Rome II: a Critical Appraisal of the Conflict Rule on Culpa In Contrahendo

Prof. Rafael Arenas Garcia (Universitat Autònoma de Barcelona and Àrea de Dret Internacional Privat blog) has written an interesting article on the controversial issue of the **law applicable to culpa in contrahendo**, discussing the conflict rule set out in **Art. 12 of the Rome II regulation**: **"La regulación de la responsabilidad precontractual en el Reglamento Roma II"**.

The article (in Spanish) will be published in the forthcoming issue (2007) of the *Anuario Español de Derecho Internacional Privado* (Spanish Yearbook of Private International Law – AEDIPr.), but it can be downloaded as a .pdf file from the Àrea de Dret Internacional Privat blog.

The English abstract reads as follows:

> *Article 12 of Rome II Regulation governs the obligations arising out of dealings prior to the conclusion of a contract. It establishes that the law applicable to these obligations shall be the law applicable to the contract. Where it is not possible to determine such law, the second paragraph of article 12 establishes the application of the general connecting factors of Rome II Regulation. It is also possible to choose the law applicable to culpa in contrahendo.*
>
> *These solutions are not problem-free. The application of the law governing the future contract is not suitable in order to forbid the breaking of negotiations, without giving to the parties the possibility to rely on the law of the country in which the party has its habitual residence to establish that he can broke off negotiations without liability. It can also be criticized that there is no provision about the cases in which a contract between the parties has been concluded in order to rule the negotiations. As a result of this lack of provision in these cases the law governing culpa in contrahendo will be the law of the future contract instead of the law of the contract that rules the negotiations.*
>
> *This article analyses these problems and the difficult delimitation between contractual and non-contractual fields in matters relating to obligations arising*

out of dealings prior to the conclusion of a contract. It also includes de lege ferenda proposals.

Interesting Case at the Confluence of Choice of Law, Comity and the Hague Abduction Convention

"At the heart of this sad case, which raises questions of international and federal law under the Hague [Abduction] Convention, is a custody battle over a young girl who has not seen either of her parents in years." That was the lead-in from Judge Jordan to the recent decision by a three-judge panel of the Third Circuit. *Carrascosa v. McGuire*, No. 07-1748/4130 (3rd Cir., March 20, 2008), involved a Spanish mother, once married to an American father, whose child was habitually resident in New Jersey. Upon their divorce, the couple signed a "Parenting Agreement" that established an "interim resolution" of the custody issue and prohibited either of them from traveling outside the country with their daughter. Shortly thereafter, the mother took the daughter to Spain.

A judge in New Jersey issued several orders for the daughter's return, and when each went unanswered, issued a warrant for the mother's arrest. In the meantime, however, purporting to follow the Hague Abduction Convention, the Spanish Courts had decided that the Parenting Agreement violated Article 19 of the Spanish Constitution (regarding the freedom to chose one's place of residence), determined that the removal to that country was not "wrongful" within the meaning of the Convention, and ordered that the daughter remain. When the mother returned to the United States to attend to the divorce proceedings, she was arrested. She challenged her detention as "in violation of the laws and treaties of the United States" through a writ of habeas corpus. In essence, she argued that a decision of the Spanish Court that the Parenting Agreement was null and void should be afforded comity, and void the charges of

contempt against her.

The Federal District Court for the District of New Jersey denied the writ, and the Third Circuit affirmed. Applying the Hague Convention and its implementing legislation, the Court recognized that "[t]here is no dispute that [the daughter's] place of habitual residence, prior to . . . her [removal] to Spain, was the United States, in particular New Jersey." As to whether her removal to Spain was wrongful under Article 3 of the Hague Convention, the District Court examined whether the father's custody rights were breached by Victoria's removal. Because, under New Jersey law, the father had custody rights by virtue of a valid Parenting Agreement, and the mother breached those rights by removing the daughter to Spain without his consent, the removal was "wrongful" within the meaning of Article 3 of the Hague Convention.

The Spanish court, however, in nullifying the Parenting Agreement, never applied New Jersey law, despite their explicit recognition that the daughter's habitual place of residence was New Jersey. They instead based their decision on the "wrongfulness" of the removal solely on Spanish law, while paying only "lip-service" to the Convention. According to the U.S. Court, this "glaring departure . . . from the mandate of the Hague Convention"—i.e. the "total failure to determine [the father's] rights of custody under [the law of the child's habitual residence]"—the decision of the Spanish court was given no weight. The removal was wrongful under the Convention, and the mother's detention was held to be not "in violation of the law or treaties of the United States."

Spanish Reference for a Preliminary Ruling on the Service Regulation

The Spanish *Juzgado de Primera Instancia e Instrucción* (Court of First Instance and Preliminary Investigations) *No 5 of San Javier* has referred the following

questions to the European Court of Justice for a **preliminary ruling on the interpretation of Reg. (EC) No 1348/2000** (Service Regulation):

1. Does the scope of Regulation (EC) No 1348/2000 extend to the service of extrajudicial documents exclusively by and on private persons using the physical and personal resources of the courts and tribunals of the European Union and the regulatory framework of European law even when no court proceedings have been commenced? Or,
2. Does Regulation (EC) No 1348/2000 on the contrary apply exclusively in the context of judicial cooperation between Member States and court proceedings in progress (Articles 61(c), 67(1) and 65 EC and recital 6 of the preamble to Regulation 1348/2000)?

The case, lodged on 14 January 2008, is pending under C-14/08 (*Roda Golf & Beach Resort SL*). The referred questions have been published in the OJ n. C 92 of 12 April 2008.

Advocate General's Opinion in Case "Grunkin and Paul"

Today, *Advocate General Sharpston* has delivered her opinion in case C-353/06 (***Grunkin and Paul***).

The background of the case is as follows: The case concerns a child who was born in Denmark having, as well as his parents, only German nationality. The child was registered in Denmark – in accordance with Danish law – under the compound surname *Grunkin-Paul* combining the name of his father (*Grunkin*) and the name of his mother (*Paul*), who did not use a common married name. After moving to Germany, German authorities refused to recognise the surname of the child as it had been determined in Denmark, since according to German private international law (Art.10 EGBGB) the name of a person is subject to the law of his/her nationality, i.e. in this case German law and according to German law (§ 1617 BGB), parents who do not share a married name shall choose *either* the

father's or the mother's surname to be the child's surname.

The Local Court *(Amtsgericht) Niebüll* which was called to designate the parent having the right to choose the child's surname, sought a preliminary ruling of the ECJ on the compatibility of Art.10 EGBGB with Articles 12 and 18 EC-Treaty. However, the ECJ held that it had no jurisdiction to answer the question referred since the referring court acted in an administrative rather than in a judicial capacity (judgment of 27 April 2006, C-96/04). In the following, the parents applied again – without success – to have their son registered with the surname *Grunkin-Paul*. The parents' challenge to this refusal was heard, by virtue of German procedural law, by the *Amtsgericht Flensburg*. The *Amtsgericht Flensburg* held that it was precluded from instructing the registrar to register the applicants' son under this name by German law. However, since the court had doubts as to whether it amounts to a violation of Articles 12 and 18 EC-Treaty to ask a citizen of the European Union to use different names in different Member States, the court referred with decision of 16th August 2006 (69 III 11/06) the **following questions** to the ECJ for a **preliminary ruling:**

> *In light of the prohibition on discrimination set out in Article 12 of the EC Treaty and having regard to the right to the freedom of movement for every citizen of the Union laid down by Article 18 of the EC Treaty, is the provision on the conflict of laws contained in Article 10 of the EGBGB valid, in so far as it provides that the right to bear a name is governed by nationality alone?*

Advocate *Generel Sharpston* now held in her **opinion** that the Court should answer the question raised by the *Amtsgericht Flensburg* as follows:

> *– a choice of law rule under which a person's name is to be determined in accordance with the law of his nationality is not in itself incompatible with Articles 12, 17 or 18 EC;*
>
> *– however, any such rule must be applied in such a way as to respect the right of each citizen of the Union to move and reside freely in the territory of the Member States;*
>
> *– that right is not respected if such a citizen has been registered under one name in accordance with the applicable law of his place of birth, before it becomes necessary to register his name elsewhere, and is subsequently*

required to register a different name in another Member State;

– consequently, the authorities of a Member State may not, when registering the name of a citizen of the Union, automatically refuse to recognise a name under which he has already been lawfully registered in accordance with the rules of another Member State, unless recognition would conflict with overriding reasons of public interest which admit of no exception.

See for the full opinion the website of the ECJ. See further on this case also our previous posts on the judgment of the Court of 27 April 2006 which can be found here as well as on the referring decision of the Amtsgericht Flensburg which can be found here.

Swiss Institute of Comparative Law: Proceedings of the Colloquium on the New Lugano Convention

The contributions presented at the *19th Journée de droit international privé*, held in March 2007 at the Swiss Institute of Comparative Law (ISDC) and dedicated to the new Lugano Convention, have been published by Schulthess, under the editorship of *Andrea Bonomi*, *Eleanor Cashin Ritaine* and *Gian Paolo Romano*: **La Convention de Lugano. Passé, présent et devenir**.

Here's the table of contents (available as a .pdf file on the ISDC's website):

Avant-propos (*Eleanor Cashin Ritaine*)

Première session (Présidence: *Eleanor Cashin Ritaine*)

- *Monique Jametti Greiner*: L'espace judiciaire européen en matière civile: la nouvelle Convention de Lugano;
- *Alexander R. Markus*: La compétence en matière contractuelle selon le règlement 44/2001 «Bruxelles I» et la Convention de Lugano revisée à la suite de l'arrêt CJCE *Color Drack*;
- *Eva Lein*: La compétence en matière contractuelle: un regard critique sur l'article 5 § 1er de la nouvelle Convention de Lugano;
- *Andrea Bonomi*: Les contrats conclus par les consommateurs dans la Convention de Lugano révisée;
- *Anne-Sophie Papeil*: La Convention de Lugano et la protection du consommateur;
- *Hélène Gaudemet-Tallon*: Quelques réflexions à propos de trois arrêts récents de la Cour de cassation française sur l'art. 5-1 et de l'avis 1/03 de la Cour de justice des Communautés sur les compétences externes de la Communauté.

Deuxième session (Présidence: *Andrea Bonomi*)

- *Jolanta Kren Kostkiewicz*: Rechtshängigkeit und Konnexität;
- *Anton K. Schnyder*: Anerkennung und Vollstreckung ausländischer Entscheidungen;
- *Valentin Rétornaz*: Les limites à l'application autonome de la Convention de Lugano. Aperçu au travers de l'exequatur en Suisse des ordonnances rendues par un juge de la mise en état français;
- *Gian Paolo Romano*: Principe de sécurité juridique, système de Bruxelles I / Lugano et quelques arrêts récents de la CJCE.

Annex: Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Title: **La Convention de Lugano. Passé, présent et devenir. Actes de la 19e Journée de droit international privé du 16 mars 2007 à Lausanne**, edited by *Andrea Bonomi*, *Eleanor Cashin Ritaine* and *Gian Paolo Romano*, Schulthess (Série des publications de l'ISDC, vol. 59), Zürich, 2007, 209 pages.

ISBN: 978-3-7255-5538-3. Price: CHF 75.

(The official text of the new Lugano Convention has been published in the Official

Journal of the European Union n. L 339 of 21 December 2007, attached to the Council decision on its signing on behalf of the Community. On 29 February 2008 the Commission presented a Proposal for a Council decision concerning the conclusion of the Convention – COM(2008) 116 fin.)

Conference: ABA International 2008 Fall Meeting

The ABA Section of International Law (ABA International) organizes its 2008 Fall Meeting in Brussels, Belgium, September 23-27 with several private international law related topics on the agenda. Read the letter of the Chair (Aaron Schildhaus) of the ABA Section of International Law (ABA International) here, and see the program agenda here.

Volume 4, Issue 1, Journal of Private International Law

The April 2008 issue of the *Journal of Private International Law* has just been published. The contents are (click on the links to view the abstracts on the Hart Publishing website):

Articles

M. Keyes, "**Statutes, Choice of Law, and the Role of Forum Choice**"

Z. Tang, "**The Interrelationship of European Jurisdiction and Choice of Law in Contract**"

C. Kotuby, "**Private International Law before the United States Supreme Court: Recent Terms in Review**"

M. Pauknerova, "**Private International Law in the Czech Republic: Tradition, New Experience and Prohibition of Discrimination of Grounds of Nationality**"

N. Dariescu & C. Dariescu, "**The Difficulties of Solving Litigation Concerning the Patrimonial Effects of a Marriage Between an Italian Citizen and a Romanian Citizen**"

Review Articles

R. Michaels, "***Public and Private International Law: German Views on Global Issues – S Leible and M Ruffert (eds) Völkerrecht und IPR***"

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Conference: International Law Association Conference 2008

The 73rd. Conference of the International Law Association, hosted by its Brazilian Branch, will take place in the city of Rio de Janeiro, at the InterContinental Hotel, August 17-21 2008. The central theme of the Conference will be "Law for the Future," focusing on Natural Resources and Sustainable Development, Rights of the Human Person, Resolution of Private International Disputes, Business and Trade Law, and International Security. Regarding International Private Dispute Resolution, two issues will be addressed:

International Commercial Arbitration

- International Arbitration: Autonomy v. Territorialism
- Public Policy and Mandatory Rules: Influence on the Applicable Law
- The Influence of Cultural Factors on the Choice of the Arbitrator
- Distortions in Contemporary Arbitration: The Problems of Becoming Popular

International Civil Litigation

- Towards World Cooperation Standards: Prospects for the Hague Convention
- The Realities of Regional Judicial Cooperation: Existing Experiences

Registration for the 73rd ILA Biennial Conference is open here.

Article: Jurisdiction for Insolvency-Related Proceedings

Anatol Dutta (Hamburg) has written an article on the German reference for a preliminary ruling in *Seagon v. Deko Marty Belgium NV* (Case C-339/07): **Jurisdiction for insolvency-related proceedings caught between European legislation**, Lloyd's Maritime and Commercial Law Quarterly (LMCLQ) 2008, p. 88-96.

Here is the abstract:

> *The stock of European legislation in the area of private international law is growing steadily. The pointillist technique employed by the European legislator, however, necessarily entails friction between the different legislative acts. One illustrative example, which shall be examined in this article, concerns jurisdiction for insolvency-related proceedings. Such individual proceedings which derive directly from the bankruptcy and are closely connected to collective insolvency proceedings could be governed by different European regulations or even by national law.*

See with regard to this reference also our previous post which can be found here.

Research School on Successful Dispute Settlement in International Law

The University of Heidelberg Law School awards in cooperation with the Max-Planck-Institute for Comparative Public Law and International Law **Doctoral Research Positions** (starting June 2008, duration: up to 3 years) for studies leading to a Doctorate in Law (Dr. jur.) with the following research objective:

How can the success of international dispute resolution be explained? How must successful dispute resolution be organized? The topic includes private and public international law (arbitration, mediation) as well as international criminal law.

For more information on the research program, the coordinators, the stipends as well as requirements and the application procedure see the website of the Institute for Private International Law, University of Heidelberg which can be found (in English) here.