Krombach v. Bamberski: Update (updated)

The second criminal trial of Dr. Dieter Krombach began on March 29th in Paris.

Readers will recall that the first trial took place in the absence of Dr. Krombach, and then led to the famous *Krombach* decision of the European Court of Human Rights. Readers will also recall that this second trial will take place because the father of the alleged victim of Dr. Krombach, Mr. Bamberski, had Krombach kidnapped in Germany and delivered to French authorities.

Counsel for Krombach argued that the kidnapping made the procedure illegal. They also requested that the matter be referred (again) to the European Court of Justice.

These arguments were rejected by the Paris court on March 30th. The trial will go on.

New Spanish Law

Spanish *Ley 4/2011, de 24 de marzo, de modificación de la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil, para facilitar la aplicación en España de los procesos europeos monitorio y de escasa cuantía*, was published yesterday in our *Boletín Oficial del Estado*. The aim of the law is to facilitate the implementation in Spain of two European Regulations: Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, and Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure. To do so, the law modifies certain provisions of the Civil Procedure Act (2000), and adds new provisions to the "Disposiciones finales" (Final provisions). The purpose of these rules is to fix some precepts of the European Union Regulations: issues concerning jurisdiction, resolutions to be

adopted by the judge or the judicial clerk and their relationship with the form set out in EU regulations, possibilities of appeal, and some extra procedural rules. These changes are needed in order to allow full implementation of the EU Regulations by the Spanish courts, and to clarify these new judicial procedures characterized by the use of Forms and reserved for cross-border disputes.

See the text of the law here.

Commission's Proposals On Matrimonial Property Regimes and Property Consequences of Registered Partnerships

As announced in the past months, **on 16 March 2011 the Commission presented the proposals for two regulations on property rights of "international" married couples and registered partnerships**:

- Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011) 126 of 16 March 2011;
- Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM(2011) 127 of 16 March 2011.

The proposals are accompanied by a Communication from the Commission "Bringing legal clarity to property rights for international couples" – COM(2011) 125 of 16 March 2011 – which describes the difficulties faced by international couples in the current framework of EU legislation and national rules of the 27 Member States (see also the figures presented in the press release and the related FAQs).

The origin of the initiative dates back to the early days of the "communitarisation" of the conflict of laws. According to the Explanatory Memorandum to doc. COM(2011) 126:

> *The adoption of European legislation on matrimonial property regimes was among the priorities identified in the 1998 Vienna Action Plan. The programme on mutual recognition of decisions in civil and commercial matters adopted by the Council on 30 November 2001 provided for the drafting of an instrument on jurisdiction and the recognition and enforcement of decisions as regards 'rights in property arising out of a matrimonial relationship and the property consequences of the separation of an unmarried couple'. The Hague programme, which was adopted by the European Council on 4 and 5 November 2004, set the implementation of the mutual recognition programme as a top priority and called on the Commission to submit a Green Paper on 'the conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition', and stressed the need to adopt legislation by 2011.*

A thorough research on the matter was previously carried in 2003 at an academic level, on behalf of the Commission, by the TMC Asser Instituut and the *Département de droit international* of the Catholic University of Leuven (UCL) (the whole study – Final Report in French and Country Reports on the legislation of Member States – can be downloaded from the Documentation Centre of the DG Justice, Freedom and Security). The Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition, was published on 17 July 2006, and received nearly forty replies in the public consultation launched by the Commission.

The 2009 Stockholm Programme came back to the need of European legislation in the field, stating that mutual recognition should be extended to matrimonial property regimes and the property consequences of the separation of unmarried couples. The need was further stressed in the 'EU Citizenship Report 2010: Dismantling the obstacles to EU citizens' rights' (p. 5 ff.), adopted on 27 October 2010, where the Commission announced for 2011 an official legislative initiative. The drafting of the proposals is summarised as follows in the Explanatory memorandum:

A group of experts, PRM/III, was set up by the Commission to draw up the proposal. The group was made up of experts representing the range of professions concerned and the different European legal traditions; it met five times between 2008 and 2010. The Commission also held a public hearing on 28 September 2009 involving some hundred participants; the debates confirmed the need for an EU instrument for matrimonial property regimes that covered in particular applicable law, jurisdiction and the recognition and enforcement of decisions. A meeting with national experts was held on 23 March 2010 to discuss the thrust of the proposal being drafted.
Finally, the Commission conducted a joint impact study on the proposals for Regulations on matrimonial property regimes and the property consequences of registered partnerships. [see doc. n. SEC(2011) 327 fin. and SEC(2011)328 fin. of 16 March 2011]

Pursuant to Art. 81(3) TFEU the proposed regulations, as "measures concerning family law with cross-border implications", are subject to a special legislative procedure: the Council shall act unanimously, after consulting the European Parliament. The second subparagraph of Art. 81(3), however, provides a "passerelle-clause", under which "the Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure". The third subparagraph of the provision grants to national Parliaments of the Member States a veto power, to be exercised within six months of the notification of the Commission's proposal to enact the "passerelle".

French Book on the Rome I Regulation

The university of Burgundy has just published a new book on the Rome I Regulation: Le Règlement communautaire Rome I et le choix de loi dans les

contrats internationaux. The book is the result of a conference held in Dijon in September 2010.

The contributions include:

AVANT-PROPOS, par Sabine CORNELOUP et Natalie JOUBERT

. La théorie de l'autonomie de la volonté, par J.-M. JACQUET

. Les travaux de la Conférence de La Haye sur un instrument non contraignant favorisant l'autonomie des parties, par M. PERTEGAS

. Le choix de loi dans les contrats internationaux et la construction européenne, par S. POILLOT-PERUZZETTO

. La recherche des sécurité juridique : la stipulation quasi-systématique d'une clause de choix de la loi applicable, par Laurence RAVILLON

. L'articulation, en pratique, entre la clause de choix de loi applicable et la clause relative à la compétence internationale (clause attributive de juridiction ou clause compromissoire), par I. MICHOU

. Rome I et les principes et règles de roit matériel international des contrats, par E. LOQUIN

. Le choix d'un instrument optionnel en droit européen des contrats, par B. FAUVARQUE-COSSON

. Rome I, choix de la loi et compatibilité avec la chari'a, par G. PILLET et O. BOSKOVIC

. Le dépeçage, par C. NOURISSAT

. Le choix tacite dans les jurisprudences nationales : vers une interprétation uniforme du règlement Rome I ?, par N. JOUBERT

. Le choix implicite dans les jurisprudences nationales : vers une interprétation uniforme du Règlement ? – L'exemple du choix tacite résultant des clauses attributives de juridiction et d'arbitrage, par M. SCHERER

. Choix de loi et contrats liés, par S. CORNELOUP

. Les limites au choix de la loi applicable dans les contrats impliquant une partie faible, par S. BARIATTI

. Les limites du choix : dispositions impératives et internationalité du contrat, par H. MUIR WATT

. Les lois de police, une approche de droit comparé, par F. JAULT-SESEKE et S. FRANCQ

. Le choix de la loi applicable au contrat électronique, par Guillaume BUSSEUIL

. Le choix de loi dans la jurisprudence arbitrale, par P. MAYER

. Rapport de synthèse, par P. LAGARDE

More details can be found here.

Application of foreign law (Sellier, 2011)

APPLICATION OF FOREIGN LAW

Edited by Carlos Esplugues, José Luis Iglesias and Guillermo Palao

(Sellier, Munich, March 2011)

I am delighted to announce the publication of the book "APPLICATION OF FOREIGN LAW" (Sellier, Munich, March 2011, ISBN 978-3-86653-155-0), edited by Carlos Esplugues, José Luis Iglesias and Guillermo Palao, all of them Professors of Private International Law at the University of Valencia (Spain).

The book deals in depth with one of the most complex issues of Private International Law directly affecting the process of harmonization of Private Law and Private International Law in Europe: the application of foreign law by judicial and non-judicial authorities. During the last decade Europe has undertaken an

active and broad process of harmonisation of Private International Law. Many areas of law of diverse nature have been influenced by this trend to the point that nowadays a growing set of common choice-of-law rules exist within the EU. This process, directly grounded on Article 81 of the Treaty on the Functioning of the European Union, is yet far from being finished. It will seemingly increase in the near future covering many domains so far not governed by European instruments. However, this movement towards a harmonised system of choice-of-laws rules within the EU has so far left aside a highly relevant issue which may directly affect the viability of the whole process of harmonisation under way; the application of the foreign law referred to by harmonized choice-of-law rules by judicial and non-judicial authorities in Europe. The analysis of the several solutions embodied in the different legal systems of the EU Member States shows both the existence of some recurring problems as to this issue and of very different responses to it in all of them. The current situation is hardly consistent with the existing trend towards harmonization of Private International Law within the EU; in fact, it seemingly runs against it. It violates legal certainty and contradicts the objective of ensuring full access to justice to all European citizens within the European Union.

The book approaches the situation existing as regards this issue in every EU Member State, analyzing in depth the solutions provided by their respective legal systems and their treatment by case law. Besides, a general comparative study rendering a comprehensive overview of the existing situation in Europe is included. Standing on the different national reports and on the general study, some basic principles for a future European instrument on this field are proposed as well.

This book is the first one in Europe dealing in a joint manner with the issue of application of foreign law both by judicial and non-judicial authorities in the European Union. It provides an exhaustive analysis of an issue of very practical relevance. We are sure that it will become a highly useful tool for all legal practitioners –lawyers, judges, notaries, land registries, academics, ministry officials, public servants, prosecutors…- from the European Union and abroad.

The book is the final result of the Action Grant awarded in 2008 to the Universities of Valencia (Spain) and Genoa (Italy) and the Spanish Land Registry Association by the European Commission within the framework of the Specific Programme “Civil Justice”. The study has been developed by a team of academics

and other legal professionals belonging to some 20 different Universities and legal entities of the EU.

Index and extract are available here.

Trimble on Foreigners and Patent Litigation in the US

Marketa Trimble, who teaches at the William S. Boyd School of Law in Nevada, has posted When Foreigners Infringe Patents: An Empirical Look at the Involvement of Foreign Defendants in Patent Litigation in the U.S. on SSRN. The abstract reads:

> *This paper presents results from a multiple-year project concerned with the involvement of foreign (non-U.S.) entities in U.S. patent litigation. A comparison of data from 2004 and 2009 that cover 5,407 patent cases filed in U.S. federal district courts in those two years evidences an increase in the number of cases involving foreign defendants, and thus an increasing potential for cross-border enforcement problems. With this basic finding the research supports the proposition advanced by a number of intellectual property scholars in the U.S. and abroad that rules need to be established to facilitate a smooth process for recognition and enforcement of foreign judgments in intellectual property cases. The research fills a significant gap in the existing literature, which has relied so far on only isolated individual cases to illustrate cross-border enforcement problems; comprehensive empirical evidence has not existed to show a growing need for improved rules for recognition and enforcement. In addition to providing this missing evidence the paper uses data concerning the involvement of foreign defendants to reveal remarkable facts about the changing landscape of patent litigation in the U.S.*

The Paper is forthcoming in the *Santa Clara Computer and High Technology Law Journal* (2011, Vol. 3).

Orejudo on the Law Applicable to Mediation Contracts

Patricia Orejudo Prieto de los Mozos, who is a professor of private international law at the University of Oviedo (Spain), has posted The Law Applicable to International Mediation Contracts on SSRN. The abstract reads:

> *Mediation entails the provision of the services of a professional, the mediator, who holds a legal relationship with the disputants: the mediation contract. Where there are transnational elements in the mediation process, the contract is of an international character. In such situation, the Laws of the diverse States involved could claim to be applicable to the same contract. The determination of the (only) Law applicable is of utmost interest in spite of the high degree of standardization of the obligations of both parties in the mediation contract. First, for such lex contractus establishes the limits of the freedom of the contracting parties. And second, for there are important matters that the parties do not usually tackle within the wording of mediation contracts and that model rules and standards do not either regulate. The present paper aims at illustrating about the functioning of the present and the future instruments of Private International Law that solve the conflict-of-laws issue: Rome Convention and Rome I Regulation.*

The paper is forthcoming in *InDret* 2011.

ERA Conference on Brussels I

Revision

A conference organized by the European Law Academy (ERA) on the recast of the Brussels I Regulation will take place in Trier (Germany) on 26 and 27 May 2011. Renowned speakers will discuss the main issues of the revision: abolition of exequatur, provisional and protective measures, disputes involving third country defendants, efficiency of choice of court agreements, and the interface between litigation and arbitration.

The conference aims to provide an in-depth analysis of the recast and to promote a far-reaching and thorough debate concerning the most important or complex issues inherent to cross-border litigation in Europe.

For more information and registration click here.

Cuadernos de Derecho Transnacional, Issue 1/2011

The first issue for 2011 of the Cuadernos de Derecho Transnacional, the Spanish journal published twice a year by the Área de Derecho Internacional Privado of Univ. Carlos III of Madrid under the editorship of *Alfonso Luis Calvo-Caravaca* (Univ. Carlos III) and *Javier Carrascosa-González* (Univ. of Murcia), has been recently published. It contains twenty articles, shorter articles and casenotes, encompassing a wide range of topics in conflict of laws, conflict of jurisdictions and uniform law, all freely available for download from the journal's website.



Here's the table of contents (each contribution is accompanied by an abstract in English):

Estudios

- *Dário Moura Vicente*, Principios sobre conflictos de leyes en materia de Propiedad Intelectual;
- *Hilda Aguilar Grieder*, El impacto del Reglamento «Roma I» en el contrato internacional de agencia;
- *Celia Caamiña Domínguez*, El secuestro internacional de menores: soluciones entre España y Marruecos;
- *Celia Caamiña Domínguez*, La «supresión» del exequátur en el R 2201/2003;
- *Sergio Cámara Lapuente*, El concepto legal de «consumidor» en el Derecho privado europeo y en el Derecho español: aspectos controvertidos o no resueltos;
- *Maria Ersilia Corrao*, Il diritto internazionale privato e processuale europeo in materia di obbligazioni alimentari;
- *Pietro Franzina*, La garanzia dell' osservanza delle norme sulla competenza giurisdizionale nella proposta di revisione del Regolamento «Bruxelles I»;
- *Miguel Gómez Jene*, Inmunidad y transacciones mercantiles internacionales;
- *Aurora Hernández Rodríguez*, El contrato de transporte aéreo de pasajeros: algunas consideraciones sobre competencia judicial internacional y Derecho aplicable;
- *Mónica Herranz Ballesteros*, Prohibiciones y limitaciones del artículo 4 de la Ley 54/2007: entre los objetivos de la norma y la realidad en su aplicación;

- *Stefan Leible*, La importancia de la autonomía conflictual para el futuro del Derecho de los contratos internacionales;
- *Clelia Pesce*, Sottrazione internazionale di minori nell'Unione Europea: il coordinamento tra il Regolamento (CE) n. 2201/2003 e la Convenzione dell'Aja del 1980.

Varia

- *Alfonso-Luis Calvo Caravaca*, *Javier Carrascosa González*, Notas críticas en torno a la Instrucción de la Dirección General de los Registros y del Notariado de 5 octubre 2010 sobre régimen registral de la filiación de los nacidos mediante gestación por sustitución;
- *María Pilar Canedo Arrillaga*, Notas breves sobre la sentencia del TJUE (Sala Cuarta) de 25 febrero 2010 (Car Trim: asunto C-381/08): los contratos de compraventa y los contratos de prestación de servicios en el Reglamento 44/2001;
- *Federico F. Garau Sobrino*, La literalidad interpretada desde la coherencia del sistema. Las relaciones entre el Reglamento Bruselas I y los convenios sobre materias particulares según el TJUE;
- *Federico F. Garau Sobrino*, Notas sobre la colisión de fuentes de Derecho internacional privado español sobre responsabilidad parental y protección del niño;
- *Natividad Goñi Urriza*, La concreción del lugar donde se ha producido el hecho dañoso en el art. 5.3 del Reglamento 44/2001: nota a la STJCE de 16 de julio de 2009;
- *Carlos Andrés Hécker Padilla*, Denial of justice to foreign investors;
- *Aurora Hernández Rodríguez*, El Derecho aplicable al contrato en ausencia de elección por las partes: el asunto Intercontainer Interfrigo y su repercusión en el Reglamento Roma I;
- *Julia Suderow*, Nota sobre la sentencia del TJCE Akzo Nobel y otros de 14 de septiembre de 2010: límites al privilegio legal de las comunicaciones entre abogados y sus clientes.

See also our previous posts on past issues of the CDT (1/2009, 2/2009 and 2/2010). The journal's website provides a very useful search function, by which contents can be browsed by issue of publication, author, title, keywords, abstract and fulltext.

(Many thanks to Federico Garau, Conflictus Legum blog, for the tip-off)

Promoting a Spanish Law on International Civil Cooperation

In 2000, the Spanish Civil Procedure Act stated that within six months after its entry into force the Government would propose a draft law on international cooperation. Many years have elapsed, and the law, obviously needed, has not yet seen the light. The last Foro de Arbitraje y Litigación Internacional, celebrated in FIDE (Fundación para la Investigación sobre el Derecho y la Empresa) in February, addressed the issue, having F.J. Garcimartín Alférez (professor of private international law) and A. Mejía Errasquín (General Director for International Legal Cooperation and Relations with the Confessions of the Ministry of Justice) as speakers. Numerous references were made to a draft prepared in 2001 by M. Virgos Soriano, professor of private international law, where all the important issues of a future law on international cooperation, especially exequatur, are dealt with. For those interested in this topic here is a summary of the meeting.

Many thanks to Carlos Espósito, of aquiescencia.