Advocate General's Opinion on Art. 34 para. 1 of Regulation (EC) No. 44/2001

On 3 March 2015, Advocate General Szpunar delivered its opinion in the case C-681/13 (*Diago Brands BV*) concerning the interpretation of Art. 34 para. 1 of Regulation (EC) No. 44/2001 (former Regulation (EU) No. 1215/2012), in a case where recognition of a judgment of one Member State is sought in another Member State. In his Opinion, the Advocate General held that the mere fact that a judgment given in the State of origin is contrary to EU law does not justify the refusal of the recognition of this judgment on public policy grounds in the State in which recognition is sought. According to his Opinion, a mere error of national or EU law cannot justify refusal of recognition as long as it does not constitute a manifest breach of an essential rule of law in the State in which recognition is sought.

The full text of the Opinion can be accessed here.

French Same-Sex Marriage, a Strange International Public Policy

By Dr. François Mailhé, maître de conferences, Paris II

Last month, on January 28, the French Cour de cassation decided on a new "Same-sex Marriage" Act international case. After "Thalys babies" in September, the issue was about the authorization to wed a French and a Moroccan nationals, the last of whom citizen of a country prohibiting same-sex marriages.

THE DECISION

The facts were simple indeed. Two men, Dominique, French, and Mohammed, Moroccan, wanted to get married in Jacob-Bellecombette, in the suburbs of Chambéry, France, the city of the 1968 Winter Olympics. The Same-sex Marriage Act had just been passed in Parliament, and it was understood as having created a "right to marry" for all, that is for homosexual as well as heterosexual couples (the Act is also known as the "Marriage for all" Act), and for foreigners and French alike. Indeed, Article 202-1 Civil code (C.Civ.) read, at the time:

"*The qualities and conditions necessary to be able to contract marriage are governed, for each spouse, by his personal law.*

Nevertheless, two persons of the same sex may contract marriage when, for at least one of them, either his personal law, or the law of the State within which he has his domicile or his residence, permits it".

Obviously, since Dominique was French and they both lived in France, the condition of Article 202-1 C.civ. was fulfilled. Unforunately, it was not applicable to the case. Indeed, France and Morocco have signed a bilateral convention, on August 10, 1981, concerning personal and family status and judicial cooperation. Sure enough, this "right to wed" therefore knew exceptions, those compelled by the pyramid of norms: where there existed provisions of international source providing solutions for conflict of marriage law, these solutions would prevail over Article 202-1 C.civ. It had actually even been expressly written down in the draft Act, only to be later written off by the Senate on the ground that the principle of hierarchy of norms enshrined in Article 55 of the Constitution made it irrelevant.

That was until January 28, 2015. In a highly advertised decision, the Cour de cassation decided that:

« […] *if, according to Article 5 of the Franco-Moroccan Convention* […] *substantial conditions such as prohibitions to marriage, are governed for each future spouse by the law of the State he is a citizen of, its Article 4 outlines that one of the contracting States laws may be set aside by the courts of the other State if it is manifestly incompatible with its public policy ;* […] *that is the case of the applicable Moroccan law opposed to the marriage of two persons of the same-sex when, for at least one of them, either his personal law, the law of the State of his domicile or that of his residence allows it* ».

Dominique and Mohammed are therefore allowed to wed. What now?

AN ANALYSIS

At first glance the decision may appear complex but on the whole quite conventional. The Court, after all, only uses the public policy exception allowed by the Convention itself. The solution, therefore, would be specific to the Convention itself, and Morocco only could be concerned by the decision.

The originality of this exception, though, is surprising. This public policy exception is not an absolute exception. It doesn't purport to create an absolute "right to wed". Instead, it depends upon the recognition of same-sex wedding in one of the following States: that of the domicile, the residence or the nationality of at least one of the spouses. This originality calls for three observations, the first about conflict of norms, the second about the scope of this exception, the last about the nature and development of this kind of exception in Europe.

1/ The first observation concerns the phrasing of the public policy clause at play. Indeed, if the Cour de cassation refers to Article 4 of the Convention to justify this surprising exception, its wording is actually grounded in Article 202-1 C.civ. itself. Comparing both this paragraph of the decision and the second paragraph of Article 202-1 C.civ. makes the relationship quite obvious: the exact same words were employed for both of them. Of course, one could say any public policy exception is the political safety valve that Courts may design as they think fit. Why not designing on the basis of Article 4 of the Convention what is now written in Article 202-1 C.civ.? The blog format is perfect for such an assertion since this seems open to debate, but I would like to propose a negative answer.

In its letter, first, Article 4 is designed as a quite classical public policy exception. "*The law of one of both States applicable under the Convention may only be set aside by the Courts of the other State if it is manifestly incompatible with its public policy*". Words have some weight, though, and it seems necessary to notice that it requires a "manifest" incompatibility. The discussion of this word's value in the context of Article 21 Rome I Regulation should at least raise the attention. And anyway, how can a violation of a public policy exception be "manifest" if it requires checking a potentially foreign law?

In its spirit, second, the solution is nothing less than a levelling of the situations. The Cour de cassation refused to differentiate situations according to the

applicable norms when, apart from the nationality of the parties, the situations don't differ. But isn't it the purpose of such conventions to treat citizens differently when their States together agreed to do so? Should the teleological rationale of such mechanism (to exclude the applicable law to defend certain values) eventually level down any and all such clauses, even those more restrictive than the others?

2/ This leads me to the second observation: this exception cannot be limited to the Franco-Moroccan convention. France has ratified identical bilateral conventions with Poland, Vietnam and the former Yugoslavia (which now concerns Slovenia, Bosnia, Serbia and Montenegro). Laos, Cambodia, Tunisia, Madagascar and Algeria have each also entered into similar conventions and though this last group of conventions has no public policy clause, it is still considered available in the silence of the texts. Citizens from all these countries now beneficiate from this "right to wed", even if their countries either ignore or even penalize homosexuality: the policy reasons for which Article 202-1 C.civ. took the guise of the convention are not specific to French-Moroccan relations.

3/ The third observation is more about of this very "specific clause of public policy" (Rigaux and Fallon, n°7.54) that was first developed in Belgium (Article 46, Private International Law Act, 2004) and served as an inspiration to the French Act.

There is an ambiguity as to the nature of this clause. In France, some have characterized it as a positive public policy exception, defending the "right" implemented in the law instead of negatively protecting some values of the society. Noting that Article 202-1 C.civ. does not stop at setting aside the prohibitive law but actually gives the exact answer to the problem, some have characterized it as a substantial provision, not a conflict one. Actually, the debate doesn't seem of great importance : it may be both. Since the effect of the rule is an exclusion of the applicable law to be replaced by the Court's lex fori, it is a public policy exception. Since the effect of the rule is to make sure same-sex marriages are not declared void or prevented in France on this specific ground, it is a substantive rule. When a substantive provision may exclude the application of an opposite foreign solution, the border between notions gets blurred.

But whatever the characterization of the clause, its originality needs to be emphasized. Because they defend what is perceived as a sort of individual right

still very variously regarded abroad, Article 202-1 C.civ. as well as Article 46 Belgian law are not absolute in their rejecting prohibitive foreign laws. They require a connection to a State which defends the same right. It looks, therefore, like an application of *Inlandsbeziehung*. But this is a very special one, since *Inlandsbeziehung* requires a unilateral connection with the State of the forum. Here the connection is bilateral, with any State which accepts same-sex marriages. It is as if the French and Belgian legal systems defended that solution only insofar as it gets support from a State that is connected to the case. Truly enough, this State will most often be the French State itself, since the several connecting factors listed in Article 202-1 C.civ. will frequently lead to that country. But a French judge asked to decide on the alleged invalidity of a same-sex marriage of two Moroccan nationals, residing and married in the Netherlands, would have to set aside Moroccan law on this public policy ground because *Dutch law* recognizes same-sex marriages. If this clause is a real public policy clause, and public policy clauses defend values of the connected legal order, then this clause doesn't defend *French* values. It defends the values of an international community, and stands as a sort of truly international public policy, a transnational public policy…

Food for thoughts, and I hope for reactions on this blog.

Annexes I and II Brussels Recast

Quick post to inform about the publication, on the OJ L 54, 25.02.2015, of the Commission delegated Regulation (EU) 2015/281, of 26 November 2014, replacing Annexes I and II of Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Click here to access the text.

Tort jurisdiction and pure economic loss – Request preliminary ruling

Written by Laura van Bochove, Erasmus University Rotterdam

In January, the Dutch Court of Cassation referred several questions on Article 5(3) Brussels I Regulation to the CJEU for a preliminary ruling (Case C-12/15), including the questions how a court should establish 1) whether an economic loss is an 'initial loss' or a 'consequential loss' and 2) in which country economic losses occur.

Briefly stated, the facts of the case are as follows. In 1998, Universal Music International Ltd (part of the Universal Music Group) and Czech record company B&M agreed upon the purchase of 70 per cent of the shares of B&M by companies within the Universal Music Group. In addition, parties agreed that in 2003, Universal would buy the remaining 30 per cent. In the draft version of the Letter of Intent, the intended purchase price of all shares equalled five times the annual profit of B&M. For the drafting of the definitive share option agreement regarding the 30 per cent of the shares, the Universal Music Group turned to Czech law firm A. On 5 November 1998, a share option agreement was concluded by Universal Music International Holding B.V. (hereafter: Universal Music), seated in the Netherlands, B&M and its shareholders. However, due to an alleged mistake of A.'s employee in the drafting of the agreement, the price Universal had to pay for the shares was increased radically. In 2003 Universal Music bought, as agreed, the remaining 30 per cent of the shares. It calculated, on the basis of the intended purchase price, that it should pay about 313,000 euros. B&M's shareholders, however, calculated the price of the shares on the basis of the formula in the final agreement, resulting in an amount of more than 30 million euros. Parties went to arbitration and in 2005 Universal Music and B&M's shareholders settled their dispute for 2.6 million euros.

Universal Music then commenced legal proceedings before the court of Utrecht (the Netherlands) against the law firm and its employee for the amount of 2.7 million euros, being the difference between the intended price of the shares and the settlement plus the costs for the arbitration proceedings and the settlement. The defendants argued that the Utrecht court did not have jurisdiction. In first instance, the court denied jurisdiction, on the basis that none of the facts giving rise to the damage occurred in the Netherlands and that the connection with the Netherlands was too weak to accept jurisdiction. The Court of Appeal followed this decision and held that the court of the place where pure economic loss was suffered cannot accept jurisdiction on the basis of Article 5(3) Brussels I Regulation. Universal Music then filed an appeal in cassation.
The Court of Appeal's ruling is in line with the majority opinion long held in Dutch scholarship that the place of (initial) pure economic loss cannot be considered the place where the damage occurred or the 'Erfolgsort'. Although one could argue that the CJEU already in its 2004 decision in Kronhofer (C-168/02) suggested otherwise, the Dutch Court of Cassation deemed it necessary to ask for a preliminary ruling on this topic. However, taking into consideration the recent CJEU decision in Harald Kolassa v. Barclays Bank plc (C-375/13), which was published after the Court of Cassation referred its questions to the CJEU, it is likely that the matter will be viewed as an 'acte éclairé', since the CJEU rules that the court of the place where pure economic loss occurred as a direct consequence of misleading information in a prospectus, can establish jurisdiction on the basis of Article 5(3) Brussels I Regulation. The Kolassa judgment also provides an affirmative answer to one of the other questions of the Court of Cassation, namely whether the court in deciding on its jurisdiction should also take into account the defendant's arguments regarding jurisdiction.

However, the two remaining questions referred to the CJEU for a preliminary ruling have not yet been answered. The Court of Cassation informs how a national court should establish whether the damage should be considered initial economic loss or consequential economic loss, and how a national court should establish whether the economic damage has occurred in its territory. In the case at hand, the question is whether the difference between the intended share price and the settlement eventually paid and the costs related to arbitration and settlement should be regarded as initial economic loss, and if so, if the Netherlands should be considered the place where the damage occurred, since these costs were paid at the expense of Universal Music's assets (bank account) located in the

Netherlands.

Since the boundaries between initial and consequential economic loss can be hard to delineate and the localisation of pure economic loss often raises problems, it would be useful if the CJEU would provide courts with more guidance. It will be interesting to see whether the CJEU is willing to extent its ruling in Kolassa to all pure economic loss cases and adopt as a general rule that in cases of pure economic loss the Erfolgsort is the place where the victim suffers the loss to its assets, in this case the bank account from which the amount was transferred. Yet, the CJEU could also rule that the Kolassa judgment should be interpreted restrictively and that it only applies to private investors suffering economic damage on their investments due to misinformation.

To be continued…

German Federal Labor Court refers Questions relating to Art. 9 and 28 Rome I to the CJEU

On February 25, the German Federal Labor Court referred three questions relating to the interpretation of Art. 9 and 28 Rome I Regulation to the CJEU. They relate to the temporal scope of application of the Rome I Regulation on the hand and, and the (highly) disputed issue whether and to what extent Member States courts are required to apply foreign overriding mandatory provisions in general and overriding mandatory provisions of other Member States in particular. The following is an unofficial translation based on the court's press release:

1. Does the Rome I Regulation in accordance with Art. 28 exclusively apply to (employment) contracts if the contract was concluded (for the first time) after 16 December 2009 – or does it also apply if the parties agreed after 16 December 2009 to continue a previously concluded contract

(without any changes)?

2. Does Art. 9(3) Rome I Regulation (merely) exclude the direct application of overriding mandatory provisions of third states where the obligations arising out of the contract have not to be or have not been performed – or does it also exclude their indirect consideration in the law of the state whose laws govern the contract?
3. Does the principle of cooperation embedded in Art. 4(3) TEU affect the decisions of national courts to apply overriding mandatory provisions of other Member States (directly or indirectly)?

Background:

The claimant is a Greek national and employed by the Greek State at the Greek primary school in Nuremberg (Germany). From October 2010 through December 2012 the Greek State reduced his salary in accordance with the Greek Saving Laws No 3833/2010 und 3845/2010. The claimant asks for payment of the sums withheld. With its preliminary questions the German Federal Labor Courts wants to know whether and to what extent it is bound to apply the Greek Saving Laws.

The court's press release is available here (in German).

Conference: "The Economic Dimension of Cross-Border Families: Planning the Future" (Milan, 13 March 2015)

The University of Milan will host on **13 March 2015** a conference on **"The Economic Dimension of Cross-Border Families: Planning the Future"**. The sessions will be held in English and Italian. Here's the programme (available as a .pdf file):

14h00 Welcoming addresses

- *Gianluca Vago* (Rector, University of Milan)
- *Laura Ammannati* (Director of the Department of International, Legal, Historical and Political Studies)
- *Ilaria Viarengo* (Coordinator of the PhD course on International and European Law, University of Milan)

Chair: *Stefania Bariatti* (University of Milan)

14h15 Revision of Brussels IIa: Current State of Play

- Joanna Serdynska (Civil Justice Policy, DG Justice, European Commission)

14h45 Property Rights of International Couples and Registered Partnerships: The Role of Parties' Autonomy

- *Cristina González Beilfuss* (Universitat de Barcelona)
- *Ilaria Viarengo* (University of Milan)

15h30 The Coordination of the EU Legislation on Divorce, Maintenance and Property

- *Maria Caterina Baruffi* (University of Verona)
- *Francesca Villata* (University of Milan)

16h00 Discussion

16h30 The Interaction Among Succession and Property

- Anatol Dutta (MPI Hamburg – Universität Regensburg)

16h50 Planning the Future: Practical Issues

- *Gloria Servetti* (Judge, Chair IX Sezione Tribunale Milano)
- *Franco Salerno* Cardillo (Notary, Palermo)

17h30 Discussion

18h00 Closing Remarks: *Stefania Bariatti*

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Attendance is free of charge but registration is required. Further information and the registration form are available on the conference's webpage.

(Many thanks to Prof. Ilaria Viarengo for the tip-off)

Conflict of Laws Lectureship at Cambridge

The Faculty of Law, Cambridge University, is advertising a three year lectureship in Conflict of Laws sponsored by Clifford Chance. The closing date is 13th March 2015. More detail is available here.



If anyone would like to discuss the details of this post, please contact Richard Fentiman (rgf1000@cam.ac.uk), Pippa Rogerson (pjr1000@cam.ac.uk) or Louise Merrett (lm324@cam.ac.uk) all of whom research and lecture in conflict of laws in Cambridge.

H/T: Gilles Cuniberti

Testing the Stress of the EU: EU Law After the Financial Crisis

The University of Bayreuth (Germany) and the *Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales* (Spain), with support from the DAAD, will host a joint conference under the heading "Testing the stress of

the EU: EU law after the financial crisis" next 8 May 2015 (venue: Escuela Diplomática, Paseo Juan XXIII, 5. 28040 Madrid). Click here to see the program.

Registration:

Admission to the conference (including coffee breaks) is free of charge.

In order to attend, please register **by 15 April 2015** via e-mail to: **Zivilrecht1@uni-bayreuth.de.**

Please provide your full name and the number of your ID card/passport (required in order to access to the conference venue).

Conference Report: CISG Basel Conference, 29 and 30 January 2015, University of Basel

The CISG entered into force around 35 years ago – reason enough to celebrate and discuss the state of this instrument. Under the auspices of the University of Basel, in cooperation with UNCITRAL and the Swiss Association for International Law, a large number of experts convened on 29 and 30 January 2015 in order to present current trends and problems.

Panel 1 dealt with the economic analysis of the CISG (Prof. Dr. B. Piltz, Dr. L. Spagnolo, G. Moser and Prof. P. Winship). The core question was whether and to what extent the CISG does in fact what it promises which is to reduce transaction costs. A lot of skepticism and reservations, in particular from the US-American speaker, about economic analysis were articulated but the overall impression was that it is more efficient to have the CISG than not to have it even though it is

hardly possible to substantiate, let alone quantify, this impression. However, compared to alternatives, for example the selection of a national law by choice-of-law clauses including the numerous limitations to party autonomy, it appears plausible to believe that instruments like the CISG have beneficial effects. Any less favorable result would of course have been somewhat impolite on a birthday party for the CISG.

Panel 2 discussed extending the CISG beyond sales contracts in respect to distribution contracts, contracts on natural gas, on deduction and set-off and on the statute of limitations (Prof. Dr. P. Perales Viscasillas, Dr. F. Mohs, Prof. Dr. C. Fountoulakis, Dr. P. Hachem). It became clear that long-term contracts and service contracts are of growing importance and that the unification of contract law should continue working on these types of contracts. And indeed, UNIDROIT is currently working on principles for long-term contracts that may supplement the UPICC (http://www.unidroit.org/work-in-progress-studies/current-studies/long-term-contracts). On the basis of the current state of the CISG, each of the presentations demonstrated that the distinction between external and internal lacunae is far from trivial which sometimes may contribute to doubts about the economic efficiency of unified law.

Panel 3, originally planned as the second part of the conference but postponed due to late arrivals (snow storms in New York), analysed the recent trend towards a decline of reservations to the CISG under Articles 92, 93, 95, 96 (Prof. Dr. U. Schroeter, Prof. Dr. J. Ramberg, Prof. Dr. S. Han). Reservations were described not so much as a flaw but rather as a tool for enabling uniformity, at least to the degree politically possible. It was assumed that the reservation in Article 94 for regional harmonization may play a growing role in the future, in particular in Asia.

Panel 4 again turned to the question of extending the CISG, now in respect to validity issues (Prof. Dr. S. Eiselen, Prof. L. Gama, Prof. J. Gotanda, Prof. E. Sondahl Levin), and discussed the complex relation of the CISG to the control of standard terms on fairness, to contractual limitations of liability, to the repayment of attorney's fees as damage and other issues. Contractual limitations for example could be viewed as covered by the CISG in respect to their incorporation, formal validity and interpretation whereas their validity as such, for example in light of protective or otherwise mandatory law, would have to be seen outside the scope,

but it was suggested that the general standards of the CISG such as party autonomy, reasonableness or good faith should control and, if necessary, limit the impact of the applicable national law – an approach that slightly mirrors the control by the European Court of Justice of the exercise of public policy clauses by Member State courts in European instruments of private international law.

Panel 5, under the heading of "CISG, State Action and Regionalisation" discussed whether and to what extent the CISG, in particular in comparison to the CESL, would be suitable for sales contracts with consumers (Prof. Dr. Y. Atamer), how to fill gaps in Article 78 CISG relating to default interest for late payments (Prof. Dr. J. Ramberg), how to apply the CISG to government purchases, in particular in relation to mandatory requirements of public procurement law (Dr. C. Pereira) and the relation of the CISG to OHADA (Dr. J. A. Penda Matipe). It became clear that the CISG, by adequate interpretation and standard terms control, could address many of the core issues of consumer protection.

Panel 6 continued the discussion on the regionalization of the CISG by focusing on the harmonization in the EU and its impact on the CISG, for example by the Late Payment Directive (Prof. Dr. C. Witz), on the political difficulties in the past and the currently limited, but may be not that much limited prospects of the CESL (M. Zaleski) – "replacement by modified proposal that will come to life this year", the harmonization in Asia, in particular with regard to the potential Principles (Prof. Dr. H. Sono) and Latin America (Prof. A. Garro).

Panel 7 dealt with the issue of the fairness of the CISG as contract law, partly with a focus on (compliance requirements for) supply and distribution chains. Prof. Dr. H. W. Micklitz posed the general question what kind of standards of fairness should apply to b2b sales relations, Prof. Dr. P. Butler addressed the relation between the "CISG and human rights – an Oxymoron?", Prof. Dr. P. Nalin discussed ethical standards in connection with international sales contracts, and Prof. Dr. A. Veneziano presented UNIDROIT's project on agricultural production contracts and explained the particularities – e.g. risk and value chain management but also imbalances of bargaining powers – and legal tools used by the parties up to now in this intriguing type of complex and relational contracts (http://www.unidroit.org/work-in-progress-studies/current-studies/contract-farming).

Last not least there was a round table discussion on the general issue of the

future of unification of contract law (Prof. Dr. Ingeborg Schwenzer, Prof. Dr. Dr. h.c. M. Jametti Greiner, Dr. B. Czerwenka, Dr. L. Castellani, J. A. Estrella Faria) that revolved, amongst other themes, around the growing importance of relational contracts of all kinds (e.g. service contracts, long-term contracts etc.) – an excellent round-up for a truly excellent conference!

Spanish Yearbook of International Law , vol. 18

The last issue of the *Spanish Yearbook of International Law* (*SYbIL*), has just been released. The whole content can be accessed either here or here.

Note: This time the volume is mostly devoted to Public International Law problems; nonetheless some PIL papers are also included, in English.