Borchers on Conflict of Laws in Human Rights Actions

Patrick J. Borchers, who is the Dean of Creighton University School of Law, has posted Conflict-of-Laws Considerations in State Court Human Rights Actions on SSRN.

> *As U.S. Supreme Court decisions have curtailed the availability of civil redress for human rights violations under the Alien Tort Statute, victims of human rights abuses are beginning to consider U.S. state courts as a possible forum. In some cases, state courts may prove to be a superior forum, however in many cases they will offer little — if any — hope of meaningful redress. In the paradigmatic case of a civil plaintiff seeking redress for torture, forced labor or other atrocities — usually as the result of an alleged conspiracy between foreign governments and private corporations or individual operating abroad — state choice-of-law doctrines will often require the application of the tort law of the foreign country, as well as the law relative to damages available. In many cases, the law choice will prove to have a crippling effect on the viability of U.S. litigation. Moreover, recent U.S. Supreme Court decisions limiting the personal jurisdictional reach of state courts over foreign corporations may make state courts unavailable for jurisdictional reasons. Finally, the common law doctrine of forum non conveniens may make state courts unavailable to victims of human rights abuses even if the state court has jurisdiction. In some cases, state courts will prove to be a preferable forum to federal court. However, prospective litigants and their counsel will need to carefully consider the potential pitfalls of filing in state court.*

The article was recently published in the *U.C. Irvine Law Review* as part of a symposium on Human Rights Litigation in State Courts and Under State Law.

Italian Society of International Law Launches SIDIBlog

The Italian Society of International Law (SIDI-ISIL) has launched a new blog devoted to International Law and EU Law: SIDIBlog. As explained in its presentation,

SIDIblog is a space for discussion and debate over current issues of Private International Law, Public International Law and European Union Law. All scholars and practicing lawyers having an interest in these topics are invited to participate through posts and comments. Posts are brief pieces (maximum 1500 words) that may discuss a relevant topic, present an innovative idea, or comment upon recent developments. They may be sent to the following e-mail address: sidiblog2013 [at] gmail.com.

The first post, authored by *Annalisa Ciampi* (Univ. of Verona), analyses the legal and diplomatic saga of the Italian marines that were arrested in India in February 2012, accused of shooting two Indian fishermen off the coast of the Kerala region, mistaking them for pirates, as they were guarding an Italian oil tankers (the Enrica Lexie). In addition, another post by *Cesare Pitea* (Univ. of Parma) provides links to relevant documents of the case, and to comments and analysis by Italian and international scholars.

Conflictoflaws.net wishes all the best to the new blog.

Denmark to Apply Brussels I Recast

Denmark has notified the Commission of its decision to implement the contents of Regulation (EU) No 1215/2012 by letter of 20 December 2012. The decision was

made under the 2005 Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

H/T: Rafaël Jafferali

ECJ Rules on Jurisdiction for Claims based on Promissory Notes

On March 14th, 2013, the Court of Justice of the European Union delivered its judgment in Ceská spontelna, a.s. v. Gerald Feichter (Case C 419/11).

The case was concerned with a blank promissory note issued by a Czech company (Feichter) in favour of another Czech company (Ceská spontelna) in order to guarantee the first company's obligations under an overdraft agreement. Mr Feichter, having his domicile in Austria, also signed, as an individual, the promissory note on its face, marking it 'per aval' and thus undertaking to guarantee its payment. The beneficiary of the note eventually sued the avaliste (guarantor) in the Czech Republic.

Mr Feichter first argued that he was a consumer and should benefit from Article 16 of the Brussels I Regulation. The Czech court also wondered whether the action under the promissory note ought to be characterized as contractual in character for the purpose of Article 5(1) of the Regulation.

Consumer Protection

The ECJ held

> *36 It is common ground that the giver of the aval in the case in the main proceedings became the guarantor of the obligations of the company of which he is the managing director and in which he has a majority shareholding.*
>
> *37 Accordingly, even if the obligation on the giver of the aval is of an*

abstract nature and is thus independent of the obligation on the maker of the note for which the giver of the aval became guarantor, the fact remains, as the Advocate General observed in point 33 of her Opinion, that the aval of a natural person, given on a promissory note issued in order to guarantee the obligations of a commercial company, cannot be regarded as having been given outside and independently of any trade or professional activity or purpose while that individual has close professional links with that company, such as being its managing director or majority shareholder.

Contractual Claim

The ECJ held

48 As regards whether such an obligation exists in circumstances such as those at issue in the main proceedings, it must be noted, as it was by the Advocate General at point 45 of her Opinion, that, in the present case, the giver of the aval, by signing the promissory note on its face under the indication 'per aval', voluntarily consented to act as the guarantor of the obligations of the maker of that promissory note. His obligation to guarantee those obligations was thus, by his signature, freely accepted, for the purposes of that provision.

49 The fact that that signature was made on a blank promissory note is not such as to cast doubt on that finding. Account must be taken of the fact that the giver of the aval, by also signing the agreement on the right to complete the note, freely accepted the conditions concerning the manner in which that promissory note would be completed by the payee filling in the missing information, even though signature of that agreement did not, in itself, result in the aval coming into being.

Final Ruling

1. Article 15(1) 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 must be interpreted as meaning that a natural person with close professional links to a company, such as its managing director or majority shareholder, cannot be considered to be a consumer within the meaning of that provision when he gives an aval on a promissory note issued in order to

guarantee the obligations of that company under a contract for the grant of credit.

Therefore, that provision does not apply for the purposes of determining the court having jurisdiction over judicial proceedings by which the payee of a promissory note, established in one Member State, brings claims under that note, which was incomplete at the date of its signature and was subsequently completed by the payee, against the giver of the aval, domiciled in another Member State.

2. Article 5(1)(a) of Regulation No 44/2001 applies for the purposes of determining the court having jurisdiction over judicial proceedings by which the payee of a promissory note, established in one Member State, brings claims under that note, which was incomplete at the date of its signature and was subsequently completed by the payee, against the giver of the aval, domiciled in another Member State.

H/T: Severine Menetrey

Recast of the Rules of Procedure of the ECJ

Georgia Koutsoukou is a researcher fellow of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law. This contribution summarizes the most relevant features of the Recast Rules of Procedure of the ECJ, which were the object of a thorough presentation at one of the Institute's weekly seminars. A table of correspondence of the new and old rules was published in the Official Journal C 337, 6.11.2012.

The Rules of Procedure of the ECJ have been recently amended and, as provided in Article 210 of the Rules, the new provisions entered into force on November 1st, 2012 (OJ L 265/I, 29.9.2012). The preamble of the new Rules of Procedure sheds

light on the reasons which led to their amendment. Above all, the preponderance of preliminary proceedings in the Court´s practice necessitated the adaption of the rules, which were originally primarily tailored to direct actions, to its caseload. It is further noteworthy that the new rules take account of procedural economy considerations and, additionally, purport to simplify complex procedures and ease certain procedural arrangements.

The first Title (Articles 3-42) concerns the internal organization of the Court. Firstly, Article 10 provides for the creation of the function of the **Vice President** of the Court in order to reduce the task burden of the President. Article 27 has altered the composition of the Grand Chamber. It is also noteworthy that Article 22 (1) extends the **right to consult the register** of the Registry to "anyone" in order to increase transparency in the function of the Court.

The second Title (Articles 43-92) refers to the procedural provisions common to all types of procedure and has brought about significant changes. As for the written part of the procedure, according to Article 58 of the Rules the Court can determine the **maximum length of written pleadings and observations** through decision published in the Official Journal of the European Union. With regard to the oral part of the procedure, the Court can by virtue of Article 76 (2) on proposal of the Judge Rapporteur and after hearing the Advocate General **abstain from holding a hearing in case** the written pleadings or observations are sufficient for the ruling to be delivered. Moreover, Article 77 introduces the possibility for **similar cases to be heard jointly**. Article 83 has restricted the Court´s discretion in relation to the **reopening of oral procedure** through determination of the conditions under which the court may issue such an order. Finally, we should point out that, unlike the old rules, the new provisions do not provide for common rules on **legal aid**. There are rules on legal aid only for references for a preliminary ruling and appeals in other titles of the Rules. This can be attributed to the minor, if any, importance of legal aid for direct actions.

The new Rules introduce a separate, third Title on references for a preliminary ruling (Articles 93-118) due to their obvious preponderance in the court practice. For the first time Article 94 determines the minimum essential content of any request for preliminary ruling and Article 97 clarifies the term "parties to the proceedings". Besides, the Court considered it necessary to introduce a rule on anonymity in Article 95. Article 100 adopts the Court's case law by providing that it remains seized as long as the request for a preliminary ruling is not withdrawn

by the referring Court. To enhance the procedural efficiency, Article 99 **simplifies and harmonizes the procedural requirements for a decision by reasoned or**der. As for the goal of proceedings acceleration, it must be noted that the **expedited procedure** does not take place only at the request of the referring court but also on motion of the President of the Court according to Article 105 (1). Further, there are some changes with regard to the **urgent preliminary ruling** procedure. Firstly, a case connected to another pending case assigned to a Judge Rapporteur can be assigned pursuant to Article 108 (2) to the same Judge Rapporteur, even if he is not a member of the designated Chamber. Secondly, another Member State can be invited according to Article 109 (3) to participate in the proceedings, in case the request for a preliminary ruling refers to an administrative procedure or to judicial proceedings in its territory.

The fourth Title (Articles 119-166) deals with direct actions. Article 124 (1) extends the **time-limit for lodging a defense** from one to two months and Article 124 (3) allows the extension of the time-limit only in exceptional cases. According to Articles 126 (2) and 133, respectively, the President of the Court is entitled to **specify the issues to which the reply and the rejoinder should relat**e and to initiate an expedited procedure. The provisions on the intervention of the Member States and other EU-Institutions have been also simplified. Besides, pursuant to Article 145, disputes concerning the costs are assigned to the Chamber of three or five judges, whose member is the Judge Rapporteur responsible for the case.

The fifth Title (Articles 167-190) concerns the appeals against the decisions of the General Court. First of all, Article 176 et seq. draws a clearer distinction between response to the appeal and cross-appeal. The latter has to be submitted according to Article 176 (2) by **document separate from the response**. Additionally, Article 183 clarifies that the manifest inadmissibility or the discontinuance of an appeal deprives the cross-appeal of its purpose. Moreover, Article 182 provides for **decisions by reasoned or**der with reference to the relevant case law in case the Court has already ruled on one or more questions of law identical to the ones raised by the pleas in law of the appeal or cross appeal.

The Review of the decisions of the General Court is regulated in the sixth Title (Articles 191-195). Article 191 foresees the **designation of reviewing Chamber** consisting of five Judges for an one-year period. The proposal to review may be made by the First Advocate General and the decision of the Court refers both to

the proposal of the Advocate General and the substance of the Case, as stipulated in Article 192 and 195 respectively.

The seventh title (Articles 196-200) amends the relevant procedural arrangements with regard to the Opinions in context of Article 218 TFEU on the agreements between the EU and third countries or international organizations. Article 197 states that **only one Advocate General** instead of all (eight) will be participating at the proceedings. The opinions must further on be delivered **in open court** by virtue of Article 200.

Last but not least, Article 206, which forms part of the eighth and last Title (Articles 201-206) on particular forms of procedure, introduces a new procedure for requests of the Member States according to **Article 269 TFEU**, i.e. **requests for the review of the legality of observations and recommendations** made by the Council or European Council in case of clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU.

To conclude, by adopting these new Rules of Procedure, the Court seeks to adapt to the changes in its caseload and dispose within a reasonable period of time of the cases brought before it by fostering the acceleration of the proceedings. It will be interesting to see in the future whether and how these quite significant amendments successfully achieve the desired outcome.

Choice of forum in bills of lading before Greek courts

Dr. Apostolos Anthimos is attorney at law at the Thessaloniki Bar, Greece. He holds a Ph.D. in International Civil Litigation and is a visiting lecturer at the International Hellenic University. He can be reached at: apostolos@anthimos.gr

A recent judgment from the Thessaloniki Court of Appeal addressed the issue of the validity of jurisdiction agreements in contracts for the carriage of goods by sea.

The facts of the case are simple: A Greek company purchases goods from a Dutch company; goods are to be sent to the port of Thessaloniki, where the Greek company has its seat. A commission agent is entrusted with the transport details to Thessaloniki. Loading takes place in the port of Kotka, Finland, on a ship with Bulgarian flag. The Dutch carrier signs the bill of lading and he then endorses it to the Greek buyer, who becomes its legal holder. The latter concludes an insurance agreement with a Greek company. Due to erosion caused by seawater, goods were damaged. The Greek insurance company paid the agreed price to the buyer. It then files claim against the Dutch carrier and the Greek commission agent before the Thessaloniki first instance court; the latter rejected the action on the grounds of lack of international jurisdiction, emanating from a choice of forum clause in favor of Hong Kong courts in China, embedded in the general terms of the bill of lading.

The appeal court's analysis began by Art. 23 of the Brussels Regulation and the need for its narrow interpretation in respective cases, in light of the ECJ ruling in the *Tilly Russ* case. It then continued with the analysis of domestic law provisions regarding derogation agreements, which presupposes the existence of signatures from both parties at large, namely the captain or an authorized agent on the one side, and the shipper or the recipient of goods on the other side. Finally, it concluded that the choice of forum included in the bill of lading was null and void because it wasn't signed from both parties. The court underlined that the subsequent signature by the recipient (i.e. when the bill of lading was endorsed) took place only with the purpose of completing the transfer of the bill's rights in personam and in rem, and does not include any agreement or consent as to the prorogation clause. It went then further, stating that the jurisdiction agreement was not concluded in a form, which accords with a usage of which the buyer was or ought to have been aware. Finally, the court found that no continuous commercial links between the parties were proven, and rejected the respective argument by the appellees.

By reading this ruling, two are the main conclusions to be drawn from: First, the Thessaloniki Appeal Court applied the Brussels Regulation despite the clear wording of Art. 23.1, which excludes control over prorogation agreements in favor of a court or courts of non – member states from its ambit. This is not the first time Greek courts are opting for this approach, and it happens even after the ECJ ruling in the *Coreck* case. Additionally, the facts of the case give no rise for

supporting a potential violation of the so-called protective jurisdictional bases (Art. 13, 17 & 21 Brussels I Regulation), which would be reason enough to bring back the Regulation into play [see in detail *Rauscher/Mankowski*, EuZPR/EuIPR (2011), Art. 23, Nr. 3a, 532, *(Magnus)/Mankowski*, Brussels I Regulation (2012), Art. 23, Nr. 37, 458].

Secondly, this decision echoes a well-established jurisprudence, which started with a 1994 Supreme Court ruling, and has been followed with minimal exceptions ever since, one of which was the quashed ruling of the Thessaloniki 1st instance court. Regrettably, courts are making no distinction in terms of applicable law, i.e. whether the case should be tried according to Art. 23 Brussels Regulation or domestic choice of forum rules (Art. 42-43 CCivP). Hence, failure of the seller to produce a bill of lading bearing both signatures leads to its nullity concerning the prorogation clause, and regardless whether the case falls into the scope of the Regulation or not. This runs contrary to the prevailing opinion of legal doctrine on the application of Art. 23 Brussels Regulation in Greece and abroad [see for instance *(Magnus)/Mankowski*, Brussels I Regulation (2012), Art. 23, Nr. 138, p. 499 et seq., *Reithmann/Martiny/Hausmann*, Internationales Vertragsrecht, 7. Auflage (2010), p. 1993 et seq., Nr. 6464, note 2, *Rauscher/Mankowski*, EuZPR/EuIPR (2011), Art. 23, Nr. 54a, 585, *Staehelin*, Gerichtsstandsvereinbarungen im internationalen Handelsverkehr Europas: Form und Willenseinigung nach Art. 17 EuGVÜ/LugÜ (1994), p. 89 et seq].

Devaux on the EU Succession Regulation

Angelique Devaux has posted The European Regulations on Succession of July 2012: A Path Towards the End of the Succession Conflicts of Law in Europe, or Not? on SSRN.

> *In recent years, the mobility of people within the European Union has created major problems such as the settlement of cross-borders inheritances that may*

accelerate in the coming years.

Europeans as well as foreigners own estates in different countries. This ownership triggers the application of multiple inheritance laws and creates conflicts of law. Currently in Europe, there are two types of inheritance law, the principle of scission (known in France, UK, and Belgium, but also outside Europe as in USA) and the law of the Unity Estate (currently applied in Germany, Spain, Italia or Portugal).

Previous attempts to unify the rules of succession in Europe have been unsuccessful. Nevertheless, since 2005 , the European Union has focused on succession. The European Parliament and the Council of the European Union adopted last July 4th 2012 a European regulation on jurisdiction, applicable law, recognition and enforcement of decisions, and acceptance, and enforcement of authentic instruments in matters of succession, and on the creation of a European Certification of Succession. Except for the United Kingdom, Denmark and Iceland, this text is primarily geared to avoid conflicts of law of succession with a universal character. This means, for example, that an American citizen, owner of a property in Europe, could use these regulations. It retains the principle of one law applicable to the succession by determining the deceased's habitual residence. This regulation denies all actual references to the rule of scission. It also admits the professio juris rule, holding that any citizen can decide the law applicable to his estates, which could be the law of his citizenship or the law of his habitual residence.

In this paper, I examine some of the potential problems with the new European legislation such as the theoretical aspects of the rule of the habitual residence. Does the rule anticipate any conflicts of law? The paper also addresses the practical aspects of the regulations. One likely consequence is that the legal practitioners, who are mostly Notaries in the European continental law countries, will have to receive training about the relevant foreign laws. Till now, the question of how they will have access to this training and be ready to apply it to actual cases has not been adequately addressed.

I suggest a new approach to deal with these issues. Since the European countries will have three years to reform their national laws to conform to the European regulations, the time is ripe to discuss the challenges that law ahead with respect to the succession laws.

“Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity.”

Hage-Chahine on Culpa in Contrahendo in European PIL

Najib Hage-Chahine has posted Culpa in Contrahendo in European Private International Law: Another Look at Article 12 of the Rome II Regulation on SSRN.

Precontractual liability is liability that arises out of a harmful conduct that occurs during the formation period of a contract. Where the harmful conduct occurs during international negotiations, a conflict of laws issue arises. The determination of the applicable law to precontractual liability can be a complex and tedious task, which is why the European Legislature has provided a special conflict-of-law rule in Article 12 of the Rome II Regulation on the applicable law to non-contractual obligations. Through this provision, the European Legislature aims to achieve uniformity between EU Member States, while providing an appropriate conflicts rule. The present essay assesses the European Legislature’s attempt at codification and offers a commentary of Article 12 of the Rome II Regulation. It comes at a time when the Commission is scheduled to submit a report on the application of the Rome II Regulation to the European Parliament, the Council, and the European Economic and Social Committee. This essay will show that the Legislature has displaced the traditional rules of European private international law by adopting a contractual connecting factor in order to determine the applicable law to a non-contractual obligation. Indeed, the European Legislature has, for the purposes of European private international law, chosen to characterize culpa in contrahendo as non-contractual, but has chosen to determine the applicable law to this non-contractual obligation on the basis of a contractual connecting factor. Thus, Article 12(1) of the Rome II Regulation has, in fact, chosen to submit claims arising out of culpa in contrahendo to the lex contractus in

negotio. According to this provision, the applicable law to claims arising out of culpa in contrahendo is the law of the contract that was under negotiation. In spite of its advantages, the rule provided by Article 12 of the Rome II Regulation lacks flexibility. The lack of escape devices and the relative inapplicability of the second paragraph of Article 12 of the Rome II Regulation make this rule a rigid one whose application cannot be displaced whenever it reaches inappropriate results.

The paper was published in the *Northwestern Journal of International Law & Business*.

Conference in Sydney — Facing Outwards: Australian Private International Law in the 21st Century

The Sydney Centre for International Law is a holding a conference entitled "Facing Outwards: Australian Private International Law in the 21st Century" on Wednesday, 10 April 2013. A conference flyer may be found here. For further information and registration, click here.

The conference description is as follows:

The nation's prosperity depends not only on the willingness of its businesses to export goods and services, and of its citizens and residents to travel to take advantage of opportunities overseas, but also on the willingness of the businesses and citizens of other nations (in particular in the Asia-Pacific region) to come to Australia to do business. Economic expansion, and parallel increases

in tourism and immigration, have brought Australians into more frequent contact with the laws and legal systems of other nations. At the same time, the legal systems of Australia are faced with a growing number of disputes involving foreign facts and parties. Against this background, the Attorney-General's current review of Australian private international law is timely and calls for debate as to the best way forward in terms of policy and substantive rule making. This conference, jointly organised by Sydney and Griffith Law Schools, brings together experts from Australia, New Zealand, Asia and Europe to consider the recent and future development of the law in this area.

The line up of speakers includes Roger Wilkins AO, Secretary of the Attorney General's Department; Adeline Chong, Singapore Management University; Yujun Guo, Wuhan University; Elsabe Schoeman, University of Auckland; Andrew Dickinson, Sydney Law School; Michael J Hartmann, Asia-Pacific Regional Office of The Hague and formerly Justice of the Court of Appeal of Hong Kong; Mary Keyes, Griffith Law School; Thomas John, Attorney General's Department; Richard Garnett, Melbourne Law School; Andrew S Bell SC, Eleven Wentworth Chambers; Reid Mortensen, University of Sthn Queensland; and David Goddard QC, Thorndon Chambers (Wellington).

The keynote address is to be given by the Honourable James Allsop AO, Chief Justice, Federal Court of Australia, formerly President, NSW Court of Appeal.

Fourth Issue of 2012's Revue Critique de Droit International Prive

The last issue of the *Revue critique de droit international privé* was just released. It contains five articles and several casenotes. A full table of contents can be found here.

In the first article, Paul Lagarde offers a survey of the 2012 succession regulation. Available abstracts are in French and German.

In the second article, Elise Ralser (University of La Réunion) discusses the issues raised by the existence of customary personal status in Mayotte island (*Le statut civil de droit local applicable à Mayotte – Un fantôme de statut personnel coutumier*). The English abstract reads:

> *The existence of customary personal status is protected by the Constitution of 4 October 1958, giving rise, within the French legal system, to a somewhat singular form of conflicts of laws. Distinct from international conflicts, internal conflicts of laws can still borrow the same methods, even if they do not always encounter the same limits. Both cases are a distributive exercise as between different rules, but the constitutional nature of internal conflicts of laws induces a different approach. Taking the personal status of Mayotte as an example, our study will describe the difficulties raised, both in the determination and in the implementation of applicable personal status in this context.*

In the third article, Laurence Usunier (University Paris 13 Nord) discusses the decision of the French Supreme Court which ruled that Article 14 of the Civil Code does not raise any serious issue of compatibility with fundamental rights (*La compatibilité de l'article 14 du Code civil avec les droits fondamentaux, une question dépourvue de caractère sérieux ?*).

In the fourth piece, Horatia Muir Watt (Sciences Po Law School) offers thoughts on the Privy Council case *La Générale des Carrières et des Mines v. F.G. Hemisphere Associates LLC* (*L'immunité souveraine et les fonds vautours*).

Finally, Dai Yokomizo (Nagoya University) discusses in the last article the impact of the ratification by Japan of the 1980 Child Abduction Hague Convention (*La Convention de La Haye sur les aspects civils de l'enlèvement d'enfants et le Japon*).