ERA Conference: Complete agenda spring and summer 2009

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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.

ERA Conference: Cross-Border insolvency proceedings

On 26-27 March 2009 a conference on Cross-Border insolvency proceedings will be held at the Academy of European Law in Trier. The abstract reads:

When the assets belonging to an insolvent debtor are situated in different EU Member States, crossborder insolvency will often give rise to conflicts that need to be resolved by applying Regulation (EC) 1346/2000 on Insolvency Proceedings.

The Regulation sets up a legal framework that contributes significantly to the better functioning of the Internal Market. It includes conflict-of-law rules as well as rules on jurisdiction, and provides for uniformity of insolvency proceedings by means of mutual recognition within the EU. The Regulation is one very useful element of facilitating cross-border insolvency cases. By now, national courts

have several years of practical experience with the Regulation. Concerning the interpretation of the Regulation's material provisions, much has been clarified or established through court authorities.

However, much remains unresolved and will be the subject of extensive judicial activity in the future.
The conference will focus on the case law of the Court of Justice of the European Communities, offering an indepth analysis of the recent jurisprudence and discussing cases still pending.

On the second conference day, enterprise groups' insolvencies will be discussed. Finally, the conference will concentrate on recent developments in national insolvency and turnaround laws.

Choice of Law in the American Courts in 2008

Symeon Symeonides has posted the twenty-second instalment of his annual survey on US choice of law decisions on SSRN. Here's the abstract:

> *This is the Twenty-Second Annual Survey of American Choice-of-Law Cases. It covers cases decided by American state and federal courts from January 1 to December 31, 2008, and reported during the same period. Of the 3,249 conflicts cases meeting both of these parameters, the Survey focuses on those of the 1023 appellate cases that may add something new to the development or understanding of choice of law. The Survey is intended as a service to fellow teachers and students of conflicts law, both within and outside the United States. Its purpose is to inform, rather than to advocate.*
>
> *The following are among the cases discussed in this Survey: Two U.S. Supreme Court cases and several intermediate court cases delineating the extraterritorial reach of the Constitution and federal statutes, and one Supreme Court case on the domestic effect of a judgment of the International Court of*

Justice; A New Jersey Supreme Court case abandoning Currie's interest analysis in tort conflicts in favor of the Restatement (Second), and a New Mexico Supreme Court case abandoning the traditional approach in contract conflicts (but only in class actions) and adopting the "false conflict doctrine" of the Restatement (Second); Several cases applying (and one not applying) the law of the parties' common domicile to torts occurring in another state; Cases involving cross-border torts and applying the law of whichever of the two states (conduct or injury) favors the plaintiff; Product liability cases granting forum non conveniens dismissals in favor of alternative fora in foreign countries and those countries' responses by enacting "blocking" statutes; Cases refusing to enforce clauses precluding class-action or class-arbitration; Cases illustrating the race to the courthouse between insurers and their insureds; Cases recognizing Canadian or Massachusetts same-sex marriages, and a case refusing to recognize a Pakistani talaq (unilateral, non-judicial divorce); and a case refusing to recognize a foreign judgment that conflicted with a previous judgment from another country.

The survey is forthcoming in the *American Journal of Comparative Law* (vol. 57, 2009), but you can also download it for free from SSRN. (*Bonus link: here's our item on last year's survey, and here's the one from 2006*.) As always, highly recommended.

ERA Conference: Annual Conference on European Insurance Law 2009

The ERA website informs: On 23 and 24 March 2009 the Annual Conference on European Insurance Law 2009 will be held in Trier at the Academy of European Law. The objective of this conference is to update practitioners on the most recent developments in the field of insurance law pursuant to legislation and

jurisprudence. The Financial Services Action Plan was implemented with a view to improving the single market in financial services, including the insurance market, by allowing insurers to operate throughout the European Union whilst ensuring a high level of consumer protection. Over recent years, legislative measures have been adopted in order to achieve open and secure retail markets as well as sound supervisory structures. The conference will also focus on other relevant measures concerning insurance undertakings and contract law designed for consumer protection, such as:

- Jurisdiction and applicable law in insurance contracts,
- motor insurance,
- insurance mediation,
- Solvency II, the Commission's proposal for a new directive to be adopted in 2009.

This list of topics may be subject to modifications and additions in the final programme to reflect the latest developments.

The Amir of Qatar, a yacht built in New Zealand and sailed to Australia, and the Australian Federal Court

In *Thor Shipping A/S v The Ship "Al Duhail"* [2008] FCA 1842 (5 December 2008) the Australian Federal Court considered damages proceedings in its admiralty jurisdiction against the Ship *Al Duhail*. The proceedings were brought by the owner of a cargo vessel, Thor Shipping, which had been chartered to carry the *Al Duhail* from New Zealand, where it was constructed, to the Seychelles. In fact, in an alleged breach of the charterparty by the charterer, the *Al Duhail* was never

loaded onto the cargo vessel, and was instead sailed from New Zealand to Australia, where it was arrested following the commencement of the proceedings. The writ alleged that the charterparty was entered into by agents of the Amir of Qatar, the Head of State of Qatar. The Amir applied for release of the ship on the bases that the Federal Court's admiralty jurisdiction had not been engaged and that, in any event, he enjoyed head of state immunity.

As to the first point, pursuant to s 17 of the *Admiralty Act* 1988 (Cth), for the admiralty jurisdiction to be engaged, it was necessary that the Amir was the owner, or in possession or control, of the *Al Duhail* at the time the cause of action arose and also at the time of commencement of the proceedings. It was common ground that the latter requirement was made out. However, the Amir contended that at the time the cause of action arose, ie when the charterparty was breached, he was not the owner of the *Al Duhail*.

At the time of breach, the *Al Duhail* was under construction and the agreement with the construction company, governed by English law, provided that title did not pass to the Amir from the construction company until the *Al Duhail* had been accepted by the Amir and all payments had been made. That had not occurred. Thor Shipping asserted, among other things, that title had nevertheless passed to the Amir pursuant to the law of Qatar when the *Al Duhail* was registered in Qatar in the name of the Amir, which occurred before breach of the charterparty. There is Full Court authority for the view that in cases where a ship has been registered, the law of the place of registration governs questions of title, property and assignment of the ship as the *lex situs*: *Tisand (Pty) Ltd v The Owners of the Ship MV "Cape Moreton" (ex "Freya")* (2005) 143 FCR 43; [2005] FCAFC 68. However, in this case, Dowsett J considered it uncertain, in circumstances where it was said that registration itself effected a transfer of title, whether the law governing ownership should be the law of the place of registration (Qatar) or the law of the place where the *Al Duhail* was at the time (New Zealand) or the law applicable to the construction contract (England).

Ultimately, Dowsett J did not have to reach a conclusion on this issue, because he considered that the Amir was entitled to head of state immunity pursuant to the *Foreign States Immunities Act* 1985 (Cth) and the *Diplomatic Privileges and Immunities Act* 1967 (Cth). It was common ground that any relevant immunity of the Amir was that applicable in his private capacity. Pursuant to s 36 of the *Foreign States Immunities Act*, as in the UK, the immunity was that extended by

the *Diplomatic Privileges and Immunities Act* to the head of a diplomatic mission, with such modifications as are necessary. The latter act applies provisions of the *Vienna Convention on Diplomatic Relations*as Australian law. In particular, it applies art 31, which provides for a general immunity from civil jurisdiction, subject to certain exceptions none of which were relevant in this case. Dowsett J rejected Thor Shipping's contention that the effect of art 39 was to apply the immunity to the Amir in his private capacity only when in Australia. That article relevantly provides:

> *(1) Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.*
>
> *(2) When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.*

Dowsett J concluded:

> *The error in the plaintiff's submission is the characterization of article 39 as a geographical limitation upon diplomatic immunity. In fact, it is designed to give immunity whilst the relevant diplomatic agent is in post, whether or not he or she is in the receiving state. It commences upon arrival in that state for the purpose of taking up the post, and terminates upon completion of his or her functions and departure. The geographical references in [art] 39 reflect the nature of the diplomatic agent's duties which generally require that he or she be in the relevant country in order to perform them. However he or she enjoys immunity whilst in post, regardless of location. It is that degree of immunity which must be extended to heads of state pursuant to s 36 of the [Foreign States Immunities Act].*

This is consistent with the approach to art 39 adopted by Lord Browne Wilkinson

and Lord Goff of Chieveley in the House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 3]* [2000] 1 AC 147; [1999] UKHL 17.

Assistant in Private International Law in Luxembourg

The Faculty of Law of the University of Luxembourg is seeking to recruit an Assistant (PhD student) in Private International Law, Comparative Law or Civil Law. This is a distinct position from the one I reported on earlier.

The candidate should be a PhD student who will be expected to work on his doctorate, to teach a few hours per week (one to three) and to contribute to research projects in private international law or in civil law. It is a 2-year fixed-term contract, renewable once.

The full text of the advertisment can be found here (only in French for the time being). The deadline for the application is 10 February 2009.