Choice of forum in bills of lading before Greek courts

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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.*
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> *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).*
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> *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.*

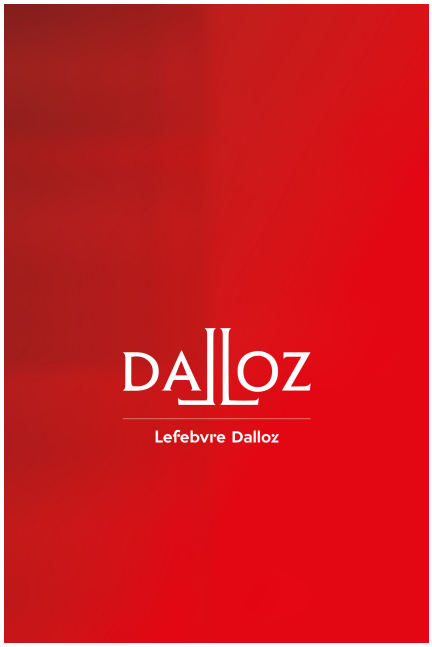
The line up of speakers includes Roger Wilkins AO, Secretary of the Attorney General's Department; Adeline Chong, Singapore Management University; Yujun Guo, Wuhan University; Elsabe Schoeman, University of Auckland; Andrew Dickinson, Sydney Law School; Michael J Hartmann, Asia-Pacific Regional Office 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*).

Ancel and Cuniberti on One Sided Jurisdiction Clauses

Pascal Ancel and I (University of Luxembourg) have posted One Sided Jurisdiction Clauses – a Casenote on Rothschild on SSRN.

This is a short casenote of the decision of the French Supreme Court of September 26th, 2012, which found that one-sided jurisdiction clauses are void for being binding on one party only, and are thus contrary to the purpose of Article 23 of the Brussels I Regulation. The first part of the note discusses the private international law aspects of the case. The second part discusses the

application of the francophone doctrine of potestativite in the context of jurisdiction clauses.

Note: downloadable document is in French.

Hague Conference's 2nd Guide on Accreditation under Adoption Convention

The Hague Conference on Private International Law has issued its Second Guide on Accreditation and Adoption Accredited Bodies under the 1993 Hague Convention (Accreditation and Adoption Accredited Bodies: General Principles and Guide to Good Practice, *Guide No 2 under the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*).

Accreditation practice differs widely. The understanding and implementation of the Convention's obligations and terminology vary greatly. It is recognised that there is an urgent need to bring some common or shared understanding to this important aspect of intercountry adoption to achieve greater consistency in the operation of accredited bodies.

The purpose of this Guide is therefore to have an accessible resource, expressed in plain language, which is available to Contracting States, accredited bodies, parents and all those other actors involved in intercountry adoption. The Guide aims to:

• that the principles and obligations of the Convention apply to all actors in Hague Convention intercountry adoptions;

• clarify the Convention obligations and standards for the establishment and operation of accredited bodies;

• encourage acceptance of higher standards than the minimum standards of the Convention;

• identify good practices to implement those obligations and standards; and

• propose a set of model accreditation criteria which will assist Contracting States to achieve greater consistency in the professional standards and practices of their accredited bodies.

It is hoped that this Guide will assist the accrediting and supervising authorities in the Contracting States to perform their obligations more comprehensively at the national level, and thereby achieve more consistency at the international level.

It can be freely downloaded here.

Will the U.S. Supreme Court Take Up a Case Involving the Interpretation of Foreign Law?

What deference should a U.S. court give to a foreign sovereign's interpretation of its domestic law? That question is asked, and a whole host of interesting others, in a recently filed petition for certioari in the case of Islamic Republic of Iran v. McKesson Corp. To make a long story short (the original complaint was filed in 1982 and the case was just subject to a final judgment of $43.1 million dollars!), McKesson Corporation alleges that the Islamic Republic of Iran expropriated its interest in a dairy operated by McKesson from the 1960s to the 1980s. McKesson brought an action before the United States District Court for the District of Columbia, and, after much back and forth (the court of appeals has heard the case five times!), the disctrict court held that as a matter of Iranian law that McKesson had a cause of action under a Treaty of Amity between the U.S.

and Iran.

While the cert. petition is largeley devoted to the question of interpreting that treaty, there is also a question presented regarding what deference is due to a foreign sovereign's interpration of its law. According to the cert. petition, this is a question that has split the circuits. Some courts give "substantial deference," others give "some degree of deference," others give some unstated deference.

It will be interesting to see if the Supreme Court takes up this choice of law related case.

The New Issue of the TDM Journal: EU, Investment Treaties, and Investment Treaty Arbitration – Current Developments and Challenges

TDM Journal has just published its newest issue, which addresses the often-tenuous co-existance of EU law, international investment law, and the use of investment treaty arbitration for intra-EU investment disputes. In addition to addressing the latest developments in the field, this issue tries to reflect on the remaining challenges and possible solutions for open questions. It also includes a study requested by the European Parliament's Committee on International Trade which is made available on TDM with kind permission.

Grosse Ruse-Khan on Competing Rationalities in International Law

Henning Grosse Ruse-Khan (Max Planck Institute for Intellectual Property & Competition Law) has posted A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging between IP, Trade, Investment and Health on SSRN.

The idea of employing conflict-of-laws principles to address competing rationalities in international law is unorthodox, but not new. Research focuses on inter-systemic conflicts between different areas of international law – but has stopped short of proposing conflict rules. This article goes a step further and reviews the wealth of private international law approaches and how they can contribute to applying rules of another, 'foreign' system. Against the background global intellectual property rules and their interfaces with trade, investment, health and human rights, the dispute over plain packaging of tobacco products serves as test case for conflict-of-laws principles. It shows how these principles allow a forum to apply external rules – beyond interpretative concepts such as systemic integration.