Retaliation in Alien Tort Statute Litigation?

An interesting case where Chevron is seeking to recover legal costs, including $ 190,000 in copying expenses, from Nigerian villagers

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Publication: Liber Fausto Pocar – New Instruments of Private International Law

The Italian publishing house Giuffrè has recently published a very rich collection of essays in honor of Fausto Pocar, Professor at the University of Milan and judge and former President of the International Criminal Tribunal for the former Yugoslavia, one of Italian leading scholars in the field of public international law, EU law and private international law.

The collection, ***Liber Fausto Pocar***, edited by *Gabriella Venturini* and *Stefania Bariatti*, is divided in two volumes, devoted respectively to public international law (vol. I, Diritti individuali e giustizia internazionale – Individual Rights and International Justice) and private international law (vol. II, Nuovi strumenti del diritto internazionale privato – New instruments of Private International Law).

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Title: **Liber Fausto Pocar – Vol. II: Nuovi strumenti del diritto internazionale privato**, edited by *Gabriella Venturini* and *Stefania Bariatti*, Giuffrè, Milano, 2009, XXXVII – 1020 pages.

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Jurisdiction in Contract Matters in Brazil

I am grateful to Henry Saint Dahl, the President of the Inter-American Bar Foundation, for contributing this report.

São Paulo Civil Appellate Court, Seventh Chamber (Appeal N0. 312.848-4/4-00): *Editoriale Johnson SPA et al.; v. Renaço Comércio e Importação e Indústria Ltda et al.*, judgment rendered on December 17, 2008

The parties, an Italian publishing house and a Brazilian distributor, entered into a contract for commercial representation in Brazil. The contract was signed in Italy. Alleging contractual breach plaintiff, the Italian publisher, filed a lawsuit in Brazil, against the Brazilian distributor, claiming rescission plus damages.

The Brazilian District Court dismissed the case for lack of Brazilian jurisdiction, based on the fact that the contract was entered in Italy, which made Italian law applicable to solve the two issues raised: rescission and damages.

The Appellate Court held in its majority decision that although the contract was signed in Italy, performance took place in Brazil where defendant distributed plaintiff's products. It is certain then that although the deal was made in Italy, it was meant to produce effects in Brazil. The case is then controlled by Article 88, paragraph II of the Code of Civil Procedure, as well as Article 12 of the Introductory Act to the Civil Code, both of which grant jurisdiction to the Brazilian court when "the obligation must be performed in Brazil."

The Appellate Court further considered that sending the plaintiff to an Italian court would also impose a heavy burden on the Brazilian defendants and even preventing them access to justice and an ample opportunity to defend themselves.

The district-court judgment was annulled and the file was returned to said court with instructions to conform to the appellate decision.

Brazilian attorney André de Almeida provided the text of this decision.

Programme and Booking for the Journal of Private International Law Conference 2009 at NYU

The **programme for the Journal of Private International Law Conference 2009**, to be held at New York University Law School on 17-18 April 2009, along

with a special tribute to Andreas Lowenfeld on 16 April, is now available. The line-up, both in the early careers section, and in the plenary sessions, makes this a diverse and fascinating conflicts conference of the very highest quality. There is limited space available, so it is strongly recommended that you book early. The booking page has details on New York accommodation, as well as the relevant fee for each category of registrant.

I look forward to seeing many of you there. Martin.

10th Anniversary of the Yearbook of Private International Law

For the 10th Anniversary of the **Yearbook of Private International Law**, a conference will be held in Lausanne, Switzerland, on 19 March 2009 at the Swiss Institute of Comparative Law.

The topic of the day will be "The Future of PIL between National and International Codifications and Case Law". The program can be found here.

The following day, on 20 March, the Swiss Institute organizes the "21e journée de droit international privé", on "La loi fédérale de droit international privé, 20 ans après" (interventions in French or German). The program can be found here.

First Issue of 2009's Journal du Droit International

The first issue of French *Journal du Droit International* (also known as *Clunet*) will shortly be released. It contains several articles dealing with

conflict issues.

The topic of the first two is the 2008 Rome I Regulation on the law governing contractual obligations. First, Hughes Kenfack, a professor at Toulouse University, wonders whether the Regulation will function like a steady vessel or will be unable to avoid the reefs (*Le règlement Rome I, navire stable aux instruments efficaces de navigation ?*). The English abstact reads:

> *The Regulation on the Law Applicable to Contractual Obligations (« Rome I ») was adopted after five years of preparatory work. It supersedes the Rome Convention for contracts concluded after the 17th of September 2009, and works harmoniously within a framework of other Regulations including « Brussels I » and « Rome II ». Its purpose is to reinforce predictability and security in legal solutions to disputes while safeguarding a measure of flexibility. While upholding certain solutions imposed by the Rome Convention, the new text introduces some well met changes, notably regarding the determination of the applicable law in the absence of choice by the parties. The outcome will now be more predictable for most international commercial contracts.*
> *In the main, as a metaphor in the maritime field, the « Rome I » Regulation functions like a steady vessel with effective instruments of navigation. With the guiding light of the Court of justice of the European Communities, it should allow to avoid the reefs and lead to safe harbour.*

In the second article, Stephanie Francq, a professor of law at the Catholic University of Louvain (Belgium), presents the changes introduced by the new legislation (*Le Règlement Rome I. De quelques changements…*). The abstract reads:

> *EU Regulation n° 593/2008 (« Rome I ») harmonises conflicts-of-law rules in the area of contract law. The Regulation, which replaces the Rome Convention, applies to contracts entered into as from December 17, 2009. This article analyses in details the main changes brought about by the Regulation and reflects on the consequences of its adoption at EU level. In turn, it inquires into the existence of a logical and theoretical underpinning for the new rules. Finally, it highlights the particular influence exercised by certain Member States in the process leading to the adoption of the Regulation because of their*

opt-out from title IV of the EC Treaty.

The third article is a short report by Hélène Péroz (Caen University) on Certifying Authorities for European Enforcement Orders after a recent French Decree (*Les autorités certificatrices de titre exécutoire européen. A propos du Décret n°2008-484 du 22 mai 2008*). Here is the English abstract:

Decree n° 2008-484 regarding proceedings before the French Cour de cassation amends the list of authorities in charge of certifying European Enforcement Orders. French notarial acts will from now on be certified by the notary keeping the original document.
Decisions will also henceforward be certified by the chief registrar of the Court, choice which seems in contradiction with Regulation (EC) N° 805/2004 the decree is supposed to implement and therefore contrary to law.

Finally, the Journal offers two articles on international commercial law.

The first is the written version of the Lalive Lecture that Pierre Mayer, a professor of law at Paris I University and a partner at Dechert, gave in Geneva on Contract Claims and Jurisdiction Clauses in Investment Treaties (Contract Claims *et clauses juridictionnelles des traités relatif à la protection des investissements*).

The drafting of the dispute resolution clause contained within most investment treaties varies from one treaty to another. Certain clauses limit the offer of arbitral jurisdiction (addressed by each State party to the investors of the other State parties) to claims based on a breach of the substantive clauses of the treaty (treaty claims). Other clauses are drafted in more general terms, but arbitral tribunals limit their scope and exclude, here as well, claims based on a breach of the investment contract (contract claims). In these two cases, requests of the investors which are based on the same facts and seek the same relief – compensation for the loss suffered due to the host state – have to be therefore submitted to different tribunals, which results in injustice and contradictions. No theoretical argument, based in particular on the alleged necessity to distinguish between State legal order and international legal order, justifies such an unacceptable result in practice.

The second is the second part of a piece on The New International Oil Exploration

and Sharing Agreements in Libya (the first part was published in the first issue of the 2008 volume of the Journal) by professor de Vareilles-Sommières and attorney Anwar Fekini.

> *Concluding the previously undertaken study on the legal regime of the exploration and production sharing agreements (EPSAs) entered into by the Libyan National Oil Company with foreign oil companies since 2005 (cf. JDI 2008, p. 3 for its first part), this second part of the article focuses on te rights and obligations deriving from the EPSA. A distinction has to be made between the main contract regarding the exploration or production on the one hand, and auxiliary legal acts such as the Bid Package or other agreements which are annexes to the EPSA like the letter of guarantee, the Shareholders agreement and the Joint operating agreement, on the other hand. The EPSA in itself appears to be a sui generis agreement, neither a concession, nor a works contract, from which derive a number of obligations (payment of bonus, setting up of managing bodies, lifting of oil portion by each party…), as well as a number of rights including a right of property over the oil produced. The article then considers, in order to assess their legal consequences, the four possible occurrences looming for better or worse over the EPSA (commercial discovery, breach of contract, change of circumstances, differences between parties). Regarding auxiliary legal acts, emphasis is lain on coordinating each of them with the main contract and on sorting out problems this coordination is likely to raise.*

PIL conference in Johannesburg

PIL conference at the University of Johannesburg
9-11 September 2009
Call for papers: www.uj.ac.za/law
Closing date: 28 February 2009

ECJ Judgement on Deko-Marty Belgium, Case C-330/07

Many thanks to Professor Laura Carballo (Santiago de Compostela University, Spain), who has asked me to upload this brief comment on the ECJ judgment following Veronika Gaertner's *post* ECJ: Judgment on International Jurisdiction in Respect of Actions to set a Transaction aside by Virtue of Insolvency.

By Judgement of 12th of February 2009, the ECJ has addressed the issue of international jurisdiction for claims "which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings". These terms are contained in Recital 6 of Regulation (EC) Nr. 1346/2000, on insolvency proceedings; its Article 25.1 repeats the same definition, stating that judgments delivered in such kind of claims are to be recognized according to Articles 31 to 51, with the exception of Article 34(2), of the Brussels I Convention (now Articles 32 to 52, with the exception of Article 45.1, of the Brussels I Regulation). But Regulation (EC) Nr. 1346/2000 does not say anything about international jurisdiction rules for such claims, i.e. about a rule on *vis attractiva concursus*.

The issue was directly addressed by 1970 and 1980 Drafts of an European instrument on insolvency proceedings, both setting out which claims closely connected with insolvency proceedings must be concentrated before the *forum concursus*. Because of these statements, the silence of Regulation (EC) Nr. 1346/2000 was understood as an acknowledgment of the application of national jurisdiction rules. But this resulted to be a dangerous interpretation, because, as mentioned, Article 25 of this Regulation grants a privileged recognition system, without examination on the grounds of international jurisdiction; therefore, Member States should enforce all judgements, even when delivered by an exorbitant forum. Besides, application of national jurisdiction rules gives rise to negative conflicts of jurisdiction, because of the many understandings of the *vis attractiva concursus* rule by Member States. This is the outcome in the case

underlying the recent EJC Judgement: On 14 March 2002, Frick Teppichboden Supermärkte GmbH, which has its seat in Germany, transferred EUR 50 000 to Deko Marty Belgium NV, a company with its seat in Belgium. Frick made an application for opening an insolvency proceeding the 15th March of 2002 and the named liquidator brought an action to set the transaction aside. He tried it first in Belgium, but Belgian Law establishes a *vis attractiva concursus* for avoidance proceedings and sent the matter to Germany. On the contrary, Germany places this action by the courts of the defendant's domicile, in this case Belgium. In the end, the German Bundesgerichtshof posed the two following questions to the ECJ, framing the issue in terms of European Regulations' scope of application:

"(1) Do the courts of the Member State within the territory of which insolvency proceedings regarding the debtor's assets have been opened have international jurisdiction under Regulation [No 1346/2000] in respect of an action in the context of the insolvency to set a transaction aside that is brought against a person whose registered office is in another Member State?

(2) If the first question is to be answered in the negative:

Does an action in the context of the insolvency to set a transaction aside fall within Article 1(2)(b) of Regulation [No 44/2001]?"

The EJC gives a positive answer to the first question:

"Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to decide an action to set a transaction aside by virtue of insolvency that is brought against a person whose registered office is in another Member State".

The EJC's answer is a logic one, given the fact that the definition stated by Recital 6 and Article 25.1,II of Regulation (EC) Nr. 1346/2000 comes from Case 133/78 Gourdain [1979] ECR 733, paragraph 4, a judgement delivered on the interpretation of Article 1(2)(b) of the Brussels I Convention, where it was decided that the so defined claims do not fall within the scope of application of the Convention, now Brussels I Regulation, in the case a French action against the de facto manager of an insolvent company. Therefore, this judgement is not a surprise, but a step forward in bringing juridical security to insolvency

proceedings in the European Union. As a result of this answer, the question of which claims "are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings" and, therefore, are to be located before the courts where insolvency proceedings are conducted, is now open and should give rise to an autonomous interpretation by the ECJ. *Gourdain* and *Deko Marty Belgium* give just some clues, but the issue is far from being closed. For now, this judgement makes it clear that avoidance proceedings are one of them, but it is going to be more difficult to decide other claims, such as liability claims against managers and administrators, or claims arising from the impact of insolvency in running contracts.

ECJ: Judgment on International Jurisdiction in Respect of Actions to set a Transaction aside by Virtue of Insolvency

On 12th February, the ECJ delivered its judgment in case C-339/07 (*Christopher Seagon in his capacity as liquidator in respect of the assets of Frick Teppichboden Supermärkte GmbH v Deko Marty Belgium N.V.*).

The questions referred to the ECJ concern the international jurisdiction of courts in respect of actions to set a transaction aside by virtue of insolvency. Thus, the case raises the question of the delimitation of Regulation (EC) No. 1346/2000 (Insolvency Regulation) and Regulation (EC) No. 44/2001 (Brussels I Regulation) or – more precisely – the question of whether Art. 3 (1) Insolvency Regulation covers actions to set a transaction aside in the context of insolvency, although they are not mentioned explicitly.

See for a short summary of the background of the case our previous post on the AG's opinion which can be found here and our post on the referring decision which can be found here.

The German Federal Court of Justice (*BGH)* had referred the **following questions** to the ECJ for a preliminary ruling:

> *(1) Do the courts of the Member State within the territory of which insolvency proceedings regarding the debtor's assets have been opened have international jurisdiction under Regulation [No 1346/2000] in respect of an action in the context of the insolvency to set a transaction aside that is brought against a person whose registered office is in another Member State?*
>
> *(2) If the first question is to be answered in the negative:*
>
> *Does an action in the context of the insolvency to set a transaction aside fall within Article 1(2)(b) of Regulation [No 44/2001]?*

Now, the **ECJ** followed the opinion given by *Advocate General Ruiz-Jarabo Colomer* and held in its **judgment** that

> *Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to decide an action to set a transaction aside by virtue of insolvency that is brought against a person whose registered office is in another Member State.*

In its reasoning, the Court referred to its case law on the Brussels Convention (*Gourdain*) where the Court has held that an action similar to that at issue in the main proceedings is related to bankruptcy or winding-up if it derives directly from the bankruptcy or winding-up and that such an action does not fall within the scope of the Convention (para. 19). The Court emphasises that it is exactly this criterion – i.e. the strong connection to insolvency proceedings – which is used by Recital 6 of the Insolvency Regulation to delimit its purpose (para. 20). According to Recital 6 of the Insolvency Regulation "the Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings."

The Court concludes that "concentrating all the actions directly related to the insolvency of an undertaking before the courts of a Member State with

jurisdiction to open the insolvency proceedings" is "consistent with the objective of improving the effectiveness and efficiency of insolvency proccedings having cross-border effects […]." (para. 22)

This result is supported by the Court with reference to Recital 4 of the Insolvency Regulation according to which forum shopping shall be avoided and further by means of a conclusion drawn from Art. 25 Insolvency Regulation: According to Art. 25 (1) Insolvency Regulation, judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Art. 16 Insolvency Regulation and which concern the course and closure of insolvency proceedings – and thus a court with jurisdiction under Art. 3 (1) Insolvency Regulation – have to be recognised with no further formalities. According to the second subparagraph of Art. 25 (1) Insolvency Regulation, the first subparagraph also applies to judgments deriving directly from the insolvency proceedings and which are closely linked to them. This means – in the Court's words – that this "provision allows the possibility for courts of a Member State within the territory of which insolvency proceedings have been opened, pursuant to Article 3 (1) of that regulation, also to hear and determine an action of the type at issue in the main proceedings." (para. 26)

Service of Federal Court documents outside Australia

Practitioners in Australia should be aware that, pursuant to Practice Note No 13 (4 September 2008), the Federal Court requires a party applying for leave to serve originating process or other documents outside Australia to support the application with evidence of information obtained from the Private International Law Section of the Commonwealth Attorney-General's Department in relation to the appropriate method of transmitting documents for service, including certain specified information. See the Practice Note for further details.