AG Opinion on Brussels II bis Regulation

Yesterday, Advocate General *Kokott* delivered her opinion in case C-523/07 (*Applicant A*).

The case, which has been referred to the ECJ by the Finnish *Korkein hallinto-oikeus*, concerns three children who lived originally in Finland with their mother (*A*) and stepfather. In 2001 the family moved to Sweden. In summer 2005 they travelled to Finland – originally with the intention to spend their holidays there. In Finland, the family lived on campsites and with relatives and the children did not go to school there. In November 2005 the children were taken into immediate care and placed into a child care unit. This was unsuccessfully challenged by the mother and the stepfather.

The *Korkein hallinto-oikeus*, which is hearing the appeal, had doubts with regard to the interpretation of the Brussels II *bis* Regulation and referred the following **questions** to the ECJ for a preliminary ruling:

> *1(a) Does Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, (the Brussels IIa Regulation) apply to the enforcement, such as in the present case, of a public-law decision made in connection with child protection, as a single decision, concerning the immediate taking into care of a child and his or her placement outside the home, in its entirety,*
>
> *(b) or, having regard to the provision in Article 1(2)(d) of the regulation, only to the part of the decision relating to the placement outside the home?*
>
> *2 How is the concept of habitual residence in Article 8(1) of the regulation, like the associated Article 13(1), to be interpreted in Community law, bearing in mind in particular the situation in which a child has a permanent residence in one Member State but is staying in another Member State, carrying on a peripatetic life there?*
>
> *3(a) If it is considered that the child's habitual residence is not in the latter*

Member State, on what conditions may an urgent measure (taking into care) nevertheless be taken in that Member State on the basis of Article 20(1) of the regulation?

(b) Is a protective measure within the meaning of Article 20(1) of the regulation solely a measure which can be taken under national law, and are the provisions of national law concerning that measure binding when the article is applied?

(c) Must the case, after the taking of the protective measure, be transferred of the court's own motion to the court of the Member State with jurisdiction?

4 If the court of a Member State has no jurisdiction at all, must it dismiss the case as inadmissible or transfer it to the court of the other Member State?

AG *Kokott* suggested in her **opinion** to answer these questions as follows:

1. Article 1(1) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as amended by Council Regulation (EC) No 2116/2004 of 2 December 2004, must be interpreted as meaning that a single decision ordering a child to be taken into care immediately and placed outside his or her original home in a child care unit is covered by the term "civil matters" for the purposes of that provision, where that decision was adopted in the context of public law rules relating to child protection.

With regard to this first question, the AG could refer to the judgment given by the ECJ in case C-435/06 *(Applicant C*) since the question referred to the Court has essentially been the same. *(See with regard to case C-435/06 our previous posts on the reference, the opinion and the judgment).*

2. A child is habitually resident under Article 8(1) of Regulation No 2201/2003 in the place in which the child – making an overall assessment of all the relevant factual circumstances, in particular the duration and stability of residence and familial and social integration – has his or her centre of interests. Only if no habitual residence in that sense can be established and if no jurisdiction based on Article 12 exists do the courts of the Member State in which the child is present have jurisdiction under Article 13(1) of the

regulation.

Of particular interest are the AG's remarks on the second question which concerns the interpretation of the concept of the child's habitual residence – which is not defined in the Regulation itself. Here, the AG emphasises that the basic idea underlying the rules on jurisdiction in Brussels II *bis* is that the courts of the Member State should have jurisdiction which are best placed to take decisions concerning parental responsibility. And these are – because of proximity – the courts of the Member State in which the child is habitually resident (para. 18). Even though also mere presence may establish proximity to the courts of the respective State, the AG stresses that mere presence does not lead to a relationship of the same quality as habitual residence (para. 20). Thus, criteria must be developed in order to distinguish habitual residence from mere presence.

Taking into consideration the wording and objectives of Brussels II *bis* as well as the relevant multilateral conventions, AG *Kokott* states that "the concept of habitual residence in Article 8 (1) of the Regulation should therefore be understood as corresponding to the actual centre of interests of the child." (para. 38)

As relevant criteria for the distinction between habitual residence and the mere (temporary) presence, the AG designates in particular a certain duration and regularity of residence, which might be interrupted as long as it is only a temporary absence (para. 41 et seq.). Further, the familial and social situation of the child constitute important indicators for habitual residence (para. 47 et seq.).

3. (a) Article 20(1) of Regulation No 2201/2003 allows the courts of a Member State in urgent cases to take all provisional measures for the protection of a child who is present in that Member State, even if the courts of another Member State have jurisdiction under the regulation over the substance of the matter. There is urgency if immediate action is, in the view of the court seised in the State of the child's presence, necessary to preserve the child's welfare.

With regard to this question, the AG stresses that Art. 20 (1) Brussels II *bis* has to be interpreted narrowly since it authorises courts to act which do not have jurisdiction over the substance of the matter (para. 56). Further, the AG clarifies

that there are basically three requirements which have to be taken into consideration with regard to the application of Art. 20 (1): First, the measure may relate only to children who are present in the respective Member State (para. 57). Second, there must be an urgent case (para. 58) and third, Art. 20 (1) permits only provisional measures since the final decision is reserved to the court which has jurisdiction over the substance of the matter (para. 60).

> *(b) Article 20(1) of the regulation allows the taking of the provisional measures that are available under the law of the Member State of the court seised, and those measures need not be expressly designated as provisional measures under national law. It is otherwise for the referring court to determine which measures may be taken under national law and whether the provisions of national law are binding.*
>
> *(c) The regulation does not oblige the court which has taken a provisional measure under Article 20(1) to transfer the case to the court of another Member State with jurisdiction over the substance of the matter. However, it does not preclude the court seised from informing the court with jurisdiction, directly or via the central authorities, of the measures taken.*
>
> *4. A court which under the regulation lacks jurisdiction over the substance of the matter and does not consider any provisional measures under Article 20(1) of the regulation to be necessary must declare that it lacks jurisdiction, under Article 17 of the regulation. The regulation does not provide for a transfer to the court with jurisdiction. However, it does not preclude the court seised from informing the court with jurisdiction, directly or via the central authorities, of its decision.*

See with regard to this case also our post on the reference which can be found here.

Special Issue Rome II Nederlands Internationaal Privaatrecht

The latest issue of the Dutch PIL journal *Nederlands Internationaal Privaatrecht* (2008, no. 4 – published in December) is dedicated to the Rome II Regulation. It includes the following eleven contributions:

M. Wilderspin, The Rome II Regulation; Some policy observations, p. 408-413

Xandra Kramer, The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: The European private international law tradition continued. Introductory observations, scope, system, and general rules, p. 414-424

Thomas Kadner Graziano, The Rome II Regulation and the Hague Conventions on Traffic Accidents and Product Liability – Interaction, conflicts and future perspectives, p. 425-429

Andreas Schwartze, A European regime on international product liability: Article 5 Rome II Regulation, p. 430-334

Timo Rosenkranz and Eva Rohde, The law applicable to non-contractual obligations arising out of acts of unfair competition and acts restricting free competition under Article 6 Rome II Regulation, p. 435-439

Dick van Engelen, Rome II and intellectual property rights: Choice of law brought to a standstill, p. 440-448

Aukje van Hoek, Stakingsrecht in de Verordening betreffende het recht dat van toepassing is op niet-contractuele verbintenissen (Rome II) , p. 449-455 (includes English abstract)

Stephen Pitel, Choice of law for unjust enrichment: Rome II and the common law , p. 456-463

Bart Volders, Culpa in contrahendo in the conflict of laws: A first appraisal of Article 12 of the Rome II Regulation, p. 464

Herman Boonk, De betekenis van Rome II voor het zeerecht, p. 469-480 (includes English abstract)

Tomas Arons, 'All roads lead to Rome': Beware of the consequences! The law applicable to prospectus liability claims under the Rome II Regulation, p. 481-487

In case you are interested in contributing to this journal, please contact Xandra Kramer (kramer@frg.eur.nl) (editor-in-chief).

AG Opinion on the Interpretation of Art. 5 (1) Brussels I Regulation

Yesterday, *Advocate General Trstenjak`s* opinion in case C-533/07 (*Falco Privatstiftung und Rabitsch*) was published.

This case is of particular interest since it concerns the interpretation of the notion of "services" (Art. 5 (1) (b) second indent Regulation (EC) Nr. 44/2001 (Brussels I Regulation)) which has not been interpreted by the ECJ in the context of the Regulation so far. Further, with Art. 5 (1) Brussels I Regulation, the case concerns the interpretation of a provision which has been highly discussed in the course of the transformation of the Brussels Convention to the Regulation.

I. Background

The case concerns – briefly worded – proceedings between two plaintiffs, the first being a foundation managing the intellectual property rights of the late Austrian singer "Falco" established in Vienna (Austria), the second being a natural person domiciled in Vienna as well and a defendant domiciled in Munich (Germany) who are arguing about royalties regarding DVDs and CDs of one of the late singer's concerts: While a licence agreement was concluded between the plaintiffs and the defendant concerning the distribution of the DVDs in Austria, Germany and Switzerland, the distribution of the CDs was not included by this agreement. In

the following, the plaintiffs sued the defendant for payment – based, with regard to the DVDs, on the licence agreement and with regard to the CDs on the infringement of their intellectual property rights.

The first instance court in Austria (*Handelsgericht Wien*) assumed its international jurisdiction according to Art. 5 (3) Brussels I Regulation arguing that it had jurisdiction with regard to the infringement of intellectual property rights since the respective CDs were sold inter alia in Austria. Due to the close connection between the claim based on the licence agreement and the claim based on the infringement of intellectual property rights, the court assumed jurisdiction for the contractual claim as well.

The court of second instance *(Oberlandesgericht Wien*), however, held that it had no jurisdiction with regard to the claim based on the licence agreement arguing Art. 5 (1) (a) Brussels I Regulation was applicable. Since the principal contractual obligation was a debt of money, which had to be fulfilled under German law as well as under Austrian law at the debtor's domicile (Munich), German (and not Austrian) courts had jurisdiction. According to the *Oberlandesgericht Wien*, jurisdiction could not be based on Art. 5 (1) (b) Brussels I Regulation either, since the licence agreement did not involve the "provision of services" in terms of the Regulation.

Subsequently, the plaintiffs appealed to the Austrian Supreme Court of Justice (*Oberster Gerichtshof*).

II. Reference for a Preliminary Ruling

Since the *Oberste Gerichtshof* had doubts on the interpretation of Art. 5 (1) Brussels I, it referred the following **questions** to the ECJ for a preliminary ruling:

> *1. Is a contract under which the owner of an incorporeal right grants the other contracting party the right to use that right (a licence agreement) a contract regarding 'the provision of services' within the meaning of Article 5(1)(b) 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 (the Brussels I Regulation)?*
>
> *2. If Question 1 is answered in the affirmative:*

2.1. Is the service provided at each place in a Member State where use of the right is allowed under the contract and also actually occurs?

2.2. Or is the service provided where the licensor is domiciled or, as the case may be, at the place of the licensor's central administration?

2.3. If Question 2.1 or Question 2.2 is answered in the affirmative, does the court which thereby has jurisdiction also have the power to rule on royalties which result from use of the right in another Member State or in a third country?

3. If Question 1 or Questions 2.1 and 2.2 are answered in the negative: Is jurisdiction as regards payment of royalties under Article 5(1)(a) and (c) of the Brussels I Regulation still to be determined in accordance with the principles which result from the case-law of the Court of Justice on Article 5(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the Brussels Convention)?

III. Opinion

1. First Question

In her extensive opinion, AG *Trstenjak* first clarifies that the referring court basically aims to know with regard to the first question whether Art. 5 (1) (b) second indent Brussels I Regulation has to be interpreted to that effect that a contract under which the owner of an incorporeal right grants the other contracting party the right to use that right (a licence agreement) constitutes a contract regarding the "provision of services" within the meaning of this provision – and thus whether a licence agreement can be regarded as a contract on the provision of services in terms of Art. 5 (1) (b) second indent Brussels I Regulation (para. 46).

With regard to this question, the AG states in a first step, that "licence agreement" has to be understood in this context as a contract under which the owner of an incorporeal right grants the other contracting party the right to use that right (para. 48 et seq.).

In a second step, the AG turns to the notion of "services" in Art. 5 (1) (b) second indent Brussels I which does not provide for an explicit definition of this term

(para. 53 et seq.). Here, the AG stresses that – due to the lack of an express definition and the fact that the ECJ has not interpreted the meaning of services in the context of the Brussels I Regulation so far – starting point for an interpretation has to be on the one side the general meaning of this term while on the other side, an analogy to other legal sources might be taken into consideration. With regard to an abstract definition of "services", the AG regards two elements to be of particular significance: First, the term of "services" requires some kind of activity or action by the one providing the services. Secondly, the AG regards it as crucial that the services are provided for remuneration (para. 57).

On the basis of this general definition, the AG holds that a licence agreement cannot be regarded as a contract having as its object the provision of services in terms of Art. 5 (1) (b) second indent Brussels I Regulation (para. 58) since the licensor does not perform any activity by granting the licence. The lincensor's only activity constitutes the signing of the licence agreement and the ceding of the licence's object for use. This, however, cannot, in the AG's view, be regarded as "service" in terms of this provision.

In the following, the AG also turns to primary law in order to examine whether the term of "service" used in primary law can be transferred to the Brussels I Regulation (para. 60 et seq.). This, however, does not lead to a different assessment since, according to the AG, the definition of "services" cannot be transferred to the Brussels I Regulation without restrictions due to the fact that the objectives of the Regulation have to be taken into account – and they differ significantly from the purposes underlying the broad interpretation of "services" in terms of Art. 50 EC aiming at establishing a common market (para. 63).

Of particular interest is the AG's reference to Regulation (EC) No. 593/2008 (Rome I Regulation) (para. 67 et seq.) which is used as an additional argument supporting her opinion: She stresses that – by interpreting the notion of "services" – also the Rome I Regulation has to be taken into consideration in order to prevent an interpretation being contrary to the aims of Rome I since Recital No. 7 of the Rome I Regulation states: "The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 […]". Here, the AG shows with a view to the origin of the Rome I Regulation that an interpretation including licence agreements into the notion of "services" would run counter to the aims of Rome I (para. 69).

2. Third Question

Due to the fact that the AG answers the first question in the negative, she does not deal with the second question, but turns directly to the third question by which the Austrian court basically aims to know whether Art. 5 (1) (a) Brussels I *Regulation* has to be interpreted in continuity with Art. 5 (1) Brussels *Convention* (para. 78 et seq.).

With regard to this question, the AG argues – after explaining in detail the changes Art. 5 has passed through from the Convention to the Regulation (para. 80 et seq.) – that Art. 5 (1) (a) Brussels I Regulation has to be – in view of Recital No. 19 of the Brussels I Regulation according to which "[c]ontinuity between the Brussels Convention and [the Brussels I] Regulation should be ensured […]" – interpreted in the same way as Art. 5 (1) Brussels Convention (para. 87). This approach is supported by the identical wording of both provisions as well as historical arguments (para. 94). Here, the AG pays particular attention to the fact that by means of Art. 5 (1) (b) Brussels I *Regulation* a special provision with regard to contracts concerning the sale of goods and the provision of services was established, while with regard to all other contracts the wording of the first part of Art. 5 (1) Brussels *Convention* was maintained in Art. 5 (1) (a) Brussels I *Regulation* (para. 85).

3. The Advocate General's Conclusion

Thus, AG *Trstenjak* suggests that the Court should answer the questions referred for a preliminary ruling as follows:

1. With regard to the first question, the AG suggests that Art. 5 (1) (b) second indent Brussels I Regulation has to be interpreted as meaning that a contract under which the owner of an incorporeal right grants the other contracting party the right to use that right (licence agreement) does not constitute a contract regarding 'the provision of services' in terms of this provision.

2. With regard to the third question, the AG suggests that Art. 5 (1) (a) and (c) Brussels I Regulation has to be interpreted to the effect that jurisdiction for proceedings related to licence agreements has to be determined in accordance with the principles which result from the ECJ's case law regarding Art. 5 (1) Brussels Convention.

(Approximate translation of the German version of the AG's opinion.)

AG Trstenjak's opinion can be found (in German, French, Italian and Slovene) at the ECJ's website. The referring decision of the Austrian Supreme Court of Justice of 13 November 2007 can be found here under 4Ob165/07d (in German).

Publication: "Studi in onore di Vincenzo Starace"

The Italian publisher *Editoriale Scientifica* (Naples) has recently published a very rich collection of essays in honor of *Vincenzo Starace*, late Professor in the University of Bari, one of Italian leading academics in the field of Public International Law and Private International Law, who passed away in 2006.
The collection, **Studi in onore di Vincenzo Starace**, is divided in three volumes, devoted respectively to Public International Law (I), EU Law and Private International Law (II), and a miscellany of essays on different subjects (III).

The second volume includes the following contributions in the field of conflict of laws and jurisdictions:

- *Tito Ballarino*, Eutanasia e testamento biologico nel conflitto di leggi;
- *Stefania Bariatti* and *Ilaria Viarengo*, I rapporti patrimoniali tra coniugi nel diritto internazionale privato comunitario;
- *Andrea Bonomi*, Sull'opportunità e le possibili modalità di una regolamentazione comunitaria della competenza giurisdizionale applicabile *erga omnes*;
- *Ruggiero Cafari Panico*, Il riconoscimento e l'esecuzione delle decisioni in materia matrimoniale nel nuovo regolamento Bruxelles II bis;
- *Gabriella Carella*, Il titolo esecutivo europeo per i crediti non contestati;
- *Giorgio Conetti*, Giudizi di costituzionalità e successione di norme di conflitto;
- *Giuseppe Coscia*, Legge regolatrice del contratto e norme sulla qualità;

- *Domenico Damascelli*, Il patto di famiglia nel diritto internazionale privato*;*
- *Luigi Fumagalli*, L'esecuzione in Italia degli atti pubblici stranieri;
- *Luciano Garofalo*, Le nuove tecniche interpretative ed il concorso 'atipico' di valori giuridici provenienti da ordinamenti diversi;
- *Antonio Leandro*, La giurisdizione sulla procedura principale di insolvenza di società controllata e il regolamento (CE) n. 1346/2000;
- *Franco Mosconi*, La difesa dell'armonia interna dell'ordinamento del foro tra legge italiana, convenzioni internazionali e regolamenti comunitari;
- *Bruno Nascimbene*, Il matrimonio del cittadino italiano all'estero e dello straniero in Italia. Gli articoli 115 e 116 cod. civ., le norme di diritto internazionale privato e dell'ordinamento dello stato civile;
- *Ferdinando Parente*, I rapporti patrimoniali tra i coniugi e il regime normativo dell'accordo di 'scelta' della legge applicabile;
- *Giuseppina Pizzolante*, La kafala islamica e il suo riconoscimento nell'ordinamento italiano;
- *Francesco Seatzu*, Il procedimento europeo d'ingiunzione di pagamento nel regolamento comunitario n. 1896/2006.

The complete table of contents of the three volumes can be found here.

Title: **Studi in onore di Vincenzo Starace**. 2008 (L-2229 pages).

ISBN: 978-88-6342-019-7. Price: EUR 250,00. Available from Editoriale Scientifica (Naples).

(Many thanks to Antonio Leandro, University of Bari)

Abbott v. Abbott: An Update

As previously mentioned on this site, the case of Abbott v. Abbott continues to look like the U.S. Supreme Court's first attempt to clarify the operation of the Hague Abduction Convention. Last week, the Court invited the views of the new Solicitor General on whether the case should be accepted. While there is no way

to tell whether the SG will urge granting the Petition, or whether the Court will follow that advice, this at least seems to mean that someone at One First Street wants to take a closer look at the Convention.

The briefs in that case, including an amicus brief by the Permanent Bureau urging a grant of the petition, is available at the SCOTUSBlog.

ERA Conference: Complete agenda spring and summer 2009

ERA Conference: Complete agenda spring and summer 2009

In our previous posts we have informed about the ERA conferences for the spring 2009 titled ”Annual Conference on European Insurance Law 2009” and ” Cross-Border insolvency proceedings”. Here are the rest of the conferences for the spring and summer 2009:

Successions and Wills in a European context, Prague, 20-21 Apr 2009

From the conference website: The Czech Ministry of Justice in the framework of the Czech Presidency of the Council of the EU organizes in cooperation with ERA (Dr Angelika Fuchs) a conference titled ”Successions and Wills in a European context”.

The conference will provide an in-depth discussion of the most topical issues regarding succession and wills in a European context. The draft Regulation on Succession and Wills, expected to be issued soon, will serve as the basis of the discussion. A case-study will be presented. The conference will then address the following highly current issues:

- Scope of the instrument: The Regulation will cover jurisdiction, recognition and choice of law. To what extent should property rights be covered? Will foreign property rights unknown to a legal system (e.g. trust) have to be recognised?

- Choice of law: Will the testator be free to choose the governing law? If yes, will there be restrictions to the freedom to choose? What will be the relationship to the rules of compulsory heirship of the legal system otherwise applicable?
- Choice-of-law rule for succession to movable and immovable property: What is the appro-priate connecting factor? Will there be one rule for movables and immovables? Will there be exceptions to that rule? How will the habitual residence test be defined?
- Relationship to dispositions inter vivos: If, and to what extent, will the Regulation affect the validity of dispositions disposed of inter vivos?
- Registration of wills and European Certificate of Inheritance: Will there be a compulsory or an optional system of registration of wills? What will be the scope of a European Certificate of Inheritance?

Practical Issues of Cross-Border Mediation and Mediation Techniques, Trier, 14-15 May 2009

From the conference website: Dr Angelika Fuchs (ERA) organizes in cooperation with the European Judicial Training Network (EJTN), the Council of the Bars and Law Societies of the European Union (CCBE) and the Council of the Notariats of the European Union (CNUE) a conference titled ” Practical Issues of Cross-Border Mediation and Mediation Techniques”.

This conference will concentrate on practical issues of cross-border mediation:

- Interaction between mediation and civil proceedings, especially the impact of the Directive on certain aspects of mediation in civil and commercial matters in the Member States. Topics include the Directive’s scope; cross-border disputes: the inter-State requirement; voluntary or compulsory nature of mediation; mediation’s effect on limitation and prescription periods, and recognition and enforcement of mediation agreements.
- Encouraging mediation. The role of the legal professions, especially the cooperation between lawyers, notaries and judges.
- Quality of mediation services. A practical and continuing training of

mediators is required: life-long learning is essential. In cross-border situations, co-mediation is particularly important. Quality control mechanisms and the added value of the (voluntary) European Code of Conduct for Mediators will be discussed.

- Mediation procedure. The conference will further concentrate on fundamental minimum procedural guarantees for a fair mediation procedure. The European Code of Conduct for Mediators will be looked at in detail.

The conference will include workshops which will address specific areas such as family mediation and consumer mediation.

Summer Course on European Private Law, Trier, 29 Jun-3 Jul 2009

From the conference website: Dr Angelika Fuchs organizes a Summer Course on European Private Law.

Participants will gain an introduction to the following topics:

- European civil procedure: The summer course will present the status quo of civil procedural law on a European level, including the most recent developments. Special attention will be paid to EC legislation and the case law of the European Court of Justice.
- Private international law, especially the new Rome I & Rome II Regulations on the applicable law in contractual and non-contractual obligations.
- Consumer protection, concerning e.g. unfair commercial practices, e-commerce, consumer rights, product safety, product liability.

This course should prove of particular interest to lawyers who wish to specialise in or acquire an in-depth knowledge of European private law. A general knowledge of EU law is suitable but no previous knowledge or experience of European private law is required to attend the course.

Participants will have the opportunity to prepare in advance through an e-learning course via the ERA website, and to deepen their knowledge through case-studies and workshops during the summer course.

A visit to the European Court of Justice in Luxembourg with the opportunity to attend a hearing is an integral part of the programme.

PIL conference in Johannesburg

Please find a call for papers for the third quadrennial international conference on comparative private international law to be held at the University of Johannesburg in South Africa (9-11 September 2009) on www.uj.ac.za/law. Confirmed speakers include Prof C F Forsyth (University of Cambridge) and Prof M M Martinek (University of Saarland).

United States Signs Hague Convention on Choice of Court Agreements

On 19th January, the outgoing State Department Legal Advisor, John Bellinger, signed the Hague Convention (of 30 June 2005) on Choice of Court Agreements on behalf of the United States of America. The USA is the first country to sign the Convention, with Mexico also a party to the Convention through accession. The status table of the Convention can be found on the HCCH website, as well as the preliminary documents, and the explanatory report prepared by Hartley and Dogauchi.

Is this the first of many? Will other countries follow the USA's lead, and sign up to the Convention? I very much doubt it, but you are welcome to disagree with me in the comments.

In Memoriam: Professor Jan Kropholler

Professor *Jan Kropholler,* one of the most renowned German scholars in private international law, has passed away last week.

Only recently *Professor Kropholler* celebrated his 70th birthday. On this occasion, as we have reported, a Festschrift in his honour was published by Mohr Siebeck titled „Die richtige Ordnung“ (*The Right Order*) and presented to him last October at a ceremony at the Max Planck Institute for Comparative and International Private Law in Hamburg.

As the Max Planck Institute expresses in a statement on the occasion of his birthday last year, “[a]s Senior Research Fellow at the Hamburg Max Planck Institute, Kropholler set new standards for private international law and procedure in terms of content, methodology and pedagogy. His textbook on private international law is of particular renown and saw its 6th edition released in 2006. Among Kropholler’s works on international and European procedural law, his commentary on the Brussels I Regulation – published for the eighth time in 2005 – bears special witness to his scholarly achievements.”

A bibliography of *Professor Kropholler’s* published works, as well as further information on his academic career, can be found at the website of the Max Planck Institute in Hamburg.

Foreign Law before the Spanish

Courts: the Need for a Reform

In a previous post (under the title Spanish International Adoption Act, Law 54/2007, of December 28) I stated that, with the exception of the International Adoption Act of 2007, there is no Private International Law Act in Spain. For some years, under the direction of Professor Julio Gonzalez Campos, Spanish academics (almost all of us: we are still relatively few in this country) have been working on a bill of this nature. Sadly, Professor González Campos passed away in 2007, and his death has also brought an end to this endevour. However, many of us, if not all, believe that our autonomous PIL needs to be revised both in civil and procedural matters. A decision on some concrete points should be made with the utmost urgency: that's the case of the system of proof of foreign law before our courts.

In recent years the judicial application of foreign law in Spain has been suffering from a confusing and inconsistent practice before the lower Courts; the Supreme Court and the Constitutional Court have been called to clarify the matter, but the fact is, they themselves have not escaped dissension.

The Spanish regulations on the subject is contained in art. 12.6 CC ("Spanish conflict of laws rules will be applied ex officio"), supplemented by art. 282 LEC 2000 ("Content and validity of foreign law should be proved", and, though proofs are to be carried at the request of the parties, "the court may use any means of finding it deems necessary for the implementation of foreing Law").

The meaning of these articles is doubtful. The respective role of the parties and the judge in the applicability of foreign law are subject to discussion. Another issue under discussion, with particular acrimony, is the following: if foreign law is to be proved by the parties (completely or only to a certain point) , what happens if they fail?.

As for the former doubt, the prevailing view is that foreign law is to be considered as a fact that should be raised and proved by the parties at trial. However, the assimilation of foreign law to a fact is not absolute: it is for the courts to collaborate in its identification. But, what level of proof is required from the parties? In this respect, the Supreme Court sometimes requires strict means of proof and absolute certainty about the content of the law, whilst the Constitutional Court only ask for a "beginning of a proof". Furthermore, how deep should a court be involved in the ascertaining of the foreign law? How is its

knowledge to be acquired? could the court's private knowledge of foreign law overcome the passivity of the parties?

There are up to five Supreme Court rulings regarding the second doubt we have pointed out: whether foreign law should be disregarded if the parties fail to comply with their burden of proof. The main thesis supports the application of Spanish law when foreign law has not been proved. Another view that has also received doctrinal approval is the rejection of the claim (in the merits). The remaining possibilities would be: the rejection of the application (merits would not be considered); the return of the proceedings back to the time when foreign law should have been proved, but wasn't; and an ex officio application of foreign law. None of the solutions are completely satisfactory: in particular, the replacement of foreign law by Spanish law implies breach of the mandatory nature of the conflict of laws rule. As for the rejection of the claim, it is probably contrary to the right to an effective judicial protection: according to the Spanish principles of procedural law, it means that if a party did not allege foreign law, or was unable to prove it, he/she will not be allowed to raise his/her claim again, even alleging and proving foreign law correctly.

In light of the above, our system may surely be said to be of an "open texture"; but, whilst for some Spanish authors this flexibility should be wellcome, for others (ourselves included) it is actually a source of chaos, therefore of legal uncertainty, and it is crying out for an urgent legal reform.