IM Skaugen SE v MAN Diesel & Turbo SE [2018] SGHC 123

In *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123, the Singapore High Court had the occasion to discuss and resolve various meaty private international law issues. The facts concerned the alleged negligent or fraudulent misrepresentation by the defendants on the fuel consumption of a specific model of engine that was sold and installed into ships owned by the plaintiffs. The issue before the court was whether the Singapore courts had jurisdiction over the misrepresentation claim. The defendants were German and Norwegian incorporated companies so the plaintiffs applied for leave to serve the writ out of Singapore. This entailed fulfilling a 3 stage process, following English common law rules: (1) a good arguable case that the case falls within one of the heads set out in the Rules of Court, Order 11, (2) a serious issue to be tried on the merits, and (3) Singapore is *forum conveniens* on applying the test set out in *The Spiliada* [1987] AC 460. Stages (1) and (3) were at issue in the case.

The judgment, by Coomaraswamy J, merits close reading. The main private international law issues can be summarised as follows:

(a) Choice of law is relevant when assessing the heads of Order 11 of the Rules of Court.

The plaintiffs had relied on Order 11 rule 1(f) and rule 1(p). Rule 1(f) deals with tortious claims and the court proceeded by ascertaining where the tort was committed. According to the court, this question was to be answered by the *lex fori*. If the tort was committed abroad, the court held that choice of law for tort then came into play: the court must then determine if the tort satisfied Singapore's tort choice of law rule, ie the double actionability rule. It should be noted that the Court of Appeal in *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 had held that the double actionability rule will apply even in relation to local torts (as the flexible exception may displace Singapore law to point to the law of a third jurisdiction). The double actionability rule thus remains relevant when assessing Order rule 1(f) whether the tort is committed abroad or in Singapore.

(b) 'damage' for the purposes of Order 11 rule 1(f)(*ii*) is not limited to direct damage.

Order 11 rule 1(f)(*ii*) is in these terms: 'the claim is wholly or partly founded on, or is for the recovery of damages in respect of, damage suffered in Singapore caused by a tortious act or omission wherever occurring.' The court held that 'damage' for the purposes of rule 1(f)(*ii*) included the increased fuel expenditure and reduction in capital value of the ships due to the fuel inefficient engines suffered not just by the original owners of the ships at the time of the misrepresentation, but also the subsequent purchasers of the ships. On the facts, the court held that the damage suffered by the subsequent purchasers arose directly from the misrepresentation as the misrepresentation was also intended to be relied upon by them. Further, the court held that, even if that had not been the case, direct damage is not required under rule 1(f)(*ii*). The difference in wording between Order 11 rule 1(f) and the UK CPR equivalent (CPR PD6B para 3.1(9)) makes the decision on this point less controversial than the reasoning in *Four Seasons v Brownlie* [2017] UKSC 80, [2018] 1 WLR 192.

(c) The test used to ascertain whether 'the claim is founded on a cause of action arising in Singapore' for the purposes of Order 11 rule 1(p) differs from the substance test which applies to determine the *loci delicti* in a multi-jurisdictional tort situation for the purposes of the double actionability rule.

The former test derives from *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458. The court observed that the *Distiller's* test is more plaintiff-centric compared to the substance test used for the purposes of the double actionability rule because Order 11 rule 1(p) 'requires the court to view the facts of the case through the cause of action which the plaintiff has sought to invoke.' Whereas, the latter test is 'the more general and more factual question "where in substance did *the tort take place.*"' (para [166], emphasis in original). This point will likely be revisited by the Court of Appeal, not least because it had, as the court itself acknowledged, cited the *Distillers* test as authority for the substance test in *JIO Minerals FZC v Mineral Enterprises* [2011] 1 SLR 391.

(d) Whether Singapore is *forum conveniens* for the purposes of a setting aside application and whether Singapore is *forum non conveniens* for the purposes of a stay application should be assessed with reference to current facts.

Norway and Germany were potential alternative fora for the action. After leave had been given to serve out of jurisdiction in the *ex parte* hearing, the plaintiffs commenced proceedings in Norway as a protective measure. No proceedings were commenced in Germany. This meant that, under the Lugano Convention, the Norwegian courts had priority over the German courts. The court treated this as indicating that the courts of Germany ceased to be an available forum to the parties. This was significant, given that the court had earlier held that the *loci delicti* was Germany. The defendants argued that the commencement of Norwegian proceedings was to be ignored and the application to set aside service out of jurisdiction was to be assessed solely with reference to the facts which existed at the time when leave to serve out of jurisdiction was granted. The effect of the defendants' argument would be that the setting aside application would be determined on the basis that Germany was an available forum, while their alternative prayer for a stay would be determined on the basis that Germany was an unavailable forum. The potential for wastage in time and costs is clear on this argument and the court rightly took a common sense and practical approach on this issue.

(e) The possibility of a transfer of the case from the Singapore High Court (excluding the SICC) to the Singapore International Commercial Court (SICC) is a relevant factor in the *Spiliada* analysis.

This had previously been confirmed by the Court of Appeal in *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265. The SICC is a division of the Singapore High Court which specialises in international commercial litigation. Its rules allow for a question of foreign law to be determined on the basis of submissions instead of proof. Further, the bench includes International Judges from not only common law but also civil law jurisdictions. The court held that the specific features of the SICC and the possibility of the transfer of the case to the SICC weighed in favour of Singapore being *forum conveniens* compared to Norway and Germany.

(f) In a setting-aside application, where the plaintiffs have succeeded in showing that Singapore is the *prima facie* natural forum in the first stage of the *Spiliada* test, the burden of proof shifts to the defendants to show why they would suffer substantial injustice if the action were to proceed in Singapore.

In an Order 11 case, the second stage of the *Spiliada* test usually operates to give

the plaintiffs a second bite of the cherry should they fail to establish Singapore is the natural forum under the first stage of the test. The plaintiffs are allowed to put forward reasons why they would suffer substantial injustice if trial takes place in the natural forum abroad. Very interestingly, the court held that where, as on the facts of the case, the plaintiff had already satisfied the burden of showing that Singapore is the natural forum under the first stage of the *Spiliada* test, the burden then shifts to the defendants to show why they would suffer substantial injustice if trial took place in Singapore.

The case is on appeal to the Court of Appeal. Its judgment is eagerly anticipated.

The Russian Supreme Court's guidelines on private international law

The Russian Supreme Court has published the English translation of the guidelines on Russian private international law, issued in Russian on 27 June 2017 (ruling No 23 'On Consideration by Commercial Courts of Economic Disputes Involving Cross-Border Relations').

The ruling is binding on all the lower courts in Russia: from time to time the Russian Supreme Court gathers in a plenary session to discuss the case law approaches to controversial matters in a particular field of law. It then adopts binding guidelines to ensure a uniform application of law in the future (this role of the Supreme Court is based on art. 126 of the Constitution and arts. 2 and 5 of the law on the Supreme Court of the Russian Federation of 2 February 2014).

The 2017 guidelines are based on more than a decade of case law, as the previous plenary session on private international law was dated 2003.

The guidelines, briefly sketched below, are divided to seven parts, dedicated to the general issues (1), the international jurisdiction of the Russian commercial

courts (2), the law applicable to corporation (3), the service of documents (4), the requirements relating to the consular legalisation of foreign documents (5), the application of foreign law (6) and the provisional protective measures (7).

1. In the first part of the guidelines, the Supreme Court explains which disputes have an international character (at [1]). It also recalls the rules on absolute (international) and relative (national) jurisdiction (at [1], further detailed at [8]).

2. Part two is dedicated to the international jurisdiction of Russian commercial courts.
– The Supreme Court lists the matters within the exclusive jurisdiction of the Russian commercial courts (at [5]). If a foreign court accepts jurisdiction in violation of the rules on exclusive jurisdiction of Russian commercial courts, the foreign decision will not be recognised or enforced in Russia (at [4]).

– Several guidelines deal with the choice of court. Parties may choose a court in relation to an existing or a future dispute arising out of any relationship, be it contractual or non-contractual (at [6]). Some substantive and formal requirements relating to the choice of court agreement, including tacit submission, are discussed in detail. Two foreign parties may choose a Russian commercial court. Parties may choose to litigate at the 'court of the defendant' or 'the court of the claimant' (last four paragraphs of [6], [7]–[9], [11] and [18]). The principle of party autonomy in relation to the choice of court is also emphasised later in the guidelines (at [17]; especially in the third paragraph).

– The guidelines confirm the severability of the court choice clause (at [10]), the survival of such clause after the termination of the contract and declaring contract invalid (at [10]), and touch upon the lis pendens with a foreign court (at [11]).

– The Supreme Court recalls the principle of close connection underpinning the rules on the jurisdiction of the Russian courts. It then names a number of factors to be assessed in order to establish a close connection between the dispute and Russia (at [13]–[16]). For this purpose, the concept of activity in Russia is not confined to the registration of an affiliate or a registered office in the Russian trade register. Any activity in Russia should be taken into consideration. It may be, for example, the use of a website with a domain name '.ru' or '.su' to approach the Russian market (at [16]).

3. The third part of the guidelines is dedicated to the law applicable to corporations. After recalling that the Russian conflict of laws rules rely on the theory of incorporation (at [19], third paragraph), the Supreme Court explains which documents should be filed with the court (or consulted by the court of its own motion) to identify the country of a company's incorporation (at [19]). Failure of the first or second instance court to establish this constitutes a ground for cassation (at [22], last paragraph). The Supreme Court also discusses the law applicable to some aspects of company's representation (at [20]–[25]).

4. The fourth part of the guidelines deals with the service of documents (at [26]–[28]): the service of foreign documents on a Russian party, the service of Russian documents on a foreign party, and the relevant procedural terms (at [29]–[31]).
Two points are worth noting. First, if several international instruments on international legal cooperation containing requirements relating to the service of documents apply, the instrument allowing the fastest and the most informal service prevails (at [28]).
Second, the awareness of a foreign party of the proceedings is presumed, if the court publishes the information about the time and the place of the hearing on its website (at [37]; let us note, most information on the websites is in Russian). In the meantime, a broad range of evidence may be presented to prove awareness of the proceedings on the part of the foreign party (at [36]).

5. Part five discusses the requirements of apostille and consular legalisation of foreign documents (at [39]–[41]).

6. Part six deals with the application of foreign law. If a dispute is governed by a foreign law, Russian commercial courts have the duty to apply foreign law (at [42]). The parties have no obligation to inform the court on the content of foreign law. However, the court may require a party to do so. If the party does not comply, it may not invoke the court's failure to establish the content of foreign law later in the proceedings, provided that the court takes reasonable measures to establish the content of foreign law (at [44]). The guidelines contain some general recommendations for the lower courts on the way to take such measures (at [45]–[46]).

7. Part seven is dedicated to provisional protective measures.
– A provisional protective measure can be taken by a Russian court if it has

‘effective’ jurisdiction regarding the measure. The Supreme Court describes situations in which a Russian court has ‘effective’ jurisdiction (at [49]).
– The enforcement of a provisional protective measure granted by a foreign court falls outside the scope of instruments regulating international legal cooperation (at [50]).
– A foreign antisuit injunction cannot prevent a Russian commercial court from hearing the dispute, if the Russian court finds that it has jurisdiction regarding the dispute (at [52]).

Towards a European Commercial Court?

The prospect of Brexit has led a number of countries on the European continent to take measures designed to make their civil justice systems more attractive for international litigants: In Germany, the so-called “Justice Initiative Frankfurt”, consisting of lawyers, judges, politicians and academics, has resulted in the creation of a special chamber for commercial matters at the District Court in Frankfurt which will, if both parties agree, conduct the proceedings largely in English (see here). In France, an English-language chamber for international commercial matters was established at the Cour d’appel in Paris, adding a second instance to the English-speaking chamber of commerce at the Tribunal de commerce in Paris (see here). In the Netherlands, the Netherlands Commercial Court and the Netherlands Commercial Court of Appeal will soon begin their work as special chambers of the Rechtbank and the Gerechtshof Amsterdam (see here). And in Belgium, the government plans to establish a Brussels International Business Court (see here). Clearly: the prospect of Brexit has stirred up the European market for international litigation.

The interesting question, however, is whether the above-mentioned measures will yield much success? Will Germany, France, the Netherlands or Belgium manage to convince internationally active companies to settle their disputes on the European continent rather than in London? Doubts are in order. To begin with,

the many national initiatives vary considerably in detail and, thus, send rather diffuse signals to the business community. Moreover, most of the measures that have been taken or are being planned so far, notably those in Germany and France do not go far enough. They focus too much on English as the court language and neglect other factors that contribute to the outstanding success of London as a place for settling international disputes. This includes, for example, a pronounced service mentality that goes hand in hand with a strict orientation towards the special litigation needs of international companies. In any case, it is doubtful whether the withdrawal of London from the European judicial area can be compensated through national initiatives.

So, what can the remaining Member States do to offer European and other companies an attractive post-Brexit forum to settle their disputes? In a soon to be published study for the European Parliament I suggest a package of measures, one of which envisions the establishment of a European Commercial Court. This Court would complement the courts of the Member States and offer commercial litigants one more forum for the settlement of international commercial disputes. It would come with a number of advantages that national courts are not able to offer.

Advantages

To begin with, a European Commercial Court would be a truly international forum. As such it could better respond to the needs of international commercial parties than national courts which are embedded in existing national judicial structures. In particular, it could better position itself as a highly experienced and neutral forum for the settlement of international disputes: just like an international arbitral tribunal, it could be equipped with experienced commercial law judges from different states. These judges would ensure that the Court has the necessary legal expertise and experience to settle international disputes. And they would credibly signal that the Court offers neutral dispute settlement that is unlikely to favour one of the parties. A European Commercial Court could, therefore, offer commercial parties much of what they get from international commercial arbitration – without sacrificing the advantages associated with a state court.

A European Commercial Court, however, would not only enrich the European dispute settlement landscape and offer international commercial litigants an

additional, an international forum for the settlement of their disputes. It could also participate more convincingly in the global competition for international disputes that has gained momentum during the past years and triggered the establishment of international commercial courts around the world: Singapore, for example, opened the Singapore International Commercial Court in 2015 to offer a special court for cases that are "of an international and commercial nature". Qatar has been running the Qatar International Court and Dispute Resolution Centre (QICDRC) for a number of years by now. Abu Dhabi is hosting the Abu Dhabi Global Markets Courts (ADGMC) and Dubai is home to the International Financial Centre Courts (DIFC). And in 2018 China joined the bandwagon and created the China International Commercial Court (CICC) for countries along the "New Silk Road" as part of the OBOR (One Belt, One Road) initiative. The establishment of a European Commercial Court would be a good and promising response to these developments. The more difficult question, however, is whether the EU would actually be allowed to establish a new European court?

Competence

Under the principle of conferral embodied in Article 5 TEU, the EU may only act within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. With regard to the establishment of a European Commercial Court the EU could rely on Article 81 TFEU. This provision allows the EU to adopt measures to improve judicial cooperation in civil matters having cross-border implications. In particular, it allows the EU to adopt measures that improve access to justice (Article 81(2) lit. e) TFEU) and eliminate obstacles to the proper functioning of civil proceedings (Article 81(2) lit. f) TFEU). A European Commercial Court could be understood to do both: improving access to justice and eliminating obstacles to the proper functioning of civil proceedings. However, would it also fit into the overall European judicial architecture? Above all: would the CJEU accept and tolerate another European court?

Doubts are in order for at least two reasons: first, according to TEU and TFEU it is the CJEU that is entrusted with the final interpretation of EU law. And, second, the CJEU has recently – and repeatedly – emphasized that it does not want to leave the interpretation of EU law to other courts. However, both considerations should not challenge the establishment of a European Commercial Court because

that Court would not be responsible for interpreting European law, but for settling international disputes between commercial parties. It would – like any national court and any arbitral tribunal – primarily apply national law. And, as far as it is concerned with European law, the Court should be entitled and required to refer the matter to the CJEU. A European Commercial Court would, therefore, recognize and, in fact, defer to the jurisdiction the CJEU.

Challenges

The establishment of a European Commercial Court would be a good response to the many challenges international commercial litigation is currently facing. In order to succeed, however, the Court would have to be accepted by the business community. To this end the Court would require staff, equipment and procedures that meet the highest standards of professional dispute resolution. In addition, the Court would have to be fully integrated into the European judicial area and benefit from all measures of judicial cooperation, in particular direct enforcement of its judgments. Ensuring all this would certainly not be easy. However, if properly established a European Commercial Court would enrich and strengthen the European dispute resolution landscape. And it would contribute to the development of a strong and globally visible European judicial sector.

What do you think?

Talaq v Greek public policy: Operation successful, patient

dead…

A talaq divorce is rarely knocking at the door of Greek courts. A court in Thessaloniki dismissed an application for the recognition of an Egyptian talaq, invoking the public policy clause, despite the fact that the application was filed by the wife. You can find more information about the case, and check my brief comment here.

What puzzles me though is whether there are more jurisdictions sharing the same view. Personally I don't feel at ease with this ruling for a number of reasons. But prior to that, a couple of clarifications:

1. This case bears no resemblance to the *Sahyouni* saga. The spouses have no double nationality: The husband is an Egyptian, the wife a Greek national.
2. There was no back and forth in their lives: they got married in Cairo, and lived there until the talaq was notarized. Following that, the spouse moved to Greece, and filed the application at the place of her new residence.
3. Unlike Egypt, Greece is not a signatory of the 1970 Hague Convention on the Recognition of Divorces and Legal Separations.
4. There is no bilateral agreement between the two countries in the field.

I'm coming now to the reasons of my disagreement with the judgment's outcome.

1. The result is not in line with the prevalent view in a number of European jurisdictions: From the research I was able to conduct, it is my understanding that Austria, Germany, France, Italy, Spain, the Netherlands, Norway, and Switzerland, do not see any public policy violation, when the wife takes the initiative to apply for recognition of the talaq.
2. The reasoning of the court is a verbatim reiteration of an Athens Court of Appeal judgement from the '90s. It reads as follows: *Solely the recognition of such an act would cause profound disturbance to the Greek legal order, if its effects are to be extended and applied in Greece on the basis of the Egyptian applicable rules.* What is actually missing is the reason why recognition will lead to *profound disturbance*, and to whom.

Surely not to the spouse, otherwise she wouldn't file an application to recognize the talaq.

3. It should be remembered that the public policy clause is not targeting at the foreign legislation applied in the country of origin or the judgment per se; moreover, it focuses on the repercussions caused by the extension of its effects in the country of destination. Given the consent of the spouse, I do not see who is going to feel disturbed.
4. Recognition would not grant carte blanche for talaq divorces in Greece. As in other jurisdictions, Greece remains devoted to fundamental rights. What makes a difference here is the initiative of the spouse. In other words, the rule remains the same, i.e. no recognition, unless there's consent by the wife. Consent need not be present at the time the talaq was uttered or notarized; it may be demonstrated at a later stage, either expressly or tacitly. I guess nobody would seriously argue that consent is missing in the case at hand.
5. Talking about consent, one shouldn't exclude an ex ante tacit agreement of the spouses for financial reasons. It has been already reported that all remaining options for a spouse in countries where Sharia is predominant are much more complicated, time-consuming, cumbersome, and detrimental to the wife. Take *khul* for example: It is indeed a solution, but at what cost for the spouse…
6. Last but not least, what are the actual consequences of refusal for the spouse? She will remain in limbo for a while, until she manages to get a divorce decree in Greece. But it won't be an easy task to accomplish, and it will come at a heavy price: New claim, translations in Arabic, service in Egypt (which means all the 1965 Hague Service Convention conditions need to be met; Egypt is very strict on the matter: no alternative methods allowed!); and a very careful preparation of the pleadings, so as to avoid a possible stay of proceedings, if the court requires additional information on Egyptian law (a legal information will most probably double the cost of litigation…).

For all the reasons aforementioned, I consider that the judgment is going to the wrong direction, and a shift in Greek case law is imperative, especially in light of the thousands of refugees from Arab countries who are now living in the country.

As I mentioned in the beginning, any information on the treatment of similar

cases in your jurisdictions is most welcome.

From the editors' desk: Relaunch of conflictoflaws.net!

Dear readers,

Conflictoflaws.net has been around for 12 years by now. It has developed into one of the most relevant platforms for the exchange of information and the discussion of topics relating to conflict of laws in a broad sense. And while the world has changed a lot during the past 12 years the look of conflictoflaws.net has basically remained the same. Today this is going to change:

We are happy to announce that www.conflictoflaws.net has received a (slightly) new design!

As you will see, we have tried to keep the overall simple appearance of the blog while giving it a slightly more modern touch. As regards the structure, however, there is one major change. As of today, posts will come in two different categories: "views" and "news". Under "views" posts with independent content (case notes, comments, etc.) will be displayed". Posts under "news" will convey all sorts of information (relating to, for example, conference announcements, book releases, job vacancies, call for papers, etc.).

We hope that you will like the new design and find the new structure useful. Should you have any comments or experience problems please get in touch. Needless to say that the same holds true, if you wish to share "views" and "news"!

Best wishes and happy reading!

The editors

Islamic Marriage and English Divorce – a new Decision from the English High Court

In England, almost all married Muslim women have had a nikah, a religious celebration. By contrast, more than half of them have not also gone through a separate civil ceremony, as required under UK law. The often unwelcome consequence is that, under UK law, they are not validly married and therefore insufficiently protected under UK law: they cannot claim maintenance, and they cannot get a divorce as long as the marriage is viewed, in the eyes of the law, as a nullity.

The government has tried for some time to remedy this, under suspicious gazes from conservative Muslims on the one hand, secularists on the other. A 2014 report (the 'Aurat report'), which demonstrated, by example of 50 cases, the hardships that could follow from the fact that nikahs are not recognized, found attention in the government party. An independent review into the application of sharia law in England and law, instigated by Theresa May (then the Home Secretary) in 2016 and published earlier this year, recommended to ensure that all Islamic marriages would also be registered; it also recommended campaigns for increased awareness.

Such steps do not help where the wedding already took place and has not been registered. A new decision by the High Court brings partial relief. Nasreen Akhter (who is a solicitor and thus certainly not an uneducated woman ignorant of the law) asked to be divorced from her husband of twenty years, Mohammed Shabaz Khan. Khan's defense was that the marriage, which had been celebrated as a nikah in west London, existed only under Islamic, not under UK law, and therefore divorce under UK law was not possible. Indeed, up until now, the nikah

had been considered a non-marriage which the law could ignore, because it did not even purport to comply with the requirements of English law. The High Court was unwilling to presume the lived marriage as valid. However, drawing at length on Human Rights Law, it declared the marriage void under sec 11 of the Matrimonial Causes Act 1973 and granted the wife a decree of nullity. This has important consequences: Unlike a non-marriage, a void marriage allows a petitioner to obtain financial remedies.

The decision represents a huge step towards the protection of women whose Islamic marriages are not registered. It makes it harder for men to escape their obligations under civil law. At the same time, the decision is not unproblematic: it refuses recognition of an Islamic marriage as such, while at the same time, under certain conditions, treating it like a recognized marriage. In all likelihood, only registration will create the needed certainty.

The decision is here.

Much-awaited US Supreme Court decision has been rendered: Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.

The decision is available here and further documentation is available here. I would also like to refer to previous posts by fellow editors here and here. The US Supreme Court held that: "A federal court determining foreign law under Federal Rule of Civil Procedure 44.1 should accord respectful consideration to a foreign government's submission, but the court is not bound to accord conclusive effect to the foreign government's statements."

In a nutshell, the US Supreme Court said that the weight to be given to foreign government statements depends on the circumstances of the case. In particular, it notes that "[t]he appropriate weight [a federal court determining foreign law should give to the views presented by a foreign government] in each case, however, will depend upon the circumstances; a federal court is neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials. No single formula or rule will fit all cases, but relevant considerations include the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions."

One thing of note is that the US Supreme Court refers to *Société Nationale Industrielle Aérospatiale v. United States Dist. Court for Southern Dist. of Iowa*, 482 U. S. 522, which is a very important case in the context of the Hague Evidence Convention.

The concept of ‘right of access’ under Brussels II bis encompasses grandparents

In the judgment C-335/17 of 31 May 2018, the CJEU confirms that the autonomous concept of ‘right of access’ under Brussels II bis Regulation encompasses the rights of access of grandparents to their grandchildren.

Facts

Ms Valcheva is the grandmother of a child born from the marriage between Ms Valcheva’s daughter and the father of the child. That marriage was dissolved. Ms Valcheva lives in Bulgaria. The child lives in Greece with his father, holding full custody of the child. Ms Valcheva found that she could not maintain quality contact with her grandson. She seised a court in Bulgaria with a request to establish arrangements so that she could see her grandson more frequently.

The Bulgarian court of first instance held that Bulgarian courts had no jurisdiction. According to the court, the scope of Brussels II bis covers a wide family circle including the child’s grandparents and, therefore, applied to Ms Valcheva’s claim. Based on Article 8 Brussels II bis it is, in principle, the court of the Member State where the child’s habitual residence at the time the court is seised that has jurisdiction in matters of parental responsibility (in this case, Greek courts). The decision was upheld on appeal. Ms Valcheva has subsequently seised the Supreme Court of Cassation, Bulgaria, which referred the following question to the CJEU.

Question referred for preliminary ruling

Is the concept of “rights of access” used in Article 1(2)(a) and Article 2.10 of Regulation No 2201/2003 to be interpreted as encompassing not only access between the parents and the child but also the child’s access to relatives other than the parents, that is to say the grandparents?

Consideration by the CJEU

The CJEU answers the question in the positive. The Court notes that the concept

‘right of access’ must ‘be interpreted autonomously taking account of the wording, scheme and objectives of Regulation No 2201/2003, in the light, in particular, of the *travaux préparatoires* for that regulation, as well as of other acts of EU and international law’ (at [19]). The CJEU elaborates on these references in three main considerations.

First, the wording of the Regulation imposes no limitation in regard to the person who may benefit from the right of access (at [21]).

Second, the Regulation aims to create ‘a judicial area based on the principle of mutual recognition of judicial decisions through the establishment of rules governing jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility’ (at [28]). Not only does the objective cover all decisions on parental responsibility, according to recital 5 (at [29]), but the ‘decisions on visiting rights are also identified as a priority’, according to recital 2. The CJEU bases the interpretation of the recitals on the Commission working document on mutual recognition of decisions on parental responsibility COM(2001) 166 final of 27 March 2001. There, the EU legislature made an explicit choice not to impose restrictions on the persons who may exercise parental responsibility (at [31]).

Third, the CJEU notes the risk of irreconcilable decisions (or conflicting measures relating to parental responsibility) from various Member States, pointed out by the Advocate General. If the right of access of grandparents falls outside the scope of Brussel II bis, the questions relating to those rights could be determined not only by the court designated in accordance with Brussel II bis, but also by other courts which might consider themselves competent on the basis of their own national rules of private international law (at [35]). ‘As observed by the Advocate General in point 56 of his Opinion, the granting of rights of access to a person other than the parents could interfere with the rights and duties of those parents, namely, in the present case, the father’s rights of custody and the mother’s rights of access. Consequently, it is important, in order to avoid the adoption of conflicting measures and in the best interests of the child, that the same court — that is to say, as a rule, the court of the child’s habitual residence — should rule on rights of access’ (at [57]).

The “Coman” Case (C-673/16): Some reflections from the point of view of private international law

Written by Dr. iur. Baiba Rudevska (Latvia)

On 5 June 2018, the ECJ rendered a judgment in the *Coman* case (C-673/16). For the first time the ECJ had the opportunity to rule, on the concept of ‘*spouse*’ within the meaning of the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Directive 2004/38) in the context of a same-sex marriage. Even if the Directive only covers questions related to the entry and residence in the European Union (EU), this judgment could be of interest for Private International lawyers as well.

Main Facts:

Mr Coman (a Romanian and American citizen), and Mr Hamilton (an American citizen) met in the United States and lived there together. Mr Coman later took up residence in Belgium while Mr Hamilton continued to live in the US. In 2010 they got married in Belgium. In 2012 they contacted the competent Romanian authority to request information on the conditions under which Mr Hamilton, a non-EU citizen, could obtain the right to reside in Romania for more than three months. The Romanian authority replied that Mr Hamilton had only a right of residence for three months because, according to the Romanian Civil Code, marriage between two persons of same sex was not recognised. The case went up to the Constitutional Court, which decided to make the request for a preliminary ruling. One of the questions referred to the ECJ was as follows:

Does the term “spouse” in Article 2(2)(a) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, include the same-sex spouse, from a State which is not a Member State of the European Union, of a citizen of the European

Union to whom that citizen is lawfully married in accordance with the law of a Member State other than the host Member State?

Only this question is of interest for private international law (hereinafter referred to as "PIL"). Let us take a look at the decision and at the reasoning of the ECJ.

Decision of the ECJ:

The ECJ decided that:

1. In a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7(1) of Directive 2004/38 in a Member State other than that of which he is a national, and, whilst there, has created and strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.
2. Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.

As we can see from the operative part, the ECJ does *not* impose the recognition of same-sex marriages in all the Member States.

Main Reasoning of the ECJ:

The first important thing to be noted is that the ECJ only uses the term "recognition of marriage" (paras. 36, 40, 42, 45, 46 of the judgment) whereas the Advocate General only referred to the term "autonomous interpretation" (paras.

33-58 of the opinion). And *vice versa*– the ECJ does not directly mention the term "autonomous interpretation" and the Advocate General does not analyse the "recognition of marriage". This raises an interesting question: what exactly was the method used by the ECJ in this case? Autonomous interpretation and recognition are two different methods; the former is widely used both in EU law (in general) and in international human rights law, whereas the latter is typical of PIL. Only in the second case (if we recognise that the ECJ has applied the recognition method) will this judgment be important and have a considerable impact in the field of PIL.

Here is my opinion on how this judgment should be construed:

1. The ECJ starts its reasoning by *de facto* using the method of autonomous interpretation:

(a) The term 'spouse' refers to a person joined to another person by the bonds of marriage (para. 34 of the judgment).

(b) The term 'spouse' within the meaning of Directive 2004/38 is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned (para. 35 of the judgment).

(c) Article 2(2)(a) of that directive, applicable by analogy in the present case, does not contain any reference with regard to the concept of 'spouse' within the meaning of the Directive. It follows that a Member State cannot rely on its national law as a justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state (para. 36 of the judgment).

However, after that, the ECJ switches to the term 'recognition of marriage' (paras. 35 et seq.). Does the ECJ switch to recognition or is it still using autonomous interpretation with different words?

2. It seems that the ECJ continues to applyautonomous interpretation of the term 'spouse', as the Advocate General did in his observations. In fact, the use of the words 'recognition of marriage' must be understood within the context of Romanian domestic law (Civil Code) according to which marriages between

persons of the same sex entered into or contracted abroad by Romanian citizens or by foreigners are not recognised in Romania (paras. 8, 36 of the judgment). From the point of view of PIL, it is important to point out that this Romanian legal provision already contains the Romanian public policy clause; in other words, the public policy exception is already integrated in this legal norm.

Why Autonomous Interpretation?

Both the Advocate General and the ECJ stressed that Article 2(2)(b) of the Directive 2004/38 refers to the conditions laid down in the relevant legislation of the Member State to which that citizen intends to move or in which he intends to reside, but Article 2(2)(a) of that Directive, applicable by analogy in the present case, does not contain any such reference with regard to the concept of 'spouse' within the meaning of the Directive. Consequently, the Member State cannot rely on its national law as a justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state (para. 36 of the judgment; paras. 33, 34 of the opinion).

The Advocate General points out that the terms of a provision of EU law without express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the EU (para. 34 of the opinion). The method of autonomous interpretation (qualification *lege communae*) is the only alternative to a reference to domestic law (qualification *lege fori*or *lege causae*). There are no other alternatives, even if in practice the ECJ does not clearly emphasise the application of this method [Audit M. L'interpretation autonome du droit international privé communautaire // *Journal du droit international*, 2004, n° 3, p. 799].

The use of the Advocate General's opinion in the reasoning of the ECJ leads to the conclusion that the ECJ has applied the method of autonomous interpretation (rather than recognition) of a precise term to construe, namely 'spouse' (Article 2(2)(a) of the Directive).

Why Not Recognition?

The method of recognition is one of the methods used within the framework of

PIL. However, as Professor Lagarde has shown, this method can be applied in primary EU law and not in secondary law (like directives or regulations) [Lagarde P. La reconnaisance. Methode d'emploi. In: Vers de nouveaux équilibres entre ordres juridiques. *Mélanges en l'honneur de H.Gaudemet-Tallon*. Paris: Dalloz, 2008, p. 483].

Therefore, in cases like *Grunkin Paul*(C-353/06) and *Bogendorff von Wolffersdorff*(C-438/14) we see the application of this method to names, according to provisions of TFEU (see operative parts of both judgments). The application of recognition also implies some changes in the civil registers of the Member States. On the other hand, what had been requested in the *Coman*case was the interpretation of Article 2(2)(a) of the Directive and not a ruling on the recognition of same-sex marriages within the EU. The sole context of the word 'recognition' can be found in the relevant provision of Romanian law, excluding the recognition of foreign same-sex marriages. One can only guess, but it seems that the confusion of two methods – "autonomous interpretation" and "recognition" – has been ultimately inspired by the wording of the Romanian legal provision.

Conclusions:

The interpretation and application of the judgment in the *Coman* case is narrower than it seems at the first glance. In reality, the ECJ has applied the method of autonomous interpretation of the term 'spouse' used in Article 2(2)(a) of the Directive 2004/38. According to the ECJ, this term is gender-neutral and must be understood as encompassing same-sex spouses – but only in the context of the Directive.

Therefore, this judgment does not impose the recognition of foreign same-sex marriages within the EU. It only means that Romania must grant entry and residence permits to same-sex spouses too. In such situations Romania must apply the autonomous interpretation of the term 'spouse' instead of a domestic legal norm prohibiting the recognition of foreign same-sex marriages in Romania. In other words, Article 21(1) TFEU must be seen as precluding a Member State from applying its domestic law on this particular point, and the domestic public policy exception cannot be applied either. However, this interpretation relates only to the Directive. The qualification *lege communae* of the term 'spouse' shall prevail over its qualification *lege fori*. No more and no less.

An additional remark: see the new Regulation (EU) 2016/1191 of the European Parliament and of the Council on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 [OJ L 200, 26.7.2016, pp. 1-136]. Article 2(4) of this Regulation states that it does not apply to the recognition, in a Member State, of legal effects relating to the content of public documents (including public documents establishing the fact of marriage, capacity to marry, and marital status; Article 2(1)(e)), issued by the authorities of another Member State.

Petronas Lubricants: ECJ confirms that Art 20(2) Brussels I can be used by employer for assigned counter-claim

Last Thursday, the ECJ rendered a short (and rather unsurprising) decision on the interpretation of Art 20(2) Brussels I (= 22(2) of the Recast Regulation). In *Petronas Lubricants* (Case C 1/17), the Court held that an employer can rely on the provision to bring a counter-claim in the courts chosen by the employee even where said claim has been assigned to the employer after the employee had initiated proceedings.

The question had been referred to the ECJ in the context of a dispute between an employee, Mr Guida, and his two former employers, Petronas Lubricants Italy and Petronas Lubricants Poland. Mr Guida's parallel employment contracts with these two companies had been terminated among allegations of wrongly claimed reimbursements. Mr Guida, who is domiciled in Poland, had sued his Italian employer in Italy for wrongful dismissal and his employer had brought a counter-claim for repayment of the sums Mr Guida had allegedly wrongfully received, which had been assigned by the Polish employer.

Art 20(2) Brussels I contains an exception to the rule in Art 20(1), according to which an employee can only be sued in the courts of their country of domicile, to allow the employer to bring a counter-claim in the courts chosen by the employee. Similar exceptions can be found in Art 12(2) Brussels I (= Art 14(2) of the Recast; for insurance contracts) and Art 16(3) Brussels I (= Art 18(3) of the Recast; for consumer contracts), all of which incorporate the ground for special jurisdiction provided in Art 6 No 3 Brussels I (= Art 8(3) of the Recast). In the present case, the ECJ had to decide whether this exception would also be available for counter-claims that had been assigned to the employer after the employee had initiated proceedings.

The Court answered this question in the affirmative, pointing out that

> *[28] … provided that the choice by the employee of the court having jurisdiction to examine his application is respected, the objective of favouring that employee is achieved and there is no reason to limit the possibility of examining that claim together with a counter-claim within the meaning of Article 20(2) [Brussels I].*

At the same time, the Court emphasised that a counter-claim can only be brought in the court chosen by the employee if it fulfils the more specific requirements of Art 6 No 3 Brussels I, according to which the counter-claim must have arisen 'from the same contract or facts on which the original claim was based'. This has recently been interpreted by the ECJ (in Case C-185/15 *Kostanjevec*) as requiring that both claims have 'a common origin' (see [29]–[30] of the decision). Where this is the case – as it was here (see [31]–[32]) –, it does not matter that the relevant claims have only been assigned to the employer after the employee had initiated proceedings (see [33]).