Dane on the Natural Law Challenge to Choice of Law

Perry Dane, who is a Professor of Law at the Rutgers School of Law – Camden, has posted The Natural Law Challenge to Choice of Law on SSRN. The abstract reads:

> *Would a jurisdiction supremely confident that some or all of its own municipal law rests on natural law and universal legal truth ever have a good, purely principled, reason to look to ordinary choice of law principles and apply the substantive law of another place in a case involving foreign elements? This essay, a chapter in an upcoming volume on "The Role of Ethics in International Law," suggests several such reasons, some of them grounded in the natural law tradition itself and in sustained analysis of the relationship between natural law (if such a thing exists) and positive law. The essay also suggests at least a rough analogy between the jurisprudential challenges of choice of law and the theological challenges of interreligious encounter. It ends with a short effort apply the general argument to the specific question of the inter-jurisdictional recognition of same-sex marriages.*

The paper is forthcoming in *The Role of Ethics in International Law*, Donald Earl Childress III, ed., Cambridge University Press, 2010.

Belgian Reference for a Preliminary Ruling on Art. 6 of the Rome Convention

As pointed out by our friend *Federico Garau* over at the Conflictus Legum blog, **the Belgian Supreme Court** (*Hof van Cassatie/Cour de Cassation*) **has made a**

preliminary reference to the ECJ, with regard to the interpretation of Art. 6 (individual employment contracts) of the 1980 Rome Convention on the law applicable to contractual obligations.

The case (the second, to the best of my knowledge, to be made pursuant to the two 1988 Protocols on the interpretation of the Convention by the Court of Justice, after the *ICF* case, no. C-133/08), was lodged on 29 July 2010 under **C-384/10, *Jan Voogsgeerd v Navimer SA***.

> ***Questions referred***
>
> *Must the country in which the place of business is situated through which an employee was engaged, within the meaning of Article 6(2)(b) of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, 1 be taken to mean the country in which the place of business of the employer is situated through which, according to the contract of employment, the employee was engaged, or the country in which the place of business of the employer is situated with which the employee is connected for his actual employment, even though that employee does not habitually carry out his work in any one country?*
>
> *Must the place to which an employee who does not habitually carry out his work in any one country is obliged to report and where he receives administrative briefings, as well as instructions for the performance of his work, be deemed to be the place of actual employment within the meaning of the first question?*
>
> *Must the place of business with which the employee is connected for his actual employment within the meaning of the first question satisfy certain formal requirements such as, inter alia, the possession of legal personality, or does the existence of a de facto place of business suffice for that purpose?*
>
> *Can the place of business of another company, with which the corporate employer is connected, serve as the place of business within the meaning of the third question, even though the authority of the employer has not been transferred to that other company?*

The referring decision is available on the *Juridat* database (under no.

S.09.0013.N), and can be downloaded as a .pdf file here.

Issue 2010/3 Nederlands Internationaal Privaatrecht

The third issue of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* is dedicated to the proposal for a new Dutch Act on Private International Law that will be incorporated in Book 10 of the Dutch Civil Code. It includes a critical general review, and contributions on private international law rules on marriages and the consequences for public policy and human rights; the regulation of overriding mandatory rules; the regulation of *fait accompli*; methods of interpretation in the light of Europeanization and internationalization; and party autonomy and the law of names.

- A.P.M.J. Vonken, Boek 10 BW: meer – incomplete – consolidatie dan codificatie van het Nederlandse internationaal privaatrecht. Een bekommernisvolle bespiegeling over een legislatieve IPR-surplace, p. 399-409. The English abstract reads:

In recent decades European private international law (PIL) has undoubtedly made progress. This is largely due to the fact that a number of legislators have either codified part or all of their national PIL rules or adopted treaties and regulations drawn up by, e.g., the Hague Conference on Private International Law and the European Union. Recently, the Dutch legislator has also introduced a codification or, more precisely, a 'consolidation' covering an incomplete set of topics on the field of choice of law. I will argue that this Dutch project should be amended and supplemented to include the areas of international civil procedure (e.g., jurisdiction and the recognition and enforcement of foreign judgments) and to cover a more complete ruling of all kinds of choice of law issues for the sake of legal practice. Finally, I will propose some amendments and refinements to specific rules contained in this consolidation project.

- Susan Rutten, Aanpassing van het huwelijksrecht; gevolgen voor de openbare orde en mensenrechten in het IPR, p. 410-420. The English abstract reads:

The Dutch government is considering to take on problems of integration caused by the immigration of spouses through amending the rules governing marriage. The objective is to prevent immigrants living in the Netherlands from marrying abroad merely for the purpose of enabling their new spouse to acquire legal residence in the Netherlands. With this in mind, the government intends to raise the minimum age for marrying; to prohibit the conclusion of marriages between cousins; and to tighten the rules governing the recognition of foreign polygamous marriages. The plans will also affect rules of private international marital law, as well as the use of the public policy exception. In this article, the author examines whether the government's tentative proposals respect human rights, in particular the right to marry. Furthermore, she questions whether the public-policy exception is a suitable technique for warding off undesirable foreign marriages. The introduction and codification in the Dutch Civil Code of a new book on private international law provide an opportunity for the legislator to legally define the concept of public policy. An express reference could be made to the effect that human rights are part of our public policy, since human rights, because of their nature, are in any case seen as fundamental principles. The above proposals by the government also prompt us to be aware of the risk of public policy being used or abused for interests other than those for which the exception was intended, where it is invoked to safeguard rules of which it is less evident that they may be seen as fundamental.

- Cathalijne van der Plas, Het leerstuk van de voorrangsregels gecodificeerd in boek 10: werking(ssfeer), p. 421-429. The English abstract reads:

Draft book 10 of the Dutch Civil Code contains a general conflict of laws provision in Article 10:7 on super mandatory rules (lois de police). Many international instruments, in particular several Hague Conventions and the Rome I and II Regulations, provide for the application of such special rules of a mandatory nature in addition to, or in derogation from, applicable private law. It nevertheless makes sense for the Dutch legislature also to provide for a domestic

conflict of laws rule on the application of super mandatory rules, because not all areas of private law have been covered (as yet) by international instruments: notably parts of family law and the law of succession, the law of property, and of corporations. Some aspects of the application of super mandatory rules which remain uncertain in connection with the Rome I and II Regulations have been made explicit by the legislature, in particular the principle that the application of a law pursuant to rules of PIL includes super mandatory rules of that lex causae. Article 10:7 also allows for the application of super mandatory rules of third countries, which goes beyond the room for the application of such rules under Article 9 of the Rome I Regulation. It is submitted that the test which a court must apply when deciding whether the application of foreign public or administrative rules of law is justified and bears a resemblance to the tests under EU case law for determining whether some national rule infringes the free circulation of assets, capital and persons. EU case law provides examples of compelling public interests which could justify the application of a super mandatory rule in a specific situation. However, the Dutch courts will have the freedom to decide on the tests to be applied, and it remains to be seen how the new Article 10:7 will work out in specific cases.

- M.H. ten Wolde, De mysteries van het *fait accompli* en Boek 10 BW, p. 430-436. The English abstract reads:

Article 9 of draft Book 10 of the Civil Code introduces a new fait accompli (an accomplished fact) exception to be used in every area of conflict of laws: 'In the Netherlands, the same legal consequences may be attached to a fact to which legal consequences are attributed under the law which is applicable under the private international law of a foreign state, also when this contravenes the law which is applicable according to Dutch private international law, in as far as not attaching those consequences would constitute an unacceptable violation of the legitimate expectations of the parties or of legal certainty.' This provision aims to adjust the result of applying a Dutch conflict of law rule in the event that such a result is unacceptable since the parties involved assumed that a foreign conflict rule that referred the case to a different law was in fact applicable. The question arises whether the consequences attributed to a fact or act according to a foreign conflict of law rule may be accepted, even if those consequences do not arise under the law which is applicable according to Dutch conflict of law rules. In such

a case Dutch conflict rules should yield in favour of the foreign conflict rule, but subject to the condition that the parties rightfully believed that their legal position was determined by the closely connected foreign conflict rules in question. Moreover, not granting such effects has to constitute an unacceptable violation of the legitimate expectations of the parties or of legal certainty It is remarkable that the fait accompli exception is codified as an universal exception to all conflict rules since it has never been regarded as such in the case law or literature. Among scholars it is mainly seen as a concept that helps to discover the applicable law. The legislator bases the exception of Article 9 on the principle of legitimate expectations as expressed in the Sabah case decided by the Supreme Court and on legal certainty. However, in the Sabah case the court dealt with a completely different problem, namely that of Dutch conflict rules succeeding each other in time. The author argues that the mentioned principle cannot, without any good reason, be extended to the question of the conflict between Dutch conflict rules and foreign conflict rules. Besides this, there is no valid reason to protect parties who deliberately cross the border to a foreign country against their unfamiliarity with the law (including confict of law) of that country. The reality of international legal practice is that a legal position as a consequence of differing conflict rules may have a different content in one country than in another. Parties should be aware of this fact. International legal practice does not need a fait accompli exception. It is advisable to delete Article 9 from Book 10 Civil Code.

- A.E. Oderkerk, Een lappendeken van interpretatiemethoden in de context van het Ontwerp Boek 10 BW – De invloed van Europeanisering en internationalisering van het IPR, p. 437-446. The English abstract reads:

In the Dutch Proposal on Private International Law (Book 10 of the Dutch Civil Code), a 'General Part' containing provisions on topics like public policy, internationally mandatory provisions, party autonomy, capacity et cetera has been included. However, unlike in some foreign private international law Acts, general provisions on interpretation and/or characterisation have been deliberately omitted. In this article it is argued that it would have been useful and possible to introduce such provisions. Useful because different methods (of a general, European or international background) of interpretation and characterisation have to be applied to different (groups of) provisions of this Book and it will not be obvious to practitioners which method will have to be applied when and how.

Possible since – as will be shown – guidelines on which methods of interpretation and characterisation are to be applied and in which context can be laid down.

- Emilie C. Maclaine Pont, Partijautonomie in het 'nieuwe' internationale namenrecht, p. 447-455. The English abstract reads:

Recently, a bill has been prepared by the Dutch legislature in order to consolidate the rules of Dutch private international law. This 'Book 10 of the Dutch Civil Code' includes personal status issues. More specifically, this article focuses on surnames. In two judgments – Garcia Avello *and* Grunkin-Paul – *the Court of Justice of the EU provided incentives for the Member States to reconsider their rules regarding surnames concerning conflict of law rules and the recognition of surnames. The question is whether the Dutch regulations as laid down in the new 'Book 10 of the Dutch Civil Code' are in conformity with these decisions. This article reaches the conclusion that this question must be answered in the negative and recommends some adjustments to the current bill with the introduction of a choice of law clause.*

Complutense PIL Seminar to be held in March 2011. Call for papers

A new edition of the International Seminar on Private International Law (Universidad Complutense de Madrid) will be held on March 2011, the 24 (Thursday, morning and afternoon sessions) and 25 (just morning session). The place, as usual, will be the faculty of Law at the Universidad Complutense of Madrid.

For this edition, which is already the fifth, a general approach under the title "Trends in the evolution of private international law" has been preferred. The proposed theme is therefore a broad one, the organizers (Prof. Fernández Rozas

and de Miguel Asensio) wanting to provoke reflection on recent developments and future prospects in three different areas of Private International Law: patrimonial law, familiy law, and inter-regional law.

As in previous editions the seminar will count with several general lectures, but it is open to teachers and specialists, either Spanish or foreigners, who wish to present papers on issues related to one of the main themes. Those wanting to participate should promptly contact Professor Carmen Otero García Castrillón by email (cocastri@der.ucm.es) indicating a title for their contribution. The deadline is December 15, 2010.

The inclusion of papers in the 2010 volume of the Anuario Español de Derecho Internacional Privado will be subject to prior scientific evaluation of each work, according to general criteria applicable to the publication of academic articles in the journal. In any case, the written version of the papers must be sent before April 1, 2011; this deadline is non-extendable due to the closure requirements of the Yearbook. Contributions shall not exceed 25 pages in Word format (double-spaced on DIN A-4, and Times New Roman 12 for text and 10 for footnotes pages).

Third Issue of 2010's Belgian PIL e-journal

The third issue of the Belgian e-journal on private international law Tijdschrift@ipr.be / Revue@dipr.be was just released.

It is a bilingual journal (French/Dutch) on private international law which essentially reports European and Belgian cases addressing issues of private international law, and also offers academic articles.

The issue can be freely downloaded here.

Update: London Arbitration Feast

Further to my post of last week, just to note that the start time of next week's BIICL seminar on the Supreme Court has been moved 15 minutes earlier to 5:15pm on Wednesday 24 November. This is to enable those attending to continue their arbitration themed evening by making the short journey to the LSE to hear Professor Jan Paulsson and Alexis Mourre discuss the subject of "Unilaterally Appointed Arbitrators – A Good Idea?" from 7:15pm.

Mills on Federalism in the EU and in the US

Alex Mills, who is a lecturer at Cambridge University, has posted Federalism in the EU and the US: Subsidiarity, Private Law and the Conflict of Laws on SSRN. Here is the abstract:

> *The United States has long been a source of influence and inspiration to the developing federal system in the European Union. As E.U. federalism matures, increasingly both systems may have the opportunity to profit from each others' experience in federal regulatory theory and practice. This article analyses aspects of the federal ordering in each system, comparing both historical approaches and current developments. It focuses on three legal topics, and the relationship between them: (1) the federal regulation of matters of private law; (2) rules of the conflict of laws, which play a critical role in regulating cross-border litigation in an era of global communications, travel and trade; and (3) 'subsidiarity', which is a key constitutional principle in the European Union, and arguably also plays an implicit and under-analyzed role in U.S. federalism. The central contention of this article is that the treatment of each of these areas of law is related – that they should be understood collectively as part of the range*

of competing regulatory strategies and techniques of each federal system. It is not suggested that 'solutions' from one system can be simply transplanted to the other, but rather that the experiences of each federal order demonstrate the interconnectedness of regulation in these three subject areas, offering important insights from which each system might benefit.

The paper is forthcoming in the *University of Pennsylvania Journal of International Law*. It can be freely downloaded here.

No Renvoi in Dallah

The United Kingdom Supreme Court delivered its judgment in *Dallah* on November 3rd, 2010.

Readers will recall that the case was concerned with an arbitral award made by an ICC tribunal in Paris. Dallah was seeking enforcement in England. The Supreme court confirmed that the award would not be declared enforceable for lack of jurisdiction of the tribunal over the defendant, the Government of Pakistan (for more details see our previous post here). The case raised a variety of issues of English international commercial arbitration law that I will leave to my learned English coeditors. But it also raised a most interesting issue of conflict of laws involving French private international law.

The issue was which law governed the validity/existence of an arbitration agreement. English law and the New York Convention provide that, in the absence of a choice by the parties, the validity of an arbitral agreement is governed by "*…the law of the country where the award was made*." In this case, that was French law. And the Supreme Court applied French law.

The problem with this view is that, if one were to ask a French court whether it would apply French law in such case, it would most certainly say no. Since the *Dalico* case in 1993, the French Supreme Court for private and criminal matters (*Cour de cassation*) has ruled that international arbitration agreements are not

governed by any national law. This might look like a remarquable statement. It has shocked many French lawyers. It seems to have equally shocked quite a few Law Lords (more on this later). But however shocking it might be, it is a clear statement. According to the French *Cour de cassation*, French law does not govern the validity of arbitration agreements when the seat of the arbitration is in France. And one would think that the *Cour de cassation* knows what it is talking about when it comes to French law.

Which law governs then? Well, the two French law experts in this case had offered a reasonable interpretation. Their Joint Memorandum stated:

> *"Under French law, the existence, validity and effectiveness of an arbitration agreement in an international arbitration need not be assessed on the basis of national law, be it the law applicable to the main contract or any other law and can be determined according to rules of transnational law. To this extent, it is open to an international arbitral tribunal the seat of which is in Paris to find that the arbitration agreement is governed by transnational law".*

After citing *Dalico*, Lord Mance also started to explain:

> *15. This language suggests that arbitration agreements derive their existence, validity and effect from supra-national law, without it being necessary to refer to any national law.*

Indeed.

***Renvoi* or not *renvoi*?**

There was therefore an interesting issue before the English Supreme court. Its choice of law rule designated French law, but the French choice of law rule did not designate French susbtantive law. The question of *renvoi* had thus to be asked: would the English court ignore that French law did not want to be applied, or would it take it into consideration?

One possible answer could have been that, in the English conflict of laws, the scope of *renvoi* is limited to family law, and that, in all other fields, English courts do not care about foreign choice of law rules. Alternatively, the English Court could have answered that the New York Convention excludes *renvoi*. Lord Collins

did suggest so. He cited one author to this effect. It is disappointing that he did not mention all the others, in particular the numerous Swiss scholars who have argued to the contrary.

But this is not the main answer that Lord Collins gave. The distinguished jugde ruled that there could be no *renvoi*, because the applicable French choice of law rule designated French law. He held:

> *124 … it does not follow that for an English court to test the jurisdiction of a Paris tribunal in an international commercial arbitration by reference to the transnational rule which a French court would apply is a case of renvoi. Renvoi is concerned with what happens when the English court refers an issue to a foreign system of law (here French law) and where under that country's conflict of laws rules the issue is referred to another country's law. That is not the case here. What French law does is to draw a distinction between domestic arbitrations in France, and international arbitrations in France. It applies certain rules to the former, and what it describes as transnational law or rules to the latter.*

So, in a nutshell, although the *Cour de cassation* rules that transnational law applies, that is not the content of French law. French law provides for the application of rules specifically designed for international arbitration, and these rules are French.

Lord Mance would certainly not have disagreed with this. He ruled:

> *15. … the true analysis is that French law recognizes transnational principles as potentially applicable (…), such principles being part of French law.*

Lord Mance, however, might not have been absolutly sure about this. He thus found useful to state that this had to be a correct view, since both barristers appearing before the Court also agreed. Just as 60 million Frenchmen can't be wrong, how could three English lawyers get it wrong on French law (even after two senior French lawyers had concluded differently)?

Lord Collins and Lord Mance's London Lectures

Are Lord Collins and Lord Mance right when they say that what French courts

mean, or are doing, is to lay down French rules of international arbitration? Maybe. Quite a few French scholars have written exactly this. It might be, as Lord Collins put it, that French courts are wrong, and that what they do is is only to "describe" that transnational law applies. Yet, none of these scholars is authoritative when it comes to laying down rules of French law. Neither are Lord Collins or Lord Mance. Only French courts are. What they "describe" *is* French law.

The Lords sitting in the English Supreme Court were acting in a judicial capacity. They were faced with a question of foreign law. Their job was therefore to assess its content, and, for that purpose, they were to look at French *authorities*. Instead, the English Supreme Court explained how French law ought to be understood despite clear judgments of France's highest court ruling otherwise. It made an interesting academic point. But one would have thought that foreign law is a fact that ought to be assessed rather than an idea that can be endlessly discussed.

No doubt, French academics who disagree with this cases will appreciate the judgment in *Dallah*. It is less clear that the *Cour de cassation* will appreciate as much to have been lectured by Lord Collins and Lord Mance on the French conflict of laws.

Don't Dallah … Book Now

On 3 November 2010, the UK Supreme Court issued its decision in Dallah Real Estate & Tourism Holding Company v The Ministry of Religious Affairs, Pakistan [2010] UKSC 46, with the members of the Court unanimously declining to enforce under Part III of the Arbitration Act 1996 (giving effect to the UK's obligations under the New York Convention) an award made by an ICC Tribunal sitting in Paris.

The decision (and earlier stages of the litigation) addressed several important issues, including the scope and manner of the Court's review under section 103(2)(b) of the 1996 Act (Article V(1)(a) New York Convention), the place of the

doctrine of “competence-competence” within the Act and the application of arbitration agreements to non-signatories. The ruling and judgments of the Supreme Court on these issues will almost certainly have a significant and longstanding effect on UK arbitration practice, while influencing debate and practice in other countries.

British Institute of International and Comparative Law (through its Herbert Smith Senior Research Fellow, Dr Eva Lein) has organised a rapid response seminar to discuss the ruling and implications of Dallah case. The seminar will be held at the Institute’s headquarters from **17:15 to 18:45 0n Wednesday 24 November 2010** (followed by a drinks reception). The assembled panel of experts will include:

- David Brynmor Thomas, Herbert Smith LLP
- Dr Stavros Brekoulakis, Queen Mary, University of London
- Ali Malek QC, 3 Verulam Buildings
- Duncan Speller, Wilmer Cutler Pickering Hale and Dorr LLP

Registration and other details of the seminar are available here.

UPDATE: We mistakenly referred to September as the month for this seminar. That has now been corrected – it was, of course, meant to say November. Many thanks to those who emailed pointing out the typo. The time and list of speakers have also been updated.

Article 24 Brussels I, abuse of proceedings and Article 6 ECHR

In an interesting case concerning jurisdiction in a maintenance case, the Dutch Supreme Court – clearly doing justice in the individual case – ruled that jurisdiction may be based on Article 24 Brussels I in spite of the respondent contesting jurisdiction (LJN BL3651, Hoge Raad, 09/01115, 7 May 2010, *NJ* 2010, 556 note Th.M. de Boer). It considered that in this particular case contesting

jurisdiction constituted abuse of proceedings. It upheld the decision by the Court of Appeal that considered that declining jurisdiction would constitute a violation of the right of access to justice guaranteed by Article 6 ECHR since it would make it impossible for the claimant to have the case examined on the substance.

The facts that led to this ruling are as follows. Parties, ex spouses, both have the Dutch nationality but are domiciled in Belgium. In 2001 they obtained a divorce in the Netherlands. The District court also awarded maintenance for the (ex-) wife and their three children, but in appeal this decision was reversed due to lack of resources of the husband. In 2003, the woman turns to the Justice of the Peace in Zelzate, Belgium, again requesting maintenance (€ 1000 per child and € 3.500 for herself per month). The man argues that not the Belgian, but the Dutch court has jurisdiction. The Justice of the Peace accepts jurisdiction, but does not award the maintenance. The woman lodges an appeal at the Court of First Instance (District Court) in Ghent, Belgium. The man again contests jurisdiction of the Belgian court, this time successfully. The court in Ghent declines jurisdiction, considering that Article 6 of the Belgian-Dutch Enforcement Convention of 1925 (!) confers jurisdiction upon the Dutch court since the maintenance is connected to a divorce obtained in the Netherlands. It refers the case to the District Court in The Hague, Netherlands.

In The Hague court – meanwhile we are in 2006 – again the man invokes the exception of jurisdiction, now arguing that it is *not* the Dutch court, but the *Belgian* court that has jurisdiction pursuant to the Brussels I Regulation. The District court, however, accepts jurisdiction (incorrectly) considering that the Belgian judgment regarding jurisdiction is to be recognized, and awards part of the maintenance considering that the man does have sufficient resources after all (€ 193,31 per child and € 1.691,43 for the ex-spouse per month). The man lodges an appeal, once again contesting jurisdiction of the Dutch court. The Court of Appeal correctly concludes that the Brussels I Regulation applies (and not the Belgian-Dutch Enforcement Convention, see Art. 69). It considers that the Dutch court does not have jurisdiction pursuant to Art. 2 or 5(2) Brussels I (the ex-spouses are domiciled in Belgium and it concerns an independent maintenance claim), and that only Art. 24 on tacit submission can serve as a basis for jurisdiction.

It is under these circumstances that the Court of Appeal considers that the man contested jurisdiction of the Belgian court, arguing that the Dutch court had

jurisdiction, but when the case was transferred to the Netherlands, changed his position without a valid reason, contesting jurisdiction of the Dutch court. This constitutes abuse of proceedings under Dutch law. Where the Dutch court would decline jurisdiction, the wife would not have access to court to have her claim decided on the merits. As mentioned above, the Supreme Court ruled that the Court of Appeal under these circumstances rightfully based its jurisdiction on Art. 24 Brussels I.

Though there may be a little tension (?) with the generally rigid approach of the ECJ in relation to the Brussels I Regulation, denying arguments based on abuse of proceedings (such as in the Gasser case), I believe this Dutch judgment to be the only just solution in this case.