Chafin v. Chafin: Hague Convention, Mootness, Extraterritorial Authority and Futility

This is cross-posted by the author on Letters Blogatory, as well.

We previewed the *Chafin* case on this site when certiorari was granted last summer. It was decided yesterday by a unanimous Court. This is the second Hague Convention case to reach the Court in three years, and while the decision itself is not altogether surprising, Chief Justice Roberts does include an interesting discussion that touches on a wide array of transnational issues (outside of the family law context).

Chafin involves a U.S. Army sergeant and a Scottish woman he had married while stationed in Germany. The couple later moved to Alabama, and after their divorce, disputed the care of their daughter, who is now five years old. After obtaining a federal court order under the Hague Convention declaring that Scotland was the girl's country of habitual residence, Mrs. Chafin returned to Scotland with the child. Sgt. Chafin appealed that decision to the Eleventh Circuit, but that court dismissed the case as moot because the child had already returned to Scotland, and was outside the court's jurisdiction. Circuits have been deeply split over a fundamental and very practical question: Is the court's jurisdiction over the dispute truly limited by the water's edge? In other words, if the case were to be reversed on appeal, does the uncertainty of enforcement of the order abroad render the case moot?

The Supreme Court reversed the decision of the Eleventh Circuit because, in Chief Justice John Roberts's words, "[t]his dispute is still very much alive." "On many levels, the Chafins continue to vigorously contest the question of where their daughter will be raised. This is not a case where a decision would address 'a hypothetical state of facts.'" The Respondent and the Eleventh Circuit, the Court held, "confuse[d] mootness with the merits." To be sure, "Scotland [may] ignore a U.S. re-return order, or decline to assist in enforcing it," but a litigants "prospects

of success are … not pertinent to the mootness inquiry," and the "uncertain[]" efficacy of the ultimate judgment "does not typically render cases moot."

That was enough for Mr. Chafin to win before the Court, but here is where the decision got a bit more interesting for transnational litigants writ large. As I've discussed before elsewhere, the circuits are decidedly split on that standard for ordering antisuit injunctions, and recent high-profile cases illustrate the uncertainty surrounding injunctive orders when it concerns foreign parties living abroad. The Court in *Chafin*, however, noted the existence of its power to make such orders with little apparent concern. U.S. courts can "command[] [a party properly before it] to take action … outside the United States" under the pain of sanctions for non-compliance, the Chief Justice said. He then swiftly moved from an assertion of the Court's inherent authority to an acknowledgment of its practical limits. Parties ignore our authority all the time, the Court seems to suggest (without expressly saying it that way, of course). For instance, U.S. Courts often "decide cases against foreign nations, whose choices to respect final rulings are not guaranteed." So Argentine bondholders and an Alabama father find themselves in the same legal limbo. It remains true that a return order may not give Mr. Chafin his daughter, "just as a an order that [a foreign state] pay $100 million may not make a plaintiff rich."

These propositions are little more than an interesting aside to the central holding of the case, but they illustrate the Court's view of its tenuous place in the broader arena of transnational justice.

European Parliament Draft Report on European Account Preservation Order

The Legal Committee on Legal Affairs of the European Parliament has issued a Draft Report on the proposal for a regulation of the European Parliament and of

the Council on creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters on February 5th, 2013.

H/T: Beatrice Deshayes

Luxembourg Conference on One Way Jurisdiction Clauses

The University of Luxembourg will host a lunchtime seminar on the validity of one way jurisdiction clauses on 27 February 2013.

The seminar, which will be held in French, will discuss the impact of the widely publicised case of the French Supreme court of September 2012 on contractual practices in France and Luxembourg.

The speakers will be Pascal Ancel, a leading scholar of French contract law who recently joined the university of Luxembourg, and myself.

More information can be found here.

Recent Private International Law Scholarship

I have just posted a few recent pieces on SSRN that relate to private international law. These pieces are on forum non conveniens in U.S. courts, the role of ethics in international law, and international investment law. I would welcome any comments.

Fourth Issue of 2012's Rivista di diritto internazionale privato e processuale

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

The fourth issue of 2012 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features three articles and two comments.

In the first article, *Bruno Nascimbene*, Professor of European Union Law at the University of Milan, offers a critical appraisal of fair trial and defense rights in antitrust proceedings before the Commission ("Equo processo e diritti della difesa nel procedimento antitrust avanti alla Commissione: necessità di una riforma?"; in Italian).

In the second article, *Luca G. Radicati di Brozolo*, Professor of International Law at the Catholic University of Milan, discusses non-national rules and conflict of laws in light of the Unidroit and Hague principles ("Non-National Rules and Conflicts of Laws: Reflections in Light of the Unidroit and Hague Principles"; in English).

In the third article, *Manlio Frigo*, Professor of International Law at the University of Milan, addresses the analogies and differentiations of, respectively, insolvency of undertakings and insolvency of States ("Insolvenza delle imprese e insolvenza degli Stati: analogie ed elementi di differenziazione" in Italian).

In addition to these articles, the following comments are also featured:

- *Silvia Marino* (Researcher in International Law at the University of Insubria), "Nuovi sviluppi in materia di illecito extracontrattuale on line" (New Developments in Online Torts; in Italian);

- *Giulia D'Agnone* (Ph.D. candidate in International Law at the University of Macerata), "L'interpretazione delle clausole sui *waiting periods* nella giurisprudenza dei tribunali ICSID: obblighi o raccomandazioni?" (The Interpretation of Clauses on Waiting Periods in the Case-Law of ICSID Tribunals: Obligations or Recommendations?; in Italian).

Indexes and archives of the RDIPP since its establishment (1965) are available on the website of the Department of Italian and Supranational Public Law of the University of Milan.

Hague Academy Seventh Newsletter

The seventh Newsletter of the Hague Academy of International Law can be found here.

U.S. Circuits Split on the Implementation of 1980 Hague Child Convention

The U.S. Court of Appeals for the Second Circuit has ruled earlier this week in Ozaltin v. Ozaltin that the 1980 Hague Convention on the Civil Aspects of International Child Abduction affords a private right of action to parents who may seek to enforce their right of access in U.S. federal courts.

The Court of Appeals for the Fourth Circuit had ruled the opposite in 2006 in Cantor v. Cohen. Rights afforded by the Convention, the Court ruled, could only

be vindicated in the United States by applying to the U.S. State Department.

A useful summary is available here.

H/T: Opiniojuris.

ECJ Rules Jurisdiction Clauses do not Follow Property

On February 7th, 2013, the Court of Justice for the European Union ruled in Refcomp SpA v. Axa Corporate Solutions Assurance SA (Case C-543/10) that jurisdiction clauses do not follow goods along chains of successive contracts transferring their ownership.

Compressors manufactured by Italian company Refcomp were purchased by another Italian company, Climaveneta, to be sold to French company Liebert and eventually to French property developer Doumer.

The first contract between Refcomp and Climaveneta included a clause providing for the jurisdiction of Italian courts.

Doumer's insurer sued Refcomp and other parties in French courts. Refcomp challenged the jurisdiction of French courts on the ground that it benefited from a jurisdiction clause. It argued that all participants to the chain of contracts which successively transferred ownership of the goods were bound by it.

Under the French law of obligations, the action from Doumer against Refcomp would indeed be contractual. The doctrine is that the rights and obligations follow the goods.

But the French are isolated on that front in Europe. Unsurprisingly, the European Court rules that buyers who were not parties to the first contract are not bound by the jurisdiction clause. The Court had already rejected the French doctrine when it defined contractual matters under the Brussels Convention in its *Handte*

decision in 1992.

Ruling:

> *Article 23 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 jurisdiction clause agreed in the contract concluded between the manufacturer of goods and the buyer thereof cannot be relied on against a sub-buyer who, in the course of a succession of contracts transferring ownership concluded between parties established in different Member States, purchased the goods and wishes to bring an action for damages against the manufacturer, unless it is established that that third party has actually consented to that clause under the conditions laid down in that article.*

Many thanks to Clotilde Normand for the tip-off.

Paris, Lugano or Brussels?

The Brussels I Regulation and the Lugano Convention have each a territorial scope based on the same criteria. But it is not always easy to assess which instrument applies in a given dispute.

Take for instance a contract whereby a French bank assigned a claim to a French national domiciled in Switzerland. The contract contains a clause providing for the jurisdiction of French courts. The bank initiates proceedings in France. Which legal regime governs the clause?

Answer of the Paris Court of appeal: the French code of civil procedure governs, and the clause is unenforceable. Reason: the contract was not truly international, and thus only French law governed, as the only connection with a foreign country was the *residence* in Switzerland of one party, which was not material.

WRONG, rules the French supreme court for private and criminal matters (*Cour de cassation*) in a judgment of 30 January 2013. The Lugano Convention applies, as, the court rules, the French national was *domiciled* in Switzerland.

Well, even if the French national, who happened to be the defendant, was domiciled in Switzerland, the other party was domiciled in France, and the clause provided for the jurisdiction of French courts. So why would not the Brussels regime apply?

First Issue of 2013's Journal du Droit International

The first issue of French *Journal du droit international* (*Clunet*) for 2013 was just released. It contains two articles addressing issues of private international law and several casenotes. A full table of content is available here.

In the first article, Marie-Eve Pancrazi (University of Aix Marseille) explores the regime of Foreign Assets in International Insolvency (*L'actif étranger du débiteur en procédure collective*). The English abstract reads:

> *Bankruptcy law has always tried to be pragmatic. It never eludes difficulties likely to arise from the scattering of companies' assets over several countries. Bankruptcy law takes up this challenge by proclaiming that domestic insolvency proceedings exercise their authority over all the debtor's assets, urbi et orbi, as it were. But is not this posture rather vainglorious? One would be inclined to think so, when considering national sovereignties. And yet, this cautious attitude needs to be put in perspective, since it is not valid within Europe, and since, in any case, no reaction from foreign jurisdictions could eclipse the obligations which such authority implies for the debtor, the creditors and the bodies of the procedure.*

The second article is an empirical study on exequatur in *la Grande Region*, i.e.

Luxembourg and surrounding regions of France, Belgium and Germany. The study was conducted by a team of researchers of the university of Luxembourg who collected data on judgments rendered by courts of Arlon, Trier, Saarbrücken, Lorraine and Luxembourg.

The proposal to recast the Brussels I Regulation issued by the European Commission in December 2010 has launched a debate among European scholars and policy makers as to whether the exequatur procedure should be abolished within the European Union. While the European lawmaker has argued that the exequatur procedure is too costly, most scholars have responded that the public policy exception is a unique remedy against violations of human rights. Are the costs of the exequatur procedure really too high? This article contributes to this debate by offering an empirical analysis of the exequatur orders delivered by nine courts of four different member states based in the Grande Region surrounding Luxembourg.