*, 2008, vol. 4, pp. 243-244.

<sup>62</sup> ECJ, Case 93/71, *Leonesio v Italian Ministry of Agriculture*, 1972 ECR 293; ECJ, case 39/72, *Commission v Italy*, 1973 ECR 101.

<sup>63</sup> ECJ, Case C-339/89, *Ablstom Atlantique*, 1991 ECR 107, par. 29. About the possibility for contract law to constitute a restriction to free movement: J. RUTGERS, "Free Movements and Contract Law", *European Review of Contract Law* (forthcoming).

<sup>64</sup> J. BASEDOW, "Der kollisionsrechtliche Gehalt der Produktfreiheiten im europäischen Binnenmarkt": *favor offerentis*, in: *RabelsZ*, 1995, vol. 59, pp. 1-55, at p. 12; but critical: FALLON/MEEUSEN *supra* note 50, pp. 55-57.

Vested rights are therefore strongly centered around the individual. As observed in the literature, with regard to the recognition of acquired rights:

“L’individu acquiert une dimension autonome au plan transnational. Il résulte de cette consécration de l’autonomie que chaque situation ou rapport juridique n’est pas forcément rattaché à un seul ordre juridique mais rayonne et peut être appréhendé par plusieurs. Il en résulte également que l’hypothèse de l’autonomie participe à un besoin de réglementation d’un rapport par la collaboration des ordres juridiques concernés, sans porter, autant que possible, atteinte à la cohérence du rapport privé”.<sup>65</sup>

Mutual recognition is about the avoidance of a double burden: a manufacturer should not be asked to comply with the rules of both the member state of origin and the host member state. These ‘public’ laws are perceived as the imposer of duties, rather than the creator of rights. This is fundamentally different from ‘private law’ rules. Private law enables individuals to perform legal acts and to enter into legal relations and subsequently enforce the obtained rights. Private law thus ensures that individuals can create rights and obligations between each other. Legal subjects may benefit from the potential application of various sets of private law since this broadens the array of potential private law rights. On a European level, the impediment to free movement does not originate in the diversity of private law rights, but in the non-recognition of rights acquired under the private law system of a member state by another member state.

Vested rights are therefore more than the inability to apply legislation of the host member state to a situation already governed by the laws of the member state of origin. Vested rights do not only require the host member state to refrain from imposing its conditions to creation of the right, but also the duty to accommodate the foreign rights into its own legal system. For example if Überseering would have gone bankrupt, it would for the German authorities not be sufficient to establish that limited liability existed and subsequently treat the company as a GmbH (German private limited company). Not only the creation but also the extent and conditions of the limited liability under Dutch law have to be incorporated into German law, even if the law applicable to the insolvency proceedings

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<sup>65</sup> C. PAMBOUKIS, “La renaissance-métamorphose de la méthode de reconnaissance”, *Revue Critique de Droit International Privé*, 2008, vol. 97, pp. 513-560, at p. 527.

is German.<sup>66</sup>

## **VII. TO WHAT EXTENT DO EUROPEAN VESTED RIGHTS DIFFER FROM THE VARIOUS HISTORICAL CONCEPTIONS?**

The vested rights doctrine in the European Union can overcome the critique that led to its original decline half a century ago. As von Savigny noted, it can only be ascertained if a right is duly acquired when one has identified the law applicable to the creation of that right.<sup>67</sup> Pillet developed a separate PIL system to determine the competent legal order. In the Community, the development of a new system to establish the law applicable to the creation of a right would not be necessary. It is true that the recognition of an existing right should be separated from the applicable law, but the PIL systems of the member states that determine the applicable law can be maintained. Subsequently, it can occur that different member states declare themselves, or are declared, competent. It is up to Community law to verify whether the connecting factor used by the member state is legitimate. If several member states use different legitimate connecting factors it is for private autonomy to decide the law applicable to the creation of the right. It is the introduction of party autonomy that avoids the rigidity that brought the vested rights of Beale and Pillet down. It should be recalled that the main criticism against the First Restatement, where a vested rights doctrine was laid down, was not directed against vested rights as such but rather at the rigid way of determining the applicable law. Where the obligation for recognition was initially sought in the *comitas* doctrine of Huber and later in principles of international law, it is within the common European justice area beyond doubt that the duty to recognise directly originates in Community law.

## **VIII. VESTED RIGHTS: A BETTER INSIGHT OF ECJ CASE LAW?**

Having the vested rights theory in the back of our mind we can also explain why the ECJ allows member states in tax law matters to combat wholly artificial arrangements for tax evasion purposes,<sup>68</sup> but is not concerned with the setting up of a company in a member state, while all business is carried

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<sup>66</sup> Art. 3(1) of Regulation 1346/2000 confers jurisdiction in insolvency proceedings upon the courts of the member state where the main centre of the debtors' interest are situated, which is presumed to be the place of registration. A creditor would thus have to prove that although *Überseering* had its registered office in the Netherlands, the main centre of interest was situated in Germany. Art. 4(1) declares the *lex fori* to be applicable to the insolvency proceedings.

<sup>67</sup> F. VON SAVIGNY, *System des Heutige Römische Recht*, VIII Band, 1849, p. 132.

<sup>68</sup> Case C-196/04, *Cadbury Schweppes*, 2006 ECR I-7995.



out in another member state, with the sole purpose of avoiding the latter member states stricter company laws. Company law entails a set of obligations, such as minimum capital requirement and disclosure, which a company accepts in order to obtain a predetermined set of privileges, such as limited liability. Potential establishers of companies can only choose between company types that are created by the member state involved. There is already within a national legal system no choice about what type of tax payer one desires to be, let alone that on the international plane one can choose where one wants to pay tax. Fundamentally, there is an obligation to pay tax, but not a directly corresponding right. An undertaking does not obtain more rights when it pays a million euro company taxes instead of a euro. Tax law can therefore out of principle not be incorporated in a vested rights doctrine but has to be dealt with under the principle of mutual recognition.

The vested rights theory is able to effectively distinguish between *Daily Mail* and *Cartesio* on the one hand, and *Centros* and *Überseering* on the other. The Court never distinguished between the right to exit and the right to enter. As soon as there exists a possibility under national law of the member state of origin to re-establish in another member state, Community law safeguards that right of establishment in the sense that a restriction of that right on either side has to be justified by an overriding provision of public interest.<sup>69</sup> What matters is whether the company can invoke against the host member state a duly acquired right, the recognition of its privileges under a foreign law (for example limited liability). Whether a right is duly acquired depends on principle on the competent legal order. Art. 48 EC determines what the competent legal order is: either the jurisdiction where the company has its registered office, central administration or principal place of business. If the company desires to rely on its right, it could also very well prefer to be incorporated under German law if it moves its real seat from the Netherlands to Germany, the host member state is bound to respect it. *Cartesio* then perfectly fits in the pre-existing case law: there was no right that *Cartesio* could invoke against Hungary since Hungary already recognised all privileges resulting from incorporation under Hungarian law.

Explaining *Cartesio* with the vested rights theory would not contribute much to a better understanding of the interrelationship between Community law, national private laws and PIL if its reasoning could not be expanded beyond the scope of company law. Art. 48 EC places legal persons on the same footing as natural persons with regard to the freedom of establishment. It might therefore be interesting to have a closer look at the Court's case law in personal status issues.

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<sup>69</sup> *Cartesio*, par. 113

## IX. SURNAME LAW

The approach of the Court can also be retrieved in surname law, equally an area where the Community has no direct competence and where between member states discrepancies in connecting factors exist.

In *Konstantinidis* the transliteration of the name of a self-employed masseur into the Roman alphabet on his marriage certificate diverged from the transliteration in his Greek passport.<sup>70</sup> The ECJ held that the national rules on transliteration are incompatible with the Community law if it causes a Greek national such a degree of inconvenience that it infringes his right of establishment. This would be the case if the divergence in transliteration modifies the pronunciation and would create the risk that potential clients may confuse him with other persons. In other words: Konstantinidis had the right to use his name duly acquired under Greek law also in Germany.

In *Garcia Avello*, two children were born in Belgium out of a marriage between a Belgian and a Spanish national.<sup>71</sup> According to Belgian and Spanish nationality law the children possessed the nationality of both member states. According to Belgian surname law the children bore the family name of the father, 'Garcia Avello'. Spanish surname law allowed the parents to opt for a combination of the surnames of both parents. The couple registered the children at the Spanish embassy in Belgium under the surname 'Garcia Weber' and subsequently requested the Belgian authorities to change the surname, which was refused. The ECJ used European Citizenship to bring the situation into the scope of Community law.<sup>72</sup> The fact that the children had Belgian nationality and were resident in Belgium since birth was irrelevant; the children were also Spanish nationals living in Belgium and could therefore not be discriminated against on the ground of nationality. Non-discrimination requires that equal situations should be treated equally and unequal situations unequally. Dual citizens are in a different situation compared to Belgians that only possess one nationality, since dual citizens can bear different surnames under different laws. Treating a request of change of surname of a dual citizen equal to that of a 'single citizen' would therefore amount to unequal treatment.<sup>73</sup> Art. 12 in

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<sup>70</sup> ECJ, Case C-168/91, *Konstantinidis v Stadt Altensteig*, 1993 ECR I-1191.

<sup>71</sup> ECJ, Case C-148/02, *Garcia Avello*, ECR 2003, I-11613.

<sup>72</sup> T. BALLARINO and B. UBERTAZZI, On *Avello* and Other Judgments, "A New Point of Departure in the Conflict of Laws?", *Yearbook of Private International Law*, 2004, vol. 6, pp. 85-128, at pp. 106-111.

<sup>73</sup> Critical: P. LAGARDE, Note to *Garcia Avello*, *Revue Critique de Droit International Privé*, 2004, vol. 93, pp. 184-202.

conjunction with art. 17 EC therefore prevented a member state from refusing a change of surname if the requested surname would be in accordance with the law of a member state whose nationality the applicant also possessed.

In the light of mutual recognition the case is problematic since it does not seem possible to establish a country of origin. Could it not be argued that the Spanish embassy was bound to refuse the registration of the surname 'Garcia Weber' since a different surname had already been attributed to the child in Belgium? The case is less problematic from the point of view of the vested rights theory. In both member states a right to a surname had been duly acquired under the same connecting factor (nationality), it is within the private autonomy of an individual to choose whether he desires to enforce a right or not.

In *Grunkin Paul*, a child was born out of a marriage between two German nationals living in Denmark.<sup>74</sup> Both the parents and the child only possessed German nationality. 'Grunkin-Paul', an accumulation of the surname of both parents, was mentioned as surname on the Danish birth certificate of the child. Such an accumulation was possible under Danish law, but not under German law. Under Danish PIL the law applicable to the determination of a surname is the law of the place of habitual residence, while German PIL uses nationality as connecting factor. When the marriage broke down, the father moved to Germany and sought to register the child in Germany. Registration of the surname was refused since under German PIL the surname had to be determined according to German law, which required the parents to choose between the surname of the father and mother. A discrimination such as in *Garcia Avello* could not occur since the child only possessed German nationality and was treated equally compared to all other German nationals. The Court concluded however that a difference in surname could give rise to such an inconvenience (different surnames on diplomas, proof of identity) to create a disadvantage merely because the child exercised its freedom to move and to reside in another member state. The refusal therefore constituted a restriction on European Citizenship that could not be justified by any overriding public interest.<sup>75</sup>

Also, *Grunkin and Paul* demonstrates the difficulty of perceiving vested rights as a new form of mutual recognition combined with a country of origin approach. The parents exercised a fundamental freedom and the child

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<sup>74</sup> ECJ, Case C-353/06, *Grunkin and Paul*, 2008 ECR I-0000.

<sup>75</sup> T. KONSTADINIDES, "Citizenship within the scope *ratione materiae* of Community law: the current approach of the European Court of Justice" (2008), available at SSRN, 4-5.

born on the territory of Denmark only acquired German nationality; should Germany then not be classified as the country of origin? Rather, the Court resorts again to a party autonomy oriented approach. A member state is bound to respect a choice of law made by the parties. If the situation would have been the reverse, so that German surname law would have been more liberal than Danish surname law, it seems that Denmark would have to respect German law if the parties desired to invoke their right under German substantive law for the determination of the surname on the Danish birth certificate.

Whereas the restriction in *Garcia Avello* originated in the joint reading of the general principle of non-discrimination on the grounds of nationality and European Citizenship, the Court based its judgment in *Grunkin Paul* on citizenship alone. The Court in *Grunkin and Paul* moved away from the discrimination test it established in *Garcia Avello*, towards a test whether the difference in surname could create such a degree of inconvenience that it became more difficult for the individual concerned to exercise his rights as a citizen of the Union to move and reside freely throughout the territory of the member states. The shift of the Court fits into the gradually increasing attention of the Community of the free movement of citizens apart from economic transactions.<sup>76</sup>

Vested rights allow member states to maintain their connecting factor and perhaps more importantly, does not require change of the substantive law. National cultural identities can be preserved. Since vested rights only impact the existing legal norms in a very limited way and operate independently from the connecting factors of the host member state they are able to significantly simplify current legal problems.<sup>77</sup> Vested rights are specifically not meant to replace the normal conflict of law system, but at the avoidance of 'limping relationships'; relationships that are lawful in one member state but not in others.<sup>78</sup> Such situations are incompatible with the idea of a common European justice area. Legal fiction should be brought back in line with factual reality. What the vested rights doctrine does

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<sup>76</sup> M. FALLON, "Les conflits de lois et de juridictions dans un espace économique intégré. L'expérience de la Communauté européenne", *Recueil des Cours*, 1995, vol. 253, pp. 13-281 ; J. MEEUSEN, "Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?", *European Journal of Migration and Law*, 2007, vol. 9, pp. 287-305.

<sup>77</sup> D. COESTER-WALTJEN, "Das Anerkennungsprinzip im Dornröschenschlaf?", in: H. MANSEL *et al* (eds.), *Festschrift für Erik Jayme*, Band I, München, Sellier, 2004, pp. 121-129, at p. 123.

<sup>78</sup> R. BARATTA, "Problematic elements of an implicit rule providing for mutual recognition of personal and family status in the EC", in: *IPRax*, 2007, pp. 4-11, at p. 5.

require is that purely domestic situations are treated differently from situations involving a link with another member state. A different treatment of international situations is for European PIL not anything substantially new, but it narrows the question down. As AG Sharpston observed in her opinion in *Grunkin and Paul*:

“I would stress therefore that my approach would not require any major change to Germany’s substantive or choice of law rules in the field of names, but would simply require them to allow greater scope for recognising a prior choice of name validly made in accordance with the laws of another member state. To that extent, it involves no more than an application of the principle of mutual recognition which underpins so much of Community law, not only in the economic sphere but also in civil matters”.<sup>79</sup>

AG Jacobs, on the other hand, incorporated in his opinion in *Konstantinidis* a fundamental rights perspective.<sup>80</sup> European citizens could rely on their status as such and invoke a core of rights (*civis europeus sum*), in particular the observance of fundamental rights.<sup>81</sup> Such a political rights approach seems indeed to push back the role of PIL. From the outset it should be observed that citizenship and fundamental rights are two different things. Although both are claimed by individuals against the state, the latter are universal while the aim of the former is to make a distinction between the have and the have-nots. By reason of belonging to a certain political community, the citizen can claim certain rights that cannot be exercised by individuals not belonging to that political community.<sup>82</sup> Nevertheless, AG Jacobs held in *Konstantinidis* that the transliteration could infringe Konstantinidis’ fundamental rights, in particular his right to private life as laid down in art. 8 of the European Convention on Human Rights. The obligation to bear different surnames under the law of different member states would be incompatible with private life, and therefore the status and rights of a European Citizen, since a name forms an intrinsic part of a person’s

<sup>79</sup> AG SHARPSTON, *Grunkin Paul*, par. 91.

<sup>80</sup> A fundamental rights perspective for the unilateral recognition of family relationships was also defended by Muir Watt. The recognition of the personal status is in her opinion is not dependent upon the possession of European Citizenship and may therefore have a more universal application. H. MUIR-WATT, “Family Law: European Federalism and the ‘New Unilateralism’”, *Tulane Law Review*, 2008, vol. 82, pp. 1983-1999.

<sup>81</sup> AG JACOBS, *Konstantinidis*, 46.

<sup>82</sup> D. CHALMERS *et al.*, *European Union Law*, New York, Cambridge University Press, 2006, pp. 561-603.

identity.<sup>83</sup> Obviously, one cannot be required to maintain two different identities. A similar line can be discovered in his opinions in *Standesamt Niebüll*<sup>84</sup> and *Garcia Avello*.<sup>85</sup> The fundamental rights perspective does not come back in the decisions of the Court, which seems more concerned with the classical internal market rationale. We must be careful with such an approach since it would enormously expand the scrutiny of the ECJ over national measures.

Despite the hopeful words of AG Jacobs, '*civis europeus sum*'<sup>86</sup>, European Citizenship in itself is not an autonomous generator of rights.<sup>87</sup> Legal scholars must be careful not to take again an overexpansive interpretation of ECJ case law, as they did in company law. In a Community law context, European Citizenship might be used to broaden the interpretation of pre-existing rights. European Citizenship becomes instrumental for bringing a situation within the scope of Community law, triggering the obligation to recognise duly acquired rights. European Citizenship then does create any new rights, but ensures that not only rights obtained under Community law shall be sustained in member states, but also rights duly created in other

<sup>83</sup> The ECHR seems to interpret art. 8 differently: European Court of Human Rights, *Kuharec v Latvia* (2004) and European Court of Human Rights, *Mentzen v Latvia* (2004).

<sup>84</sup> Case C-94/04, *Standesamt Niebüll* (Grunkin Paul I), 2006 ECR I-3561. The case was held inadmissible on procedural grounds but the same facts reappeared in 'Grunkin Paul'.

<sup>85</sup> J. MEEUSEN, "Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?", *European Journal of Migration and Law*, 2007, vol. 9, pp. 287-305, at pp. 295-297.

<sup>86</sup> Further discussion and references: D. BINDER, *The European Court of Justice and the Protection of Fundamental Rights in the European Community: New Developments and Future Possibilities in Expanding Fundamental Rights Review to Member State Action*, Jean Monnet Working Paper 95/9504 (1995); see also: O. CHEREDNYCHENKO, *Fundamental Rights, Contract Law and the Protection of the Weaker Party*, Utrecht, Molengraaff Instituut voor Privaatrecht, 2007, pp. 217-218.

<sup>87</sup> European Citizenship has had a large impact on in social security matters and residency rights whereby the Court held that European Citizens lawfully resident on the territory of another member state could not be discriminated against on the grounds of nationality. The rights are however limited to those conferred by the EC Treaty. See: M. DOUGAN and E. SPAVENTA, "Educating Rudy and the (non-) English Patient: A double-bill on residency rights under Article 18 EC", *European Law Review*, 2003, vol. 28, pp. 699-712; N. REICH, 'Union Citizenship—Metaphor or Source of Rights?', *European Law Journal*, 2001, vol. 7 (1), pp. 4-23; N. REICH and S. HARBACEVICA, "Citizenship and Family on Trial: a Fairly Optimistic Overview of Recent Court Practice with Regard to Free Movement of Persons", *Common Market Law Review*, 2003, vol. 40, pp. 615-638; F. WOLLENSCHLÄGER, *Grundfreiheiten ohne Markt Die Herausbildung der Unionsbürgerschaft im unionsrechtlichen Freizügigkeitsregime*, Tübingen, Mohr Siebeck, 2006.

member states. It is true that the Court has gradually moved from establishing an economic link. One should be careful not to misinterpret this shift as replacing the red line of creating an internal market that runs through ECJ case law with a political rights approach centered around the individual. Rather, the red line has become wider as to include, next to the creation of an internal market, the creation of a common justice area. The expansion of the Courts' *leitmotiv* also reappeared in the attribution of competences in the Lisbon Treaty; art. 81 TFEU would do away with the internal market criterion.<sup>88</sup>

#### **X. EXTRAPOLATION OF *CARTESIO* AND *GRUNKIN AND PAUL*: VESTED RIGHTS IN OTHER AREAS OF PRIVATE LAW?**

The vested rights seem therefore to have returned in the case law of the ECJ in two areas of private law. To what extent can it be incorporated in other areas of private law? Especially concerning questions of personal status the vested right doctrine seems to be able to make a more general contribution.<sup>89</sup> Rights in surname and company law are however unilaterally created by registration, private autonomy thus means the liberty of a legal or natural person to choose the applicable PIL. Could the vested rights doctrine also be applied against more horizontally acquired rights, where private autonomy of two or more individuals is at stake, as for example in contract or torts?<sup>90</sup> Especially with regard to security rights in (im)movables the vested rights doctrine seems to be able to make a useful contribution. Should for example a lawfully established German retention of title clause (*Eigentumsvorbehalt*) on a delivery of computers be recognised in the context of the insolvency proceedings of the Latvian buyer in Latvia?<sup>91</sup>

Pamboukis stresses that rights obtained through registration by a public

<sup>88</sup> DE GROOT/KUIPERS *supra* note 5, pp. 111-112. Of course, the EC remains restricted by its general objectives.

<sup>89</sup> P. LAGARDE, "Développement futurs du droit international privé dans une Europe en voie d'unification: quelques conjectures", *RebelsZ*, 2004, pp. 225-243; D. HENRICH, "Anerkennung statt IPR: Eine Grundsatzfrage", *IPRax*, 2005, vol. 25, pp. 422-424 ; D. COESTER-WALTJEN, "Anerkennung im Internationalen Personen-, Familien und Erbrecht und das Europäische Kollisionsrecht", *IPRax*, 2006, vol. 26, pp. 392-401; P. LAGARDE, "La Reconnaissance mode d'emploi", in: T. AZZI *et al.* (eds.), *Vers de nouveaux équilibres entre ordres juridiques, Liber amicorum Hélène Gaudemet-Tallon*, Paris, Dalloz, 2008, pp. 481-501, at pp. 488-490.

<sup>90</sup> COESTER-WALTJEN, *supra* note 89, pp. 397-398.

<sup>91</sup> Unfortunately space prevents us from developing this argument in detail. In member states with a closed system of property rights the acceptance of vested rights would mean a modification to the property rights system in the sense property rights are not closed in a national context, but in a Community context.

authority are an *acte quasi public*. The state by exercising its authority confirms the existence of a right. The semi-public nature justifies an analogy with the principle of mutual recognition of judgments.<sup>92</sup> With regard to horizontally acquired rights, what Pamboukis finds troublesome is that without state interference it is difficult to establish whether a right has been truly created. Normal conflict of laws rules are not apt to deal with existing rights, creating legal uncertainty and unforeseeability for the individual. Despite the difficulty of establishing whether a right has been truly created, Pamboukis accepts that effect should also be given to real and existing private relationships under a foreign law.<sup>93</sup>

From the outset, there seems indeed to be nothing that prevents a party from relying on a right acquired in another member state. Limited liability could be invoked against all creditors, thus including private parties. If duly acquired rights can be relied upon in horizontal situations, there seems to be no objection why they cannot also be created in horizontal situations.

From the cited case law three conditions for the application of the vested rights doctrine can be inferred. The situation should fall into the scope of Community law, the PIL rules of member states must lead to the application of different substantive rules and finally, differences must exist between the potentially applicable legal systems.

## **XI. THE DUTY TO RECOGNISE ORIGINATES IN COMMUNITY LAW**

Community law can only generate the duty to recognise a right duly acquired right when the situation falls within its scope.<sup>94</sup> The first important

<sup>92</sup> A similar analogy is drawn by: P. MAYER, "Les méthodes de la reconnaissance en droit international privé", in: *Le droit international privé: esprit et méthodes; Mélanges en l'honneur de Paul Lagarde*, Paris, Dalloz, 2005, pp. 547-573.

<sup>93</sup> C. PAMBOUKIS, "La renaissance-métamorphose de la méthode de reconnaissance", *Revue Critique de Droit International Privé*, 2008, vol. 97, pp. 513-560. Pamboukis proposes the approach of 'reconnaissance' for quasi public actes and 'relevance' for rights created without state intervention (545). On the recognition of public rights: C. PAMBOUKIS, *L'Acte Public Étranger en Droit International Privé*, Paris, Librairie générale de droit et de jurisprudence, 1993. On the recognition of factual situations: P. PICONE, "La méthode de la référence à l'ordre juridique compétent en droit international privé", *Recueil des Cours*, 1986, vol. 197, pp. 229-419, at pp. 274-302.

<sup>94</sup> P. LAGARDE, "La Reconnaissance mode d'emploi", in: T. AZZI *et al.* (eds.), *Vers de nouveaux équilibres entre ordres juridiques, Liber amicorum Hélène Gaudemet-Tallon*, Paris, Dalloz, 2008, pp. 481-501. "Le droit communautaire n'impose pas de façon générale et inconditionnelle la reconnaissance de telles situations. Il n'en impose la reconnaissance que dans les cas où la non-reconnaissance serait une entrave non justifiée par l'intérêt général aux grandes libertés du traité." (p. 483)



limitation is thereby already given. The vested rights doctrine cannot apply to rights duly acquired in a non-member state. Germany is thus not obliged to recognise legal personality of a company incorporated under the laws of Switzerland, but with its main centre of business in Germany.<sup>95</sup> To bring the situation into the scope of Community law, European Citizenship is of particular importance with regard to personal status.<sup>96</sup> The test adopted in *Grunkin and Paul*, which determines whether a difference in surname could create such a degree of inconvenience that it causes a disadvantage to the right to freely reside in the territory of another member state, can also be applied to other personal status areas such as the recognition of adoption, lack of legal capacity, marriage or divorce.

With regard to divorce the approach that a divorce promulgated in another member state should be recognised is laid down in the Brussels IIbis Regulation.<sup>97</sup> Non-recognition of divorce promulgated in another member state would impede the possibility of remarriage in the member state of non-recognition. Art. 21(1) therefore provides that judgments relating to divorce, legal separation or marriage annulment shall be recognised in other member states without any special procedure being required. Courts only possess limited grounds of non-recognition, including a public policy exception that has to be defined narrowly.<sup>98</sup> Art. 25 provides explicitly for the possibility of multiple applicable national laws; “the recognition of a judgment may not be refused because the law of the member state in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts.”

Party autonomy also becomes clear on a different point. The Regulation only applies to positive decisions, the recognition of a decision not to grant a divorce therefore falls outside the scope of the Regulation.<sup>99</sup> Thus if a

<sup>95</sup> Bundesgerichtshof 27 October 2008, II ZR 158/06.

<sup>96</sup> More reluctant: H. MANSEL, “Anerkennung als Grundprinzip des Europäischen Rechtsraums”, *RabelsZ*, 2006, vol. 70, pp. 651-731.

<sup>97</sup> Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. The Regulation repealed Regulation 1347/2000, but maintains the same starting principle. The regulation is not based upon European Citizenship, but on Article 61(c) and Article 67(1) EC.

<sup>98</sup> Art. 22 Regulation 2201/2003.

<sup>99</sup> P. MOSTERMANS, “De wederzijdse erkenning van echtscheidingen binnen de Europese Unie”, *Nederlands Internationaal Privaatrecht*, 2002, pp. 263-273, but critically: H. GAUDEMET-TALLON, “Le Règlement no. 1347/2000 du Conseil du 29 mai 2000: Compétence, reconnaissance et exécution des décisions en matière matrimoniale et en matière de responsabilité parentale des enfants communs”, *Journal du Droit International*, 2001, pp. 381-445.

divorce between an Irish husband and a Belgian wife is denied in Ireland, parties could decide to file for a divorce in Belgium. Problematic is that Ireland is not bound to recognise the Belgian divorce if it is irreconcilable with a judgment given in proceedings between the same parties in the member state in which recognition is sought.<sup>100</sup> It cannot be excluded that in such a situation the ECJ would decide that Ireland is nonetheless bound to recognise the divorce on the basis of European Citizenship since the difference in civil status would create such a degree of inconvenience that it causes a disadvantage to the right to freely reside in the territory of another member state. Such an inconvenience would be likely to occur if the Irish husband would remain after the divorce in Belgium, remarry and subsequently desires to move with his new spouse to Ireland. Ireland would then due to the prohibition of polygamy not recognise the new marriage, impeding the right of the couple to move from Belgium to Ireland.<sup>101</sup>

## **XII. LEGITIMATE DIVERGENCE OF NATIONAL CONNECTING FACTORS**

The second condition for the application of the vested rights doctrine is that member states can legitimately apply different connecting factors.<sup>102</sup> In the literature, it has been debated whether nationality as such was a legitimate connecting factor or already in itself discriminatory.<sup>103</sup> The point is addressed by AG Sharpston in *Grunkin and Paul*:

“It is true that the rule in Paragraph 10 of the EGBGB [nationality as connecting factor, JJK] distinguishes between individuals according to their nationality, but such distinctions are inevitable where nationality serves as a link with a particular legal system. It does not, by contrast, discriminate on grounds of nationality. The purpose of the prohibition of such discrimination is not to efface the distinctions which necessarily flow from possession of the nationality of one member state rather than another (which are clearly maintained by the second sentence of Article 17(1) EC) but to preclude further differences of treatment which are based on

<sup>100</sup> Art. 22(c) Regulation 2201/2003.

<sup>101</sup> The idea of vested rights can also be retrieved in the *Green Paper on Succession and Wills*, COM (2005) 65, final, 11.

<sup>102</sup> W. ROTH, “Methoden der Rechtsfindung und Rechtsanwendung im Europäischen Kollisionsrecht”, *IPRax*, 2006, vol. 26, pp. 338-347, at p. 344.

<sup>103</sup> M. PUKJAK, *Le droit international privé à l'épreuve du principe communautaire de non-discrimination en raison de la nationalité*, Aix-en-Marseille, Presses Universitaires d'Aix-Marseille (2003); ISRAEL/SAARLOOS *supra* note 52 but as well case C-305/92, *Hoorn*, 1994, ECR I-1525; case C-214/94 *Boukhalfa*, 1996 ECR I-2253.

nationality and which operate to the detriment of a citizen of the Union".<sup>104</sup>

The connecting factor determines the competent legal order(s). An excessive connecting factor, and thus an excessive claim for regulatory competence could potentially be struck down by the ECJ.<sup>105</sup> The Court seems to have accepted both habitual residence and nationality as legitimate connecting factors in the area of surname law. That would *mutatis mutandis* also apply to all other areas of personal status. The different connecting factors lead to two or more potentially applicable legal systems. From a Community perspective, all national private law systems are equal and Community law cannot come up with a rule to determine the competent legal order (should nationality prevail over habitual residence, or *vice versa*). Community law can only observe that two or more member states can legitimately create the right, but the decision under which law the right has to be duly created must be left to private autonomy. It is after all for an individual to decide whether he desires to rely on a right or not.

Party autonomy in the applicable PIL constitutes a paradigm shift in PIL. Courts always resort to their own PIL to determine the competent legal order. Also, in the vested rights conception of Beale and Pillet it was the PIL of the forum that determined which legal order was competent to create the right concerned. However, *Grunkin and Paul* clearly goes further. Private parties can avoid the application of national PIL. The German court could not establish the competent legal order itself but had to accept that under Community law Denmark could declare itself to be a competent legal order and the parties had chosen the application of Danish PIL.

When member states use the same connecting factor, the applicable legal system shall in principle be the same, regardless under which PIL system that applicable legal system is determined. The connecting factors in the area of contract and tort law have been harmonised by respectively the Rome I and Rome II Regulation.<sup>106</sup> The connecting factor for contracts is the principle of the closest connection, which is in general the law of the place of the party that has to render the characteristic performance and in torts the *lex loci damni* applies. So, to a contract between a Greek seller and an Italian buyer Greek substantive law will apply regardless whether an action of enforcement is brought in Italy or in Greece. It will not be

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<sup>104</sup> AG SHARPSTON, *Grunkin and Paul*, par. 62.

<sup>105</sup> A possible excessive connecting factor could be automatic application of the *lex fori*.

<sup>106</sup> Regulation 593/2008 on the law applicable to contractual obligations (Rome I) and Regulation 864/2007 on the Law Applicable to Non-Contractual Obligations (Rome II).

necessary for an Italian court to establish whether the Italian buyer duly acquired under Greek law any rights that could be enforced in an Italian court since the whole legal relationship has to be answered according to Greek law anyway.<sup>107</sup> The doctrine of vested rights is then severely restricted; it can only come into play when the right is invoked in a situation governed by a law different from the law that created the right.

It could also occur that although member states use different connecting factors, they both refer to the same applicable legal system. If Spain would have used for the determination of a surname domicile as connecting factor instead of nationality, both Spanish and Belgium PIL would have referred in *Garcia Avello* to Belgian law as the applicable law. The children would then not have acquired any right under Spanish law and could hence not invoke it before the Belgian courts. It is in principle for the member state concerned to determine whether an appropriate link with its legal system exists to trigger the application of its laws.<sup>108</sup>

To return to the example of divorce, the applicable law to a divorce still has to be determined by the court seised. Since the Brussels Ibis Regulation allows for seven grounds of alternative jurisdiction<sup>109</sup> and the member states use a plurality of connecting factors, such as nationality, domicile, habitual residence or automatic application of the *lex fori*, a risk of forum shopping arises. In divorce proceedings this may become extra problematic since it will work to the detriment of the weaker party, who can see an unfavourable law 'imposed' by the economically stronger, better informed party. In the vested rights doctrine it thus becomes crucial to delimit the competent jurisdiction that can legitimately create a right.<sup>110</sup> The proposal for a Rome III Regulation seeks to delimitate the competent legal orders by harmonising the conflict of law rules of the member states. The law applicable to a divorce can to a certain extent be chosen by the parties, and in case of lack of a choice, the law of the place where both parties have their *habitual* residence shall normally be applicable. The *lex fori* as

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<sup>107</sup> The exception are the overriding mandatory provisions (art. 9 Rome I). Although part of the applicable law, what constitutes an overriding mandatory provision is still to be determined by the member states individually. Limitation in size restricts me to develop the argument further.

<sup>108</sup> In favour of a choice of law in such cases seem: G. DE GROOT and S. RUTTEN, "Op weg naar een Europees IPR op het gebied van het personen- en familierecht", *Nederlands Internationaal Privaatrecht*, 2004, pp. 273-282, at pp. 275-276.

<sup>109</sup> Art. 3 (1) Brussels Ibis Regulation.

<sup>110</sup> On the various possible approaches: V. GAERTNER, "European Choice of Law Rules in Divorce (Rome III): An examination of the possible connecting factors in divorce matters against the background of Private International Law developments", *Journal of Private International Law*, 2006, vol. 2, pp. 99-136.

connecting factor of last resort only fulfils a residual function, thereby significantly limiting the importance of the vested rights doctrine.<sup>111</sup>

Vested rights thus do not provide an unlimited possibility of choices. Required for a right to be duly established is that the law establishes that the right is designated as applicable by one of the PIL systems of the member states. In *Grunkin and Paul* the parents could therefore not have relied on the Spanish tradition of establishing surnames. Usually this will require a link with the applicable legal system, but *Centros* and *Inspire Art* demonstrate that the link can be rather loose or even artificially created. Whereas with regard to the freedom of establishment the possible connecting factors are laid down in the Treaty (art. 48), this is not the case with surname law. The Court relied on state practice and international conventions to conclude that both the use of nationality as well as habitual residence as connecting factor was reasonable. In case of the threat of abuse, connecting factors have to be harmonised to prevent abuse to the detriment of the weaker party.

### **XIII. LEGITIMATE DIVERGENCE BETWEEN POTENTIALLY APPLICABLE NATIONAL LAWS**

Obviously the legal norm applicable should differ on a substantive level from the otherwise potentially applicable law. If the conditions of the grant of a divorce would be set by the European legislator it would not matter whether one applies the law of Belgium or Ireland to a divorce. Under both legal systems the outcome of the proceedings will be identical. Not only the of vested rights will be marginalised, but also that of PIL as a whole.<sup>112</sup>

### **XIV. PULLING THE EMERGENCY BREAK: PUBLIC POLICY**

One element of the vested rights doctrine has until so far not been discussed. Courts will not enforce a right when recognition would violate the public policy of the forum. From the outset it is clear that the grounds of non-recognition of a right acquired in another member state should be interpreted narrowly.<sup>113</sup> The intentional evasion of stricter Danish minimum capital requirements in *Centros* was not enough to justify non-recognition. What becomes also clear from that judgment and *Inspire Art* is that the application of public policy should be decided on a case by case basis.

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<sup>111</sup> The proposal is the follow up of the *Green Paper on applicable law and jurisdiction in divorce matters*, COM (2005) 82 final. The fate of the proposal is currently unclear. Oral question in European Parliament with debate of E. GEBHARD, A6-0361/2008.

<sup>112</sup> G. KEGEL, *The Crisis of Conflict of Laws*, *Recueil des Cours*, 1964, vol. 95, pp. 91-268.

<sup>113</sup> Case 30/70, *Bouchereau*, 1977 ECR 1999.

Although the Brussels IIbis Regulation provides for wider grounds of non-recognition than public policy, for example a court may decide not to recognise a divorce when that is incompatible with an earlier judgment rendered in a dispute between the same parties in the member state in which recognition is sought, the automatic imposition of public policy in a situation with a certain foreign element will not pass the proportionality test. Public policy might have a stronger role in dealing with politically more sensitive rights. In the United States for example, public policy has been discussed as a potential tool for the non-recognition of same-sex marriages.<sup>114</sup> Could Poland apply its public policy as a justification for the non-recognition of a Dutch same-sex marriage?

The Dutch State Committee on PIL considered the predecessor of the Brussels IIbis Regulation, the Brussels II Regulation, also to be applicable to same-sex marriage. Since the Community lacks a common definition of 'marriage', it should be left to the member states to define what a marriage is.<sup>115</sup> Whether a marriage is validly concluded in the Netherlands should therefore be left to be determined by Dutch law. The European Commission itself recognises the Dutch same-sex marriage as 'marriage' for internal purposes.<sup>116</sup> However, the German *Verwaltungsgericht* in Karlsruhe refused on the basis of the public policy exception to recognise a Dutch same-sex marriage between a Dutch and a Taiwanese national residing in Germany, when the Taiwanese national applied as spouse of a migrant worker for a German residence permit under art. 10 of Regulation 1612/68.<sup>117</sup> France recently followed the example of the Commission and did not apply its public policy exception but instead recognised for tax purposes

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<sup>114</sup> K. WORTHEN, "Who Decides and What Difference Does It Make?: Defining Marriage in 'Our Democratic, Federal Republic'", *Brigham Young University Journal of Public Law*, 2004, vol. 18, pp. 273-307; P. BORCHERS, "*Baker v. General Motors*: Implications for Inter-Jurisdictional Recognition of Non-Traditional Marriages", *Creighton Law Review*, 1998, Vol. 32, pp. 147-185; A. KOPPELMAN, "Same-Sex Marriage, Choice of Law, and Public Policy", *Texas Law Review*, 1998, Vol. 76, pp. 921-1001.

<sup>115</sup> Staatscommissie voor het Internationaal Privaatrecht, Advies inzake het internationaal privaatrecht in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht (20010), pp. 20-21, available at: [http://www.justitie.nl/onderwerpen/wetgeving/over\\_wetgeving/privaatrecht/commissies-privaatrecht/staatscommissie-ipr.aspx](http://www.justitie.nl/onderwerpen/wetgeving/over_wetgeving/privaatrecht/commissies-privaatrecht/staatscommissie-ipr.aspx), as of 10 February 2009.

<sup>116</sup> Internal memo of 15 May 2001, see: H. JESSURUN d'OLIVEIRA, "De Europese Commissie erkent het Nederlands huwelijk. Nederlands relatierecht en de Europese Unie", *Nederlands Juristenblad*, 2001, pp. 2035-2040.

<sup>117</sup> Verwaltungsgericht Karlsruhe 9 September 2004, see: R. KOOLHOVEN, "Het Nederlands opengestelde huwelijk in het Duitse IPR. De eerste rechterlijke uitspraak is daar!", *Nederlands Internationaal Privaatrecht*, 2005, p. 138.

a Dutch same-sex marriage between two Dutch nationals residing in France.<sup>118</sup> Although it is for member states to define the notion 'marriage' it is equally within the discretion of the member state to define, within the limits of Community law, the content of their public policy. It seems unlikely that the ECJ will use European Citizenship to settle such a politically sensitive question.

## **XV. CONCLUSION**

The case law of the ECJ in company law and surname law is not completely Community law, because Community law in itself does not generate the right but depends on the various national solutions. Community law however requires the non-application of national rules that would prevent the exercise of a right acquired in another member state. In that sense it does not create any new rights but only enforces what is valid under the laws of the member state of creation. The case law does however also not fit in national private law since it leads to the creation of rights that are unavailable under national remedies and is neither PIL since the case law does not establish a law which is competent to create the right concerned. Instead the case law hovers between the legal disciplines and necessitates us to fundamentally rethink the relationship between Community law and PIL. A right duly created in one member state shall be recognised in other member states. It seems the revival of the vested rights doctrine, a PIL theory that has its roots in the writings of the Frisian scholar Ulrik Huber, and that was declared dead many years ago.

Vested rights do not interfere with the national private law rules. It only requires that a situation with a foreign element should be treated differently from a purely domestic situation. That is not something new. Vested rights do not require a member state to adopt a certain connecting factor. The connecting factor constitutes the link that determines the competent legal order. In the vested rights doctrine that is crucial since the acceptance that vested rights should be recognised does not answer the question according to which law the right has to be duly established. Community law controls the connecting factors and prevents member states from claiming to broad regulatory competences. On the other hand, Community law ensures that if a right is duly acquired according to a law designated by one of the PIL systems of the member states, it is not open for other member states to second-guess the operation of the connecting factors of the first member state. Private autonomy identifies from the various competent legal orders the legal order according to which the right has to be created.

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<sup>118</sup> J. STROOBANTS, "La France reconnaît le mariage d'un couple d'hommes néerlandais", *Le Monde*, 6 September 2008.

Vested rights can simplify the existing legal jungle when the situation falls into the scope of Community law, the PIL rules of member states lead to the application of different substantive rules and finally, differences exist between the potentially applicable legal systems. The link with Community law generates the obligation to recognise, whereas the practical effect of vested rights would be severely limited if all PIL systems would refer to the same applicable law or where the application of the law of the different member states would lead to identical results.

Although a right may be duly established it could still manifestly violate the public policy of the member state in which recognition is sought. The public policy has however to be construed narrowly. It can only protect the core values of the forum.

The doctrine of vested rights allows us a better insight into the company and surname case law of the ECJ. There is no principal differentiation between the right to entry or the right to exit. Restrictions on both rights will be under the scrutiny of Community law. A vested right can however only be invoked against the host member state and not the member state of origin. There was no right that Cartesio could invoke against Hungary since Hungary already recognised all privileges resulting from incorporation under Hungarian law. The decision of the Court in *Centros* is therefore still standing and regulatory competition is far from dead.

In family law European Citizenship may trigger the application of Community law. The Court has moved away from the establishment of economical links or the existence of discrimination on the grounds of nationality but instead adopted a test aimed at establishing whether a difference in surname (but potentially also other personal statutes) could create such a degree of inconvenience that it causes a disadvantage to the right to freely reside in the territory of another member state. It seems that vested rights can therefore especially in the field of family provide for increased legal certainty and above all, simplification.

The private international law solution as represented by the vested rights approach should be welcomed since it is able to serve two often conflicting ends. Vested rights serve the interest of the Community by taking away obstacles as a result of discrepancies in personal status and thereby promoting the common European justice area. At the same time vested rights do not necessitate any change of connecting factor or substantive law and thus allows member states to preserve their national identity.