

# 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 1<sup>st</sup>, 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 order**. 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 relate** 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 order** 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.

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# 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 1<sup>st</sup> 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, *Stahelin*, Gerichtsstandsvereinbarungen im internationalen Handelsverkehr Europas: Form und Willenseinigung nach Art. 17 EuGVÜ/LugÜ (1994), p. 89 et seq].

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# 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.”*

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# **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*.

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



# Century



The Sydney Centre for International Law is 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 Stn Queensland; and David Goddard QC, Thorndon Chambers (Wellington).

The keynote address is to be given by the Honourable James Allsop AO, Chief

# 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*).

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## **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.*

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# 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](#).

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## **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.

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# **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-existence 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.