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.*

Excessive English Costs Orders and Greek Public Policy

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.

Two recent Court of Appeal rulings in Greece have demonstrated the significance of the public policy clause in international litigation and arbitration. Both judgments are dealing with the problem of recognition and enforcement of

”excessive” costs awarded by English courts and arbitration panels. The issue has been brought several times before Greek courts within the last decade. What follows, is a brief presentation of the findings, and some concluding remarks of the author.

I.a. In the first case, the Corfu CoA refused to grant enforceability to a costs order and a default costs certificate of the York County Court on the grounds that Greek courts wouldn’t have imposed such an excessive amount as costs of the proceedings for a similar case in Greece. In particular, the court found that, granting costs of more than £ 80,000 for a case, where the amount in dispute was £ 17,000, contravenes Greek public policy perceptions. Thus, the amount of £ 45,000 + 38,251.47 was considered as manifestly disproportionate and excessive for the case at hand. Consequently, the CoA granted exequatur for the remaining sums, and refused recognition for the above costs, which could not be tolerated by a court of law in Greece.

I.b. In the second case, the Piraeus CoA recognized an English arbitral award despite allegations made by the appellant, that the award’s order for costs contravened public policy. In this case the amount in dispute was in the altitude of nearly $ 3 million, whereas the costs granted did not exceed £ 100,000. The court applied the same rule as in the previous case, and found that the costs were not disproportionate to the case at stake.

II. As already mentioned above, those decisions are the last part on a sequence of judgments since 2005. Free circulation of English judgments is generally guaranteed in Greece; the problem starts when English creditors seek to enforce the pertinent costs orders. For Greek legal views, it is sheer impossible that costs exceed the actual amount in dispute in the main proceedings. This was reason enough for the Supreme Court (Areios Pagos = AP) to establish the doctrine of public policy violation, on the occasion of an appeal against a judgment of the Athens CoA back in 2006 [AP 1829/2006, Private Law Chronicles 2007, p. 635 et seq.]. The Supreme Court held, that granting enforceability to similar orders would violate the principle of proportionality, which is embedded both in the Greek Constitution and the ECHR. At the same time, it emphasized that the excessive character of costs impedes access to Justice for Greek citizens, invoking again provisions from the Greek Constitution (Art. 20.1) and the Human Rights Convention (Art. 6.1). The reasoning of the Supreme Court is followed by later case law: In an earlier judgment of the Corfu CoA [Nr. 193/2007, Legal Tribunal

2009, p. 557 et seq.] the court reiterated the line of argumentation stated by the Supreme Court, and refused to grant exequatur (again) to an English order for costs. Two years later, the Larissa CoA [Nr. 484/2011, unreported], followed the opposite direction, based on the fact that costs were far lower than the amount in dispute.

In regards to foreign arbitral awards, mention needs to be made to two earlier Supreme Court judgments, both of which granted enforceability and at the same time rejected the opposite grounds for refusal on the basis of Art. V 2 b NYC. In the first case [AP 1066/2007, unreported], the Supreme Court found no violation of public policy by recognizing an English award, which awarded costs equivalent to half of the subject matter. A later ruling [AP 2273/2009, Civil Law Review 2010, p. 1273 et seq.] reached the same result, by making reference to the previous exchange of bill of costs particulars, for which none of the parties expressed any complaints during the hearing of the case before the Panel.

In conclusion, it is obvious that Greek courts are showing reservation towards those foreign costs orders, which are perceived as excessive according to domestic legal standards. This stance is not unique, taking into account pertinent case law reported in France and Argentina [for the former, see Cour de Cassation 1re Chambre civil, 16.3.1999, Clunet 1999, p. 773; for the latter see Kronke / Nacimento / Otto / Port (ed.), Recognition and enforcement of foreign arbitral awards – A global commentary on the New York Convention (2010), p. 397, note 245]. The decisive element in the courts' view is the interrelation between the subject matter and the costs: If the latter is higher than the former, no expectations of recognition and enforcement should be nourished. If however the latter is lower than the former, public policy considerations do not usually prevail.

Final point: As evidenced by the case law above, it is clear that the Greek jurisprudence is applying the same criteria for foreign judgments and arbitral awards alike, irrespective of their country of origin. As far as the latter is concerned, no objections could or should be raised. However, making absolute no distinction between foreign judgments emanating from EU – Member States and non-Member States courts seems to defy the recent vivid discussion that predominated during the Brussels I recast preparation phase (2009-2012). Fact is, that public policy survived in the European context, and will continue playing a significant role in the new era (Regulation 1215/2012). Still, what is missing from Greek case law is an effort to somehow soften the intensity of public policy

control in the EU landscape. Whatever the reason might be, a clear conclusion may be reached: Greek case law gives back to public policy a Raison d'être, demonstrating the importance of its existence, even when judicial cooperation and free circulation of judgments are the rules of the game.

Déjà vu: Italian Supreme Court on Jurisdiction over U.S. Rating Agencies

Many thanks to Felix A. Koechel, researcher fellow of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law. This contribution summarizes a presentation he made at one the Institute's weekly seminars (the so called "Referentenrunde"), which are held every Wednesday from 2 p.m. to 4 p.m.

Prior to the German Federal Supreme Court's decision in December 2012 (see here), the Italian *Corte Suprema di Cassazione* (Supreme Court) already in April 2012 was called upon to decide on Jurisdiction over damage claims brought by investors against rating agencies based in New York *(Cassazione*, 22 May 2012, No. 8076).

In January 2007 one of the three claimants, a stock company based in Bologna (Italy), purchased from another company based in London shares of a company based on the Cayman Islands. After the conclusion of the contract in London, the shares were pooled on the claimant's bank account in Bologna, and subsequently transferred to two further corporations equally based in the region of Emilia-Romagna and acting as claimants. The decision to acquire the shares was allegedly motivated by positive ratings awarded by the defendants (two rating agencies based in New York) as to the financial standing of the issuer. There was, however, no contractual relationship or even direct contact between the claimants and the defendants. By July 2007 the shares had already lost 80 % of

their initial nominal value while it was not before August and December 2007 that the initial ratings were downgraded. Therefore, the claimants sued the defendants in Bologna for damages allegedly suffered as a consequence of both the initial inaccurate rating and the tardive downgrading. The Court of first instance referred the question of jurisdiction to the Italian Supreme Court by means of the *regolamento preventivo di giurisdizione* (Article 41 of the Italian Code of Civil Procedure).

Although the facts of the Italian and the German case are similar, their outcomes differ considerably: The Italian Supreme Court declined jurisdiction on the grounds of Article 5(3) of Regulation (EC) No 44/2001. Not only is the application of the aforesaid Regulation noteworthy but the case more importantly gives an example of the problems arising from Article 5(3) Brussels I in case of merely financial damages.

Attentive readers of *conflictoflaws.net* know that according to Article 3(2) of Law No. 218 of 1995, in Italy the special rules of jurisdiction of the Brussels Convention apply even if the defendant is not domiciled in a contracting state (see here). Although it is controversial whether this reference should be read as referring to the Brussels I Regulation, both courts and scholars have clarified that to this date, and lacking the Italian legislator's intervention, the reference has to be interpreted as designating the Brussels Convention (cf. *Cassazione*, 21 October 2009, No. 22239; cf. *Pocar* in Riv. dir. internaz. priv. proc. 2011, 628 ff.). It is therefore likely that the application of the Brussels I Regulation in the present case is due to the very specific wording of the question referred by the Bolognese court and may not be misinterpreted as a change in case law. Taking into consideration the continuity between the Brussels Convention and the Brussels I Regulation in the specific case of Article 5(3) this question should have been without prejudice to the Court's decision.

In fact, Article 5(3) was the only ground of jurisdiction at hand that could have led to an Italian forum since the Italian legislator has refrained from introducing additional (exorbitant) *fora*. It is shown particularly in comparison with the German case that the progressive and courageous "Europeanization" of the national rules on international jurisdiction at that time came at the price of possible disadvantages for Italian claimants.

Regrettably, the Court does not address extensively the problems arising out of

Article 5(3) in the case of financial damages. In line with the ECJ in *Marinari* (C-364/93), the Court narrows down the Article 5(3) notion of "place where the harmful event occurred" to the place of the initial damage. According to the Italian Court, this initial damage consists of the acquisition of the shares at an excessive price. Apart from that, the Italian Court neither refers to the principle of ubiquity nor to the relevant and more recent ECJ case law regarding financial damages in *Kronhofer* (C-168/02). While the localization of the initial damage in London can be well accepted, the Italian Supreme Court missed the chance to contribute to the discussion on the interpretation of Article 5(3) in case of financial damages. It is to be hoped that the financial crisis with its rising flood of claims against rating agencies will shed some light on the problem.