Dutch Reference for a Preliminary Ruling on Art. 4 of the Rome Convention (Update)

Following our post on the **first reference for a preliminary ruling on the Rome Convention** on the law applicable to contractual obligations, the questions referred by the **Dutch Supreme Court** (*Hoge Raad*) have been published on the ECJ's website.

The case, lodged on 2 April 2008, is pending under **C-133/08**, ***ICF* (Intercontainer Interfrigo (ICF) SC v Balkenende Oosthuizen BV and MIC Operations BV)**.

> *Questions referred:*
>
> *a) Must Article 4(4) of the 1980 Convention on the law applicable to contractual obligations be construed as meaning that it relates only to voyage charter parties and that other forms of charter party fall outside the scope of that provision?*
>
> *(b) If Question (a) is answered in the affirmative, must Article 4(4) of the 1980 Convention then be construed as meaning that, in so far as other forms of charter party also relate to the carriage of goods, the contract in question comes, so far as that carriage is concerned, within the scope of that provision and the applicable law is for the rest determined by Article 4(2) of the 1980 Convention?*
>
> *(c) If Question (b) is answered in the affirmative, which of the two legal bases indicated should be used as the basis for examining a contention that the legal claims based on the contract are time-barred?*
>
> *(d) If the predominant aspect of the contract relates to the carriage of goods, should the division referred to in Question (b) not be taken into account and must then the law applicable to all constituent parts of the contract be determined pursuant to Article 4(4) of the 1980 Convention?*
>
> *With regard to the ground set out in 3.6.(ii) above:*

(e) Must the exception in the second clause of Article 4(5) of the 1980 Convention be interpreted in such a way that the presumptions in Article 4(2), (3) and (4) of the 1980 Convention do not apply only if it is evident from the circumstances in their totality that the connecting criteria indicated therein do not have any genuine connecting value, or indeed if it is clear therefrom that there is a stronger connection with some other country?

JHA Council Session (5-6 June 2008): Adoption of the Rome I Reg. – Political Guidelines on Rome III and Maintenance Reg. – External Dimension of JHA

On 5 and 6 June the **Justice and Home Affairs Council** will hold its 2873rd session in Luxembourg, the last under the Slovenian Presidency. Among the "Justice" issues, scheduled for Friday 6th, **the Council is expected to adopt the Rome I Regulation on the law applicable to contractual obligations** (see the list of public deliberations; for earlier stages of the procedure, see the Rome I section of our site). It should be noted that the vote had been already scheduled for the JHA session held in April, but then, due to reasons not publicly known, it did not take place. The Council's deliberation, that is open to public, will be broadcasted on the videostreaming section of the Council's website, at 10:00 AM (GMT+1).

As regards the proposals that are still under consideration, the Council is expected to agree on **some political guidelines for further work on the Rome III and Maintenance regulations**. Here's an excerpt from the background note of the meeting (see in particular the underlined part on Rome III, *emphasis added*):

Maintenance obligations

The Council will discuss a set of political guidelines of a proposal on maintenance obligations. The guidelines contain a compromise solution on six components of this draft Regulation and thus set out the framework for further discussions on this file. The Council will try to agree on the principal goal of the Regulation – complete abolition of exequatur on the basis of harmonised applicable law rules.

The ambition of the proposal is to eliminate all obstacles which still today prevent the recovery of maintenance within the European Union, in particular the requirement of exequatur procedure. By abolishing this procedure all decisions on maintenance obligations would be allowed to circulate freely between the Member States without any form of control in the Member State of enforcement and this would significantly speed up the recovery of maintenance owed. It would enable the creation of a legal environment adapted to the legitimate expectations of the maintenance creditors.

The latter should be able to obtain easily, quickly and, generally, free of charge, an enforcement order capable of circulation without obstacles in the European area of justice and enabling regular payment of the amounts due. The six elements of the compromise refer to the scope, jurisdiction, applicable law, recognition and enforceability, enforcement and a review clause.

Jurisdiction and applicable law in matrimonial matters (Rome III)

The Council will have a debate on a proposal for a Council Regulation on rules concerning applicable law in matrimonial matters (Rome III). The purpose of this Regulation is to provide a clear and comprehensive legal framework (covering both jurisdiction as well as applicable law rules in matrimonial matters) and allowing the parties a certain degree of autonomy in choosing the competent court and applicable law in case of divorce.

Spouses would be allowed to choose a competent court or the law applicable to divorce. In the absence of a choice of law by the spouses, the text would introduce conflict-of-law rules. According to the proposal, there is a cascade of connecting factors: the divorce is governed by the law of the country of habitual residence of both spouses, failing that, by that of the last habitual residence of the spouses if one of them still resides there; failing that, of the common

nationality of the spouses or, failing that, by the law of the forum. The conflict-of-law rules of the proposal aim at ensuring that, wherever the spouses lodge their request for divorce, the courts of any Member State would normally apply the same substantive law (avoiding of "forum shopping").

It should be noted that the instrument will be of universal application. This means that the Regulation would also apply if the law applicable is that of a third State. Therefore, according to the proposal, courts have to apply either their own substantive law, that of another Member State or that of a third State (e.g. Switzerland, a US State or Turkey).

It should be noted that the Regulation needs unanimity of the Member States to be adopted and that so far the attempts made by the Presidency failed because of the concerns of some Member States. The goal of the Presidency is to establish at the Council that all possibilities for a compromise have been exhausted, that a large majority of delegations supports the objectives of this proposal and to discuss the possibility of enhanced cooperation between some Member States on this file.

As a last point, the Council will take note of the progress made regarding the **implementation of the strategy for the external dimension of Justice and Home Affairs**. While this strategy encompasses all the heterogeneous matters included in Title IV of the TEC ("Visas, asylum, immigration and other policies related to free movement of persons"), an increasing importance is given to the external relations in the field of judicial cooperation in civil matters.

The Council is currently **considering the accession of the EU to some Hague Conventions**, and **bilateral contacts are taking place with countries like Russia and Ukraine with the aim of clarifying the potential of a bilateral agreement on judicial cooperation in civil and commercial law matters** (see the provisional agenda of the meeting of the Committee on Civil Law Matters held on 27 May 2008). Unfortunately, most part of the related documents are not publicly available (see, for instance, the title of this document).

Some information can be found in the progress reports "on the implementation of the strategy for the External Dimension of the JHA", prepared by the Commission and the General Secretariat of the Council. The first one, covering year 2006, can be downloaded here (Commission and Council Secretariat), while the second one

(January 2007-May 2008) is due at the end of June (a preparing document by the Commission is available here).

(Many thanks to Pietro Franzina, University of Ferrara, for the tip-off on some of the documents referred to above)

Suit Challenges Decision of New York to Recognize Same-Sex Unions

A law suit was filed in New York on June 3rd to challenge the decision of New York Governor to recognize same-sex unions.

It is argued that the Legislature was the sole branch of government which could have made such decision, and that the Governor, who is the executive power of the state of New York, usurped legislative authority.

The report of the New York Times can be found here.

Canadian Conflicts Publications

During a recent round-up of Canadian publications dealing with the conflict of laws, I have found the following articles which some might find of interest:

– Robert Flannigan, "The Use of Foreign Forms to Circumvent Local Liability Rules" (2007) 44 Alta. L.R. 803-14

– Lily Ng, "Covenant Marriage and the Conflict of Laws" (2007) 44 Alta. L.R.

815-36

– Jean-Gabriel Castel, “The Uncertainty Factor in Canadian Private International Law” (2007) 52 McGill L.J. 555-76

– Pamela D. Pengelley, “A Compelling Situation: Enforcing American Letters Rogatory in Ontario” (2006) 85 Can. Bar Rev. 345-72

– John P. Sullivan & Jonathan M. Woolley, “*Oakwell Engineering Limited v. Enernorth Industries Inc.*: Questions of Burden and Bias in the Enforcement of Foreign Judgments” (2006) 85 Can. Bar Rev. 605-32

– Craig Jones, “New Solitudes: Recent Decisions Call into Question the National Class Action” (2007) 45 Can. Bus. L.J. 111-22

Most are available on-line through various collections of legal scholarship, like Hein Online or Scholars Portal.

Directive on Mediation in Civil and Commercial Matters

On 21 May, the **Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters** has been adopted.

As stated in its Article 1, the aim of the directive is

> *to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.*

Its scope of application shall cover

> *cross-border disputes, […] civil and commercial matters except as regards rights and obligations which are not at the parties’ disposal under the relevant*

> *applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii).*

With regard to the recognition and enforcement of an agreement resulting from mediation, recital 20 states that

> *the content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognised and declared enforceable in the other Member States in accordance with applicable Community or national law. This could, for example, be on the basis of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters or Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.*

(Many thanks to Prof. Dr. Burkhard Hess, Heidelberg for the tip-off.)

Trinity College Dublin to Host Conference on Rome II Regulation

On June 21, 2008, Trinity College Dublin is hosting a conference on the Rome II regulation on the law applicable to non-contractual obligations. Full details are available here.

The conference will examine the regulation and its implications for the practice of tort law. TCD has put together a team of speakers that includes leading experts from across Europe and North America.

Paper topics include “Rome II: A True Piece of Community Law”, “Has the Forum Lost its Grip?”, “The Significance of Close Connection” and “The Application of Multiple Laws under Rome II”.

French Marriage Annulled for Lack of Virginity

On April 1st 2008, a first instance court of Lille (Northern France) set aside a marriage because the wife had concealed to her husband that she was not a virgin.

The husband found out on July 8th, 2006, that is the night of the wedding. Contrary to what she had told him, the wife was not a virgin. That was not only a problem for him, but for the whole family, so much so that his parents had been waiting outside seeping mint tea so that, at some point, they could hear the good news, if not see the bedsheets with blood on them. At 4 am, he went to see them, but only to say that there was no blood. She may have recognized then that she had lied, or did shortly after. The groom’s father brought her back to her parents, saying that his family was now dishonored. Two weeks later, the husband initiated proceedings to set aside the marriage.

What does this judgment have to do with conflicts? Arguably nothing, as the newly wed were both French nationals and the wedding had taken place in Roubaix, France. But the reason why the virginity of the wife was a big deal to both her husband and his family was because they were all muslims, and French muslims are overwhelmingly of Algerian or Morrocan origin (by far the biggest groups of immigrants in France). Origin of people is taboo in France, so it is not known whether this couple is indeed third generation immigrants from North Africa. But chances that they are are very high. Indeed, it is customary for the family to wait to see the blood on the sheets during the night in North African weddings. (Update: it has now been reported by several sources that the spouses were of Morrocan origin)

So after all, this case is not completely unrelated to conflicts. The demand for virginity was the result of a social norm governing a group of people. These people may be French nationals leaving in France, and thus entirely subject to French law, but the norm governing their community is of foreign origin. A not so uncommon case of legal pluralism.

Now, the interesting question was: how do you enforce this social norm? And that where the case gets interesting: by finding an equivalent French legal norm and, most importantly, a remedy attached to that French norm.

Under French law, marriages can be set aside when there has been a "*mistake on a material quality of the person*" (French Civil Code, art. 180). The doctrine was famously applied in cases where the spouse had served jail time, or where he could not/would not have sexual relationships. Here, the court of Lille held that the mistake was that the bride was not a virgin, and annulled the marriage, noting that the wife was in agreement with the decision.

Here is an excerpt of the judgment in French:

> *[…] Attendu qu'il importe de rappeler que l'erreur sur les qualités essentielles du conjoint suppose non seulement de démontrer que le demandeur a conclu le mariage sous l'empire d'une erreur objective, mais également que cette erreur était déterminante de son consentement.*
>
> *Attendu qu'en l'occurence, Y acquiesçant à la demande de nullité fondée sur un mensonge relatif à sa virginité, il s'en déduit que cette qualité avait bien été perçue par elle comme une qualité essentielle déterminante du consentement de X au mariage projeté; que dans ces conditions, il convient de faire droit à la demande de nullité du mariage pour erreur sur les qualités essentielles du conjoint.*
>
> *Par ces motifs, prononce l'annulation du mariage.*

The vast majority of French politicians and intellectuals have severely criticized the judgment.

UPDATE: the French government has decided to lodge an appeal against the decision of the Lille court.

New York Agencies to Recognize Same Sex Unions

The New York Times reports that the Governor of the State of New York has directed all New York state agencies to revise all statutes and regulations of the State so that same sex unions or marriages can be recognized in New York "as any other legally performed union".

The NY Times further reports that, interestingly enough, the State of New York does not itself allow gay marriage, but will nevertheless fully recognize unions entered into elsewhere.

BIICL event: Group Actions, including Class Actions: Cross-border Aspects

As part of the BIICL's 2007-2008 Seminar Series on Private International Law the BIICL organizes on Monday 23 June 2008 17:30 to 19:30 (British Institute of International and Comparative Law, Charles Clore House, 17 Russell Square, London, WC1B 5JP) a seminar titled "Group Actions, including Class Actions: Cross-border Aspects". The BIICL website informs:

This seminar focuses on particular issues involved in the commencement, conduct and effect of cross-border group actions, including: (1) Standing and Certification; (2) Jurisdiction; (3) Notification; (4) Applicable Law; (5) Evidence; (6) Case management; (7) Transnational Cooperation; (8) Costs/Lawyers Fees; and (9) Res Judicata Effect and Recognition of Foreign Judgments.

The identified issues will be discussed in light of the work of the ILA Committee on International Civil Litigation and The Interests of the Public, chaired by Prof Catherine Kessedjian, which has prepared a report and resolution on transnational group actions. This work of the committee will be presented at the upcoming ILA Biennial Conference in Rio De Janeiro, 17-21 August this year.

The expression "transnational group actions" encompasses US-style "class actions", but is more inclusive, extending also to procedures involving groups in countries that have not enacted formal class action legislation on the United States model but nevertheless recognize in certain circumstances the rights of groups of individuals or bodies to bring collective claims.
The main objective of the ILA Committee was to identify general principles and common themes or approaches across the various models of group action currently employed in the world. At times, however, it must be admitted that uniformity does not exist, even between countries which have adopted the same generic model (e.g., the US class action procedure).

Moreover, the committee set out to consider some of the uniquely cross-border and transnational aspects of group actions. While the transnational context is relevant to all aspects of group actions covered in this report, an examination of the topics of jurisdiction, applicable law and recognition and enforcement of foreign judgments will be made with a focus on whether the principles applied to ordinary suits need modification in the context of group actions.

The BIICL has invited Prof Kessedjian, as well as the rapporteurs and members of her committee, for a preliminary public discussion of the committee's draft resolution. During the seminar, the findings of the committee and the preliminary conclusions of its report will be presented and discussed by a panel of experts in the area of class actions and cross-border litigation.

For more information about the seminar, its Chair, speakers and sponsor, have a look at the website.

BIICL event: Rome I Regulation: The UK Set to Opt-in

As part of the BIICL's 2007-2008 Seminar Series on Private International Law the BIICL organizes on Wednesday 18 June 2008 17:30 to 19:30 (British Institute of International and Comparative Law, Council Chamber, Charles Clore House, 17 Russell Square, London, WC1B 5JP) a seminar titled "Rome I Regulation: The UK Set to Opt-in". The aim of the seminar is to provide one of the final opportunities for a discussion of the merit and implications of opting into the Rome I Regulation, and moreover to consider the questions which are raised by the Ministry of Justice in its consultation. Also, the changes to be expected for the legal practice in England & Wales upon entry into force of the Regulation will be addressed. The seminar will feature several presentations from expert academics and practitioners, while leaving ample space for discussion. For more information about the seminar, its Chair, speakers and sponsor, have a look at the website.