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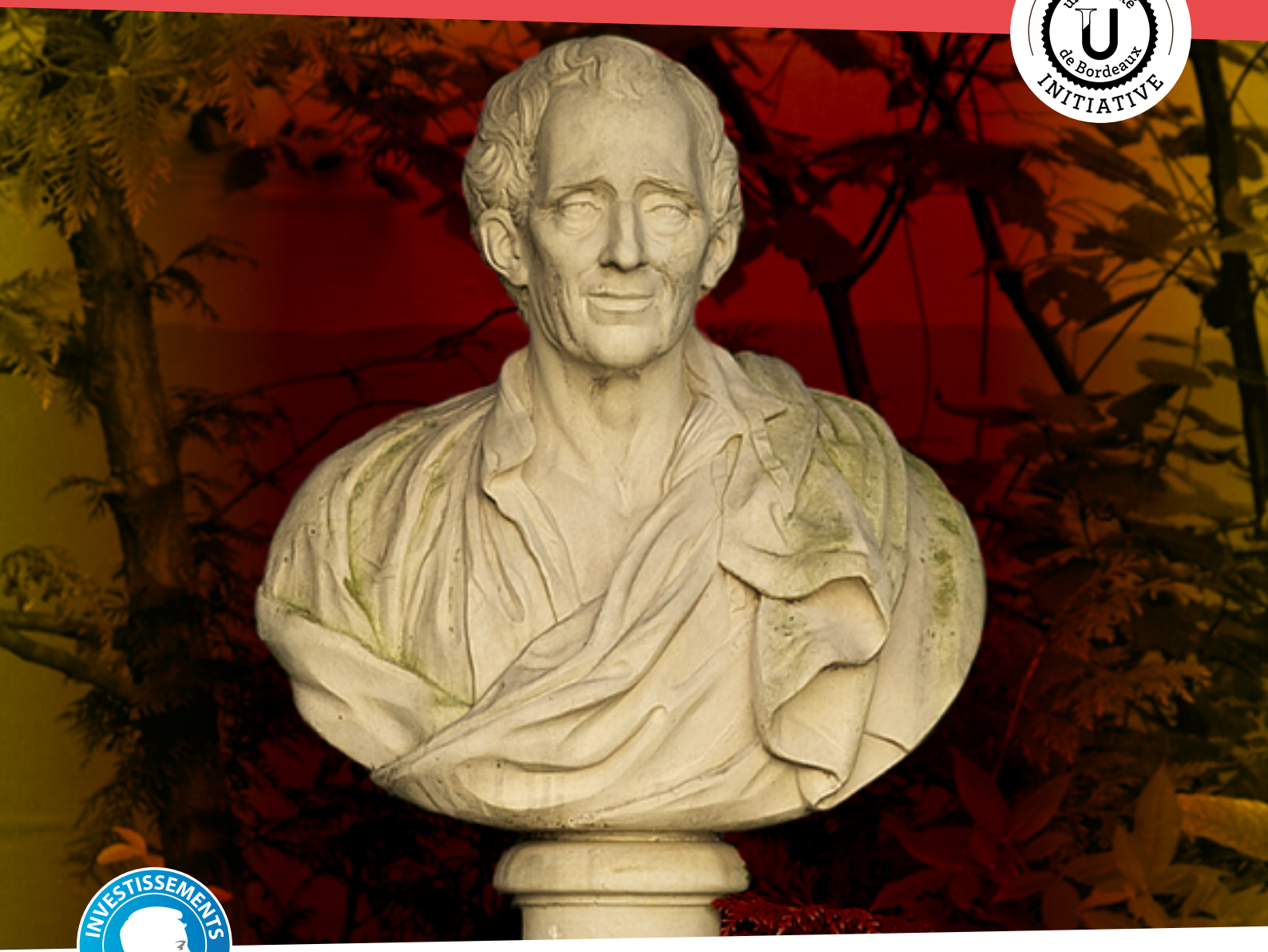

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Same-sex marriage in France and its international repercussions

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While, in the preparatory work for the Civil Code, Portalis defined marriage as "the *society of man and woman united to perpetuate their species, to help with mutual aid to carry the weight of the life and to share their common destiny*" (1), modern individualist ideology has gradually undermined the traditional conception of the couple and the family. Thus, of the 193 States in the international community, twenty have now opened up marriage to same-sex couples. France joined their number after a reform that was as passionate as it was mediatised, opening marriage and adoption to same-sex couples on 17 May 2013. Now, faced with the increasing international mobility of individuals, domestic law reforms have necessarily influenced the rules of private international law. Knowledge of the private international law rules applicable to same-sex couples is essential in resolving the inevitable problems of the legal circulation of their union, a problem that courts are already facing. Highlighting the international repercussions of opening marriage up to same-sex couples in France requires an examination of the private international law rules provided by the Law of 17 May 2013 (I), before analysing the contributions made by the Court of Cassation decision of 28 January 2015 on the celebration of a French-Moroccan gay marriage (II) and considering the limitations of the current regulations (III).

The rules of private international law from the Law of 17 May 2013:

A confirmation of traditional conflict rules

In passing the Law of 17 May 2013, the French Parliament opened up marriage to same-sex couples and enshrined the principle, under Article 143 of the Civil Code, that "*marriage is contracted by two people of different sexes or of the same sex*". However, anxious to guarantee the international influence of its reform, the legislature introduced, just this once, provisions of private international law. Thus, Article 202-2 of the Code now provides that "*marriage is validly celebrated if it was performed in accordance with the formalities required by the law of the State in whose territory the celebration took place*" and thus confirms the attachment of formal conditions of marriage to the law of the location of celebration. Similarly, the first paragraph of Article 202-1 provides that "*the qualities and conditions necessary for entering into marriage are governed, for each spouse by his or her personal law*," which confirms the traditional attachment of the basic conditions for marriage to the law applicable to personal status, being national law in French private international law.

The adoption of a new conflict rule

The gender difference being a bilateral impediment, it is subject to a cumulative application of national laws in force. However, the cumulative application of national laws on bilateral impediments to marriage results in the application of the most stringent national law and consequently deprives one member of the couple of advantages conferred on him by his national law. In other words, two people of the same sex can only marry if the national laws of both parties recognise the substantive validity of the marriage without making sexual otherness a substantive condition thereof. Consequently, given the growing number of scenarios involving couples of multiple nationalities and the low number of States that have accepted gay marriage, the second paragraph of Article 202-1 provides that "*two people of the same sex can marry when, for at least*

one of them, either their personal law or the law of the State in whose territory they have their domicile or residence permits it". While this conflict rule allows marriage between individuals of the same sex "*to escape the wrath of prohibitive personal laws*" (2), we may wonder whether it was really appropriate to adopt a specific rule applicable to marriage between persons of the same sex. Indeed, such an approach hardly seems compatible with the egalitarian objective of the legislation, and engenders a degree of inconsistency in the rules relating to marriage under private international law. As noted by Professor Fulchiron, "*this way of putting new wine into old wineskins (...) makes marriage between individuals of the same sex an exception to the normal set of conflict rules while we claim to make it a marriage like any other*" (3).

The function of the new conflict rule

The French legislature was clearly inspired by Article 46 of the Belgian Code of Private International Law, which states that "the application of a provision of the designated law pursuant to paragraph 1 (4) is waived if this provision prohibits marriage between persons of the same sex when one of them is a national of a State or is habitually resident in the territory of which the law allows such a marriage". This provision thus serves, explicitly under Belgian private international law and implicitly under French private international law (5), in disregarding the prohibitive law or the personal law(s) where the national law or law of the domicile or residence of one of the spouses allows gay marriage. Thus, a couple made up of a German and an Italian, one of whom has a residence - even a secondary residence (6) - in Portugal could marry in France (7) even though neither Germany nor Italy have opened up marriage to same-sex couples.

The boundaries of the new conflict rule

While the initial version of the Bill opening marriage to same-sex couples made the application of Article 202-1 subject to compliance with France's international commitments (8), this reference was deemed unnecessary in light of Article 55 of the Constitution, which states that treaties take precedence over national law (9). It was thus by way of the Circular of 29 May 2013 presenting the law opening marriage to same-sex couples (10) that a limit was imposed on that provision. The latter provides that "*the rule introduced by Article 202-1 paragraph 2 can only apply to nationals of countries with which France is bound by a bilateral agreement which provides that the law applicable to the basic conditions for marriage is personal law*". The Circular then recalled that France had concluded such agreements with Poland, Morocco, Bosnia and Herzegovina, Montenegro, Serbia, Kosovo, Slovenia, Cambodia, Laos, Tunisia and Algeria.

There was therefore a prohibition, in theory, on the celebration in France of same-sex marriages where one of the spouses was a national of a State which had concluded a bilateral agreement with France providing for the attachment of basic conditions for marriage to personal law. However, with regard to public order considerations in international agreements and conventions relating to personal status, the ministerial response of 13 August 2013 specified that it fell to "*judicial courts to assess whether the foreign law designated by the application of said Conventions should be excluded because it is contrary to French international public policy and to allow the celebration of the marriage in France*" (11). It is precisely on this point that the Court of Cassation decision of 28 January 2015 is so decisive.

The contributions made by the decision of 28 January 2015:

The validity of a French-Moroccan gay marriage

It only took a few months for an application for a marriage between a Frenchman and his same-sex partner, a national of a country with which France was by such an agreement, in this case Morocco, appeared before a French authority. While their application was accepted by the French registrar, the Public Prosecutor's Office at Chambéry gave notice of its refusal of the application on the basis, provided by the circular of 29 May 2013, of the Franco-Moroccan agreement on the status of persons and families and judicial cooperation of 10 August 1981, Article 5 of which provides that "*the basic conditions for marriage (...) are governed for each spouse by the law of whichever of the two States he is a national*". The *tribunal de grande instance* (regional court) and Court of Appeal of Chambéry confirmed the setting aside of the Franco-Moroccan agreement on the grounds of the "new French international public policy" (12). The Public Prosecutor's Office then appealed to the Court of Cassation, arguing the violation of Article 55 of the Constitution and the absence of manifest incompatibility or inconsistency of Article 5 of the Franco-Moroccan agreement with the French conception of French international public policy. The Court dismissed the appeal, holding, in a widely-reported decision dated 28 January 2015 (13), that "*the Moroccan law applicable, which opposes marriage between persons of the same sex (...), is manifestly incompatible with French public policy where, for at least one of those persons, personal law or the law of the State in whose territory he/she has his/her domicile or residence permits it*".

The inclusion of gay marriage in French international public policy

The subtle substitution of grounds made by the Court of Cassation is a reminder that it is not a matter of applying the French rather than the Moroccan law designated by the international agreement through a reversal of the hierarchy of legal norms that the trial judges had seemed to admit it, but rather to direct the international public policy exception provided by said agreement, against the normally applicable law and thus to apply the alternative *lex fori*. This did not, therefore, concern the issue of a supposed violation of the bilateral agreement but rather that of determining the content of French international public policy. The opening of marriage to same-sex couples by the law of 17 May 2013 thus did not simply remove sexual otherness as a basic condition for marriage but also promoted gay marriage within French international public policy. The exclusion of the law that is usually applicable under the bilateral agreement, on grounds of incompatibility with French international public policy, would appear justified by the desire (which quite clearly drove the legislature when adopting the current rules on conflicts of laws) to expand access to gay marriage to as many people as possible. Its accession to French international public policy will thus result in the exclusion of prohibitive foreign laws, even when their application is provided by an international convention to which France is a party.

The volatility of the international public order

The incompatibility of Moroccan law – or, now, any other law that does not recognise gay marriage – with French international public policy is a paradigm shift. Indeed, before the Law of 17 May 2013 came into force, incompatibility with French international public policy was invoked in order not to recognise a same-sex marriage in France that had been validly solemnised abroad (14). To affirm one day that French international public policy opposes the recognition of gay marriage in France, and the next day that the impossibility of celebrating the marriage in France is incompatible with the same international public policy is surprising. While there is evidence of the current international public order principle which requires the court to consider it in its state at the time of its decision, one might wonder "*whether the possibility of establishing such unions (...)*

became, by the sheer force of a recent statutory recognition, a fundamental principle that the (French) legal order ought to protect against infringements by foreign laws" (15). This decision is thus recent Court of Cassation case law according to which international public policy, which is at the very core of internal public policy, does not only include, as per its classic definition, "*all principles of universal justice considered in the French opinion as endowed with absolute international value*" (16) but also "*essential principles of French law*" (17). Marriage between people of the same sex, defended by the French legislature in what is undoubtedly not an isolated manner, but which is not widespread beyond French borders, has become an essential principle of French law which must be safeguarded internationally by including it in French international public policy.

The specific nature of the new conflict rule

This decision raises doubts as to the exact nature of the second paragraph of Article 202-1 of the Civil Code: this is a special public policy rule subject to a certain degree of proximity. Indeed, contrary to what is suggested by the press release concerning the decision discussed here (18), this is not a classic application of local public policy. By adopting the very terms of Article 202-1 of the Civil Code, the Court of Cassation did not examine the proximity of a link with the *lex fori* but with the legal systems of the nationality, domicile or the residence of the individual. This is an application of what Antoine Pillet called "*the reflex effect*" (19) of the international public policy to protect the values of a foreign legal system similar to that of the forum State, in this case promoting marriage between persons of the same sex. Does this new rule highlight a kind of absolutism of the conjugal model of the forum State "to the extent that good foreign legislation will exclusively be that which will present itself as substantively identical to French legislation (...) thus demonstrating quite a particular conception of private international law sometimes described as being a tool for the management of the diversity of laws and would in this instance become an instrument in propagating substantive French law" (20) through a "militant conflict rule" (21)?

The limits of the current regulations

The risks of marital tourism

While the regulations undoubtedly contribute to the creation of bad marriages (22), it is certainly better to have a marriage recognised in one country than no marriage at all, especially if the persons concerned have no intention of returning to their country of origin. But this judgment not only adds to the creation of flawed relationships, the existence of which is certainly inherent to the diversity, even the radicalism, of national legislation on such sensitive social issues. It also highlights the problem of marital tourism and "enhances France's attractiveness as a place where same-sex couples can marry" (23). However, the risk of marital tourism takes on its full dimensions when viewed in light of European freedom of movement and European human rights law which, taken together, may require a marital status acquired in France to be recognised in the couple's future home State. This issue was touched upon by parliamentarians during the debates on the adoption of the Bill. Indeed, in its initial version, the Bill provided for the exclusion of the personal prohibitive law where the law of the State in whose territory the marriage was celebrated permitted it. It thus aligned legislative competence with that of the authority responsible for solemnising the marriage. In other words, the competence of the latter authority absorbed the issue of conflict of laws and put to the forefront the need to properly determine the competence of French authorities to celebrate such a wedding.

The wide territorial jurisdiction of the French registrar

The rules on the territorial competence of the French registrar to celebrate a marriage are particularly generous (24). It is apparent from Articles 74 and 165 of the Civil Code that competence lies with the French civil registrar of the place of domicile of one of the future spouses or where one of them has lived for at least one month. If the residence is understood in more flexible terms, domicile refers to the place where the person has his principal home (25) but does not impose any conditions as to duration or effective housing. These concepts are interpreted even more broadly in that the general instructions on civil status state that it "*is desirable that the registrar adopt a liberal attitude as regards domicile or residence*" (26). The Law of 17 May 2013 nevertheless extended that competence as a same-sex marriage may now be solemnised in the commune where one of the parents of the future spouses has his or her domicile or residence, and the registrar has competence "*where the same-sex spouses, one of whom holds French nationality, have their domicile or residence in a country which does not allow marriage between two persons of the same sex and in which the French diplomatic and consular authorities may not solemnise the same*" (27).

Towards a determination of the international jurisdiction of the French registrar?

In order to take into account the intensity of the international implications of this reform, it would perhaps have been to establish the French registrar's international competence by an "*expansion of domestic territorial competence rules*" (28) on an international level. It would thus have been confined to cases where one of the spouses has French nationality or is habitually resident in France. Indeed, the connection to national law would compensate the incompetence of French diplomatic and consular authorities to solemnise a gay marriage in a foreign country. As for the concept of habitual residence, interpreted by the Court of Cassation, within the meaning of private international law rather than domestic law, as "*the place where the person concerned has established the permanent centre of his interests, with the desire to give it a stable character*" (29), this would ensure that there is an effective link with France. This proposal echoes the special provisions adopted by the Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages (30) and in light of the principle of congruent forms, the direct jurisdiction rules adopted by the Brussels II a Regulation (31). A new determination of the international competence of those French authorities permitted to perform marriage ceremonies would contribute to the fight against marital tourism and the creation of bad marriages, thus ensuring an improved co-ordination between national legal systems.

Notes

(1) Portalis (J.-E.-M.), *Présentation du projet de loi sur le mariage au corps législatif, le 16 ventôse an XI*, Fenet, t. IX, Paris, 1827.

(2) Laborde (J.-P.), « Quelques brèves observations sur les dispositions de droit international privé de la loi n°2013-404 du 17 mai 2013 ouvrant le mariage aux couples de même sexe », *Bulletin du CERFAP* n°15, November 2013.

(3) Fulchiron (H.), « Le mariage entre personnes de même sexe en droit international privé au lendemain de la reconnaissance du 'mariage pour tous' », *JDI*, n°4, 2013, doctr. 9.

(4) According to which "*the conditions for the validity of the marriage are governed, for each of the spouses, by the law of their country of nationality at the time of the celebration of the marriage*".

(5) In any case until the decision of 28 January 2015 adding same-sex marriage to French international public policy.

(6) In the absence of details, the factual concept of “residence” may simply refer to a secondary residence.

(7) On condition that the French registrar is competent.

(8) In its Opinion of 31 October 2012 on the Bill, the *Conseil d’Etat* did indeed consider that Article 202-1 would be rendered ineffective where there is a bilateral agreement containing provisions to the contrary, and that it was appropriate explicitly to introduce this reserve.

(9) In its decision of 17 May 2013 (No. 2013-669 DC), the Constitutional Council approved Article 202-1 on the grounds that it has “*neither the purpose nor the effect of derogating from the principle that every treaty in force is binding upon the parties, and should be performed by them in good faith*”.

(10) Circ. 29 May 2013, JUSC 1312445C ; Bidaud-Garon (C.), « Mariage pour tous : la circulaire ! », *JCPG* 2013, p. 729s ; Fulchiron (H.), « Le mariage pour tous ou presque », *Dalloz* 2013, p. 1969.

(11) JO déb. Ass. Nat., Questions, 13 August 2013, n° 28 287.

(12) CA Chambéry, 3rd chamber 22-10-201 (dismissal), n°13/02258; note Fulchiron (H.), *Dalloz* 2013, p. 2576; note Boiche (A.), *AJ Famille* 2013, p. 720; note Hauser (J.), *RTD Civ.* 2014, p. 89.

(13) Cass. 1st Civ., n° 13-50.059/96 ; note Gallmeister (I.), *Dalloz* 2015, p. 464 ; note Legrand (V.), *LPA*, 27 Feb. 2015, n°42, p. 6; note Gannage (L.), *JCPG*, n°12, 23 March 2015, p. 318; note Haftel (B.), *AJ Famille* 2015, p. 71 et seq; note Devers (A.) & Farge (M.), *Dr. Famille,* n°3, March 2015, comm. 63 ; note SARCELET (J.-D.), *Gaz. Pal.*, 5 February 2015, n°36, p.11.

(14) Fulchiron (H.), « Le mariage homosexuel et le droit français », *Dalloz* 2001, p. 1629 : "*a law which allows marriage between two persons of the same sex is contrary to the principle of gender difference within a marriage and must therefore be excluded in the name of French pmublic policy in international matters*".

(15) P. Wautelet, « Les couples de personnes de même sexe en droit belge en particulier sous l’angle du droit international privé » in *The Belgium reports at the Congress of Utrecht of the International Academy of Comparative Law*, 2006, p. 301.

(16) Cass. Civ. 25 May 1948, *Lautour;* Ancel (B.) & Lequette (Y.), *Les grands arrêts de la jurisprudence française de droit international privé*, Dalloz, 5th ed., 2006, n°19.

(17) Under the terms of the decision in Cass. 1 st civ., 8 July 2010, n° 08-21.740. See Guillaume (J.), « L’ordre public international selon le rapport annuel 2013 de la Cour de cassation », *Dalloz* 2014, p. 2121 et seq.

(18) According to the press release, "*the law of the foreign country may only be excluded where there is a link between the foreign future spouse and France*”.

(19) Pillet (A.), *De l’ordre public en droit international privé*, Grenoble, 1890, p. 82 et seq.

(20) Bureau (D.), « Le mariage international pour tous à l’aune de la diversité », *Les relations privées internationales, Mélanges en l’honneur de Bernard Audit*, LGDJ, 2014, p. 177.

(21) Khairallah (G.), « Le statut personnel à la recherche de son rattachement. Propos autour de la loi du 17 mai 2013 sur le mariage de couples de même sexe », in *Les relations privées internationales, Mélanges en l’honneur de Bernard Audit*, LGDJ, 2014, p. 493.

(22) The Circular of 29 May also invites the registrar to inform the future spouses of the probable lack of recognition of their union in their country of origin and the possible criminal penalties incurred.

(23) Gallmeister (I.), « Mariage de personnes de même sexe : exception d’ordre public international », *Dalloz* 2015, p. 464s.

(24) V. Fulchiron (H.), « Le mariage entre personnes de même sexe en droit international privé au

lendemain de la reconnaissance du mariage pour tous », *JDI* 2013, doctr. 9, p. 1055s. specifically n°36-41.

(25) Under Article 102 of the Civil Code.

(26) IGEC, paragraph 392.

(27) Under the terms of Article 171-9 of the Civil Code.

(28) According to the method identified by case law for the purposes of establishing rules of direct jurisdiction for French courts (Cass. 1 st civ., *Pelassa*, 19 October 1959 and Cass. 1st civ., *Scheffel,* 30 October 1962).

(29) Cass. 1 st civ., 14 Dec. 2005; Gallmeister (I), *Dalloz* 2006, p. 12 ; Courbe (P) & Jault-Seseke (F.), *Dalloz* 2006, p. 1502.

(30) Under Article 3, "*the marriage is to be solemnised where the future spouses meet the substantive requirements of the internal law of the State of celebration and one of them has the nationality of that State or is ordinarily resident there*". See Battifol (H.), « La treizième session de la Conférence de La Haye de droit international privé », *RCDIP*, 1977, p. 467 et seq; and Nygh (P.), « The Hague marriage convention : a sleeping beauty ? », in *E pluribus unum : liber amicorum Georges Droz: on the progressive unification of private international law*, 1996, p. 267 et seq.

(31) Under Article 3 of Council Regulation of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.