Deadline for Submission of Abstracts – Journal of Private International Law Conference 2007

Call for Papers DEADLINE NOTICE

for the Journal of Private International Law Conference 2007

to be held at the **University of Birmingham on 26th -27th June 2007**

The deadline for submission of an abstract of a proposed conference paper is **20th December 2006**, at which time all submitted abstracts will be considered by the editors. Vacancies for speaking at the conference can not be guaranteed after the deadline.

Please see here for details on submitting an abstract.

Graveson Memorial Lecture at King's College, London

A big event will be taking place tomorrow at King's College London:

The Graveson Memorial Lecture 2006 in memory of Professor R H Graveson CBE QC

Some Judgments on Judgments : A View from America

by Professor Linda J Silberman Martin Lipton Professor of Law, New York

University, School of Law

The Chair will be taken by The Rt Hon Lord Justice Auld

17.30 Wednesday 13 December 2006, King's College London, Weston Room, Maughan Library, Chancery Lane, London WC2

- Admission free without a ticket
- All interested welcome to attend

The Threat of Forum Shopping

Peter Frost and Anne Harrison (*Herbert Smith*) have written a short piece in the new edition of The Lawyer (Lawyer 2006, 20(48), 21) entitled "**Company Uniform**", which:

> *Considers the need for multinational companies to ensure that the they are protected from the threat of being sued by employees based outside the UK and employees based in the UK suing them in non-UK jurisdictions. Discusses the jurisdictions of the UK, US, Germany, and France. Notes reasons for forum shopping.*

The full article can be found online.

Norwegian Supreme Court of Appeals on the Lugano Convention

Art 16(1)(a)

The Norwegian Supreme Court of Appeals has recently handed down a judgment on the Lugano Convention Art 16(1)(a). The decision (Norsk Höyesterett (kjennelse)) is dated 2006-09-07, was published in HR-2006-01547-U – case no. 2006/1310 and is retrievable from here.

Facts and contentions
The facts and contentions of the case were the following. In 2003, C and his cohabitant A bought a house in Spain. A died 15 January 2004. Serving the decedent estate on 21 June 2005 with a subpoena in the forum (Oslo tingrett) at the place of the decedent estate´s domicile in accordance with the Norwegian Civil Procedural Law of 13 August 1915 nr 6 (Lov om rettergangsmaaten for tvistemaal) § 30, C claimed the joint ownership dissolved in accordance with the Law of Joint Ownership of 18 June 1965 nr. 6 (Lov om sameige) § 15. C extended his claim on 29 September 2005 and contended to buy the decedent estate out of the joint ownership in accordance with an agreement between C and A of 14 August 1997. The decedent estate contended, first, there was no agreement on buy out, and, second, the forum (Oslo tingrett) at the place of the decedent estate lacked adjudicatory authority. Therefore, the decedent estate asserted the court must reject to hear the case and subsequently dismiss the case from becoming a member of the Norwegian adjudicatory law system.

Legal basis
The relevant provision for determining the adjudicatory authority of Norwegian Courts was the Lugano Convention Art 16(1)(a). That provision reads:

> *"The following courts shall have exclusive jurisdiction, regardless of domicile: (1) (a) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated;"*

In general, the legal basis for conferring, delimiting and thus both attribute and exclude adjudicatory authority to Norwegian courts is regulated by chapter 2 of the Norwegian Civil Procedural Law of 13 August 1915 nr. 6 (Lov om rettergangsmaaten for tvistemaal) where § 36a decides that the Norwegian Civil Procedural Law Chapter 2 is limited by "agreements with a foreign state". Such

an agreement is the Lugano Convention, which was ratified by Norway on 2 February 1993 and adopted and implemented by incorporation as law of 8 January 1993 nr. 21 (Luganoloven). The law entered into force on 1 May 1993 and regulates international civil and commercial matters between persons domiciled within EFTA-States, and between persons domiciled in an EFTA-State and an EU-State.

Court instances and conclusions

The decisions of the court of first and second instance as well as the Supreme Court of Appeals were as follows. The court of first instance ("Oslo tingrett"), in its decision on 14 October 2005, attributed adjudicatory authority to hear the case. The decedent estate appealed to the court of second instance ("Borgarting lagmannsrett"), which on 23 January 2006 decided, first, the decedent estate was obliged to pay C´s court costs only for the proceedings before the court of second instance, and, second, to attribute adjudicatory authority to Norwegian courts. Hence, the court of second instance sent the case back to the court of first instance to be heard. The decedent estate appealed to the Supreme Court of Appeals, which on 29 March 2006, rejected the judgement of the court of second instance and returned the case to that court for adjudication. The court of second instance decided on 30 June 2006, first, the decedent estate was not obliged to pay C´s court costs, and, second, to attribute adjudicatory authority to Norwegian courts and send the case back to the court of first instance to hear the case. The decedent estate appealed that decision to the Supreme Court of Appeals contending Norwegian courts lacked adjudicatory authority. The Supreme Court of Appeals was, in accordance with the Norwegian Procedural Law (tvistemålsloven) § 404, competent to hear questions pertaining to procedure and interpretation, and the appeal to the Supreme Court of appeals concerned the interpretation of the court of second instance on the Lugano Convention Art 16(1)(a). Hence, the Supreme Court of Appeals was competent to test the correctness of the interpretation of the court of second instance on the Lugano Convention Art 16(1)(a). The Supreme Court of Appeals agreed with the lower instances on adjudicatory authority being attributed to Norwegian courts, and subsequently rejected the appeal from decedent estate. Hence, the case was sent back to the court of first instance.

Ratio decidendi of the Supreme Court of Appeals

In the following, the rationale of the Norwegian Supreme Court will be described.

- First, the Supreme Court of Appeals concluded, with support from the judgement of the Norwegian Supreme Court in Rt-2000-654, the Lugano Convention in material scope was applicable to the dissolution of the joint ownership in accordance with article 1 since the dissolution of joint ownership would entail a sale of the property in question, which did not fall under the scope of article 1 nr. (1), where rights arising out of wills and succession are excluded from the material scope of the Lugano Convention.

- Second, the Supreme Court of Appeals introduced the wording of the Lugano Convention Art 16, which, first, the court stressed, concerns exclusive jurisdiction for certain courts, and, second, the courts of the Contracting State in which the property is situated have such exclusive jurisdiction in accordance with that article paragraph (1)(a) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property.

- Third, the Supreme Court of Appeals stated that the notion "rights in rem" is to be interpreted autonomously, and independent from national conceptions of that notion in each Contracting State. On the concept of autonomous interpretation, the Supreme Court of Appeals referred to its judgement in Rt-2006-391, paragraph 20 and 21, and also to the judgement of 18 May 2006, case C-343/04, Land Oberösterreich vs EZ as by the European Court of Justice.

- Fourth, the Supreme Court of Appeals accentuated the importance of Art 16 as being an exception to the main rule in Art 2, the article must not be interpreted wider than the limits of its aim and purpose. In that respect, the Supreme Court of Appeals referred to the judgement of 5 April 2001, case C-518/99 Gaillard vs Chekili and the judgement of 18 May 2006, case C-343/04, Land Oberösterreich vs EZ as by the European Court of Justice on the corresponding article in the Brussels Convention. Thereupon, the Supreme Court of Appeals inserted paragraph 28 of the Danish version of the latter judgement, which in English reads:

"as regards the objective pursued by Article 16(1)(a) of the Brussels Convention, it is clear both from the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1) and the consistent case-law of the Court that the essential

reason for the exclusive jurisdiction of the courts of the Contracting State where the property is situated is that the court of the place where property is situated is best placed to deal with matters relating to rights in rem in, and tenancies of, immovable property (see, in particular, Case 73/77 Sanders [1977] ECR 2383, paragraphs 11 and 12).”

- Fifth, the Supreme Court of Appeals inserted the Danish version of paragraph 29 and 30 of the judgement of 18 May 2006, case C-343/04, Land Oberösterreich vs EZ as by the European Court of Justice. Those paragraphs read in English:

“29 As regards, in particular, disputes concerning rights in rem in immovable property, they must generally be decided by applying the rules of the State where the property is situated, and the disputes which arise frequently require checks, inquiries and expert assessments which have to be carried out on the spot, so that the assignment of exclusive jurisdiction to the court of the place where the property is situated, which for reasons of proximity is best placed to ascertain the facts satisfactorily, satisfies the need for the proper administration of justice (see, in particular, Sanders, paragraph 13, and Reichert and Kockler, paragraph 10).”

“30 It is in the light of the interpretative principles thus recalled that the Court held that Article 16(1)(a) of the Brussels Convention must be interpreted as meaning that the exclusive jurisdiction of the courts of the Contracting State in which the property is situated does not encompass all actions concerning rights in rem in immovable property, but only those which both come within the scope of the Brussels Convention and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide the holders of those rights with protection for the powers which attach to their interest (Reichert and Kockler, paragraph 11).”

- Sixth, the Supreme Court of Appeals quoted paragraph 17 of the judgement of 5 April 2001, case C-518/99 Gaillard vs Chekili as by the European Court of Justice where it is stated that:

"the difference between a right in rem and a right in personam is that the former, existing in an item of property, has effect erga omnes, whereas the latter can only be claimed against the debtor (see the judgment in Lieber, paragraph 14)."

- Further, The Supreme Court of Appeals clarified that the Chekili-case concerned an action for rescission of a contract of sale of immovable property and claim for damages for rescission, which clearly did not concern rights in rem in accordance with the Brussels Convention Article 16(1)(a).
- Furthermore, the Supreme Court of Appeals referred to the judgement of 17 May 1994, case C-294/92 Webb vs Webb as by the European Court of Justice, which concerned proceedings to obtain a declaration that a son holding the flat for the exclusive benefit of the father and that in that capacity he is under a duty to execute the documents necessary to convey ownership of the flat to the father. The Supreme Court of Appeals inserted the Danish version of paragraph 15 of that judgement, which in English reads:

"The father does not claim that he already enjoys rights directly relating to the property which are enforceable against the whole world, but seeks only to assert rights as against the son. Consequently, his action is not an action in rem within the meaning of Article 16(1) of the Convention but an action in personam."

- Seventh, against the preceding considerations, the Supreme Court of Appeals concluded that the claim for dissolution of the joint ownership did not fall under the scope of the Lugano Convention Art 16(1)(a) as conceived as a right in rem under that article. The Supreme Court of Appeals defined the question before the court as a question of whether or not the conditions for dissolution of the agreement on joint ownership were fulfilled, which in turn may be regulated by a contract or by law. Hence, that claim must be directed against those taking over the part of the joint ownership previously held by the deceased. Therefore, the Supreme Court of Appeals held that the claim could not be directed against anyone since the claim for dissolution of the joint ownership did

not follow from the rights of ownership of the property, which if it did, could be directed against anyone. Reiterating the relatively narrow scope of the exclusive jurisdiction of courts in accordance with the Brussels Convention Art 16(1)(a), the Supreme Court of Appeals reaffirmed that article, and also the parallel article in the Lugano Convention, being an exception to the main rule laid down in Art 2, must not be interpreted wider than the limits of its aim and purpose, as follows by case-law of the European Court of Justice and by legal theory.

- Hence, the Supreme Court of Appeals agreed with the lower instances that the Lugano Convention Art 16 was inapplicable (and therefore not attributing adjudicatory authority to Spanish courts), and attributed adjudicatory authority to Norwegian courts at the place of the domicile of the defendant. Subsequently, the Supreme Court of Appeals rejected the appeal from decedent estate and sent the case back the court of first instance.

The court decision (Norsk Höyesterett (kjennelse)) is dated 2006-09-07, was published in HR-2006-01547-U – case no. 2006/1310 and is retrievable from here.

The American Journal of Comparative Law, 2006 American National Report

The 2006 American National Report, published yearly by the The American Society of Comparative Law, is now in print. The Society has as its laudable goal to "promote the comparative study of law and the understanding of . . . private international law," and the recent Report is no exception. In pertinent part, the Table of Contents is as follows:

American Law in the 21st Century: U.S. National Reports to the XVIIth International Congress of Comparative Law

Edited by John C. Reitz and David S. Clark

Preface by John C. Reitz & David S. Clark

American Participation in the Development of the International Academy of Comparative Law and Its First Two Hague Congresses by David S. Clark

SECTION II: Civil Law, Procedure, and Private International Law

- *New Developments in Succession Law* by Ronald J. Scalise, Jr.
- *Parenthood in a Time of Transition: Tensions between Legal, Biological, and Social Conceptions of Parenthood* by David D. Meyer
- *The Boundaries of Property Rights: La Notion de Biens* by Alain A. Levasseur
- *Estoppel and Textualism* by Gregory E. Maggs
- *Pure Economic Loss in American Tort Law: An Unstable Consensus* by David Gruning
- *Contracts Subject to Non-State Norms* by Symeon C. Symeonides
- *New Experiences of International Arbitration in the United States* by Christopher R. Drahozal
- *Recognition of Same-Sex Legal Relationships in the United States* by Peter Hay
- *The Civil, Criminal and Disciplinary Liability of Judges* by John O. Haley
- *Access to Justice, Costs, and Legal Aid* by James P. George
- *Agriculture and the Polluter Pays Principle* by Ved P. Nanda

Information on how to order a copy, or to obtain information about the Society's other publications, seminars and activities, is available on its website.

The Impact of Mutual Recognition and the Country of Origin

Principle on the Internal Market

There is a French article in the new issue of the Journal du Droit International by Mathias Audit (*University of Caen, France*) entitled, ""**Régulation du marché intérieur et libre circulation des lois**". Professor Audit has kindly summarised the thrust of the article for us:

> *Since the Cassis de Dijon case, an original regulatory tool of the internal market has been developed in EU Law. It is founded on the idea that an economic activity developed on the ground of the law of a member state could be extended in other member states' territory following provisions of its law of origin. In other words, free movement of goods, services or capitals should imply a similar transborder movement of rules belonging to the state they come from.*
>
> *Freedom of movement would therefore be extended to legal rules. The mutual recognition principle is the first illustration of this particular kind of regulatory tool. More recently, it also appeared in the so-called country of origin principle.*
>
> *This study tends to evaluate the regulatory impact of these two principles on the internal market. This implies to examine the relations between them and private international law. The important function given to the law of origin by the two European law principles should either disrupt or revitalize classical mechanisms of conflict of laws.*

Those of you with LexisNexis access should be able to download it from there.

Jurisdiction over Defences and Connected Claims

There is a case note in the latest issue of the *Lloyd's Maritime & Commercial Law Quarterly* (L.M.C.L.Q. 2006, 4(Nov), 447-452) by Adrian Briggs (*Oxford*

University) on "**Jurisdiction over Defences and Connected Claims**", which:

> *Criticises the interpretation by the European Court of Justice of the provisions of Council Regulation 44/2001 allowing similar cases to be heard together to avoid irreconcilable differences in precedent, where they refused to hear claims together in the cases of Gesellschaft fur Antriebstechnik mbH & Co KG (GAT) v Lamellen und Kupplungsbau Beteiligungs KG (LuK) (C-4/03) and Roche Nederland BV v Primus (C-539/03).*

German Federal Supreme Court: Ban on Divorce may infringe German Public Policy

The German Federal Supreme Court has held in its judgment of 11 October 2006 (XII ZR 79/04) that the non-availability of divorce under the applicable law may violate Art. 6 Basic Law which protects marriage and the family, and therefore German public policy (Art. 6 Introductory Act to the Civil Code (EGBGB)). With this decision the Federal Supreme Court set aside the judgment of the lower court (Court of Appeal Karlsruhe, judgment of 23 April 2004 – 5 UF 205/03)) which did not regard public policy as violated, thereby departed from its own former case law.

The Court sets forth *inter alia* that the public policy clause was not immutable, but had rather to be seen in the context of the contemporary legal order. Therefore it was subject to the transition of moral concepts. The Court refers for supporting the theory that value propositions had changed to the fact that hardly any State does not provide for the possibility of divorce nowadays (in the European Union the only State not allowing divorce is Malta). Further the Court stresses that the German Basic Law proceeds on the concept of a secular marriage subjected to civil law. Part of this marriage concept was also the possiblity to reattain one's freedom to remarry – by divorce.

The full judgment is available on the Federal Supreme Court's website. The judgment of the Court of Appeal Karlsruhe can be found in IPRax 2006, 181 including an annotation by *Thomas Rauscher* at p. 140.

A Farewell to Cross-Border Injunctions?

Annette Kur (Max Planck Institute for Intellectual Property, Competition and Tax Law) has written an article in the latest issue of the International Review of Intellectual Property and Competition Law (IIC 2006, 37(7), 844-855) entitled, "**A Farewell to Cross-Border Injunctions? The ECJ Decisions GAT v. LuK and Roche Nederland v. Primus and Goldenberg**". The abstract states [links to the judgments have been inserted]:

> *The two ECJ judgments of 13 July 2006 – GAT v. LuK and Roche Nederland – have stirred much concern in the patent community. On the basis of its reasoning, which is amazingly brief both in view of the complexity of the issues decided and the length of the time it has taken the court to ponder about its decisions, it was ruled that contrary to practice presently established in some Member Countries, the courts in the country of registration are exclusively competent to adjudicate validity, even when it only arises as an incidental matter. It is also not possible to join claims against affiliated companies for coordinated infringement of European bundle patents before the courts in the country where the principal office steering the activities has its seat.*

You can see our summary of GAT v Luk here. You may also be interested in reading the contemporary ECJ case of Reisch Montage AG v Kiesel Baumaschinen Handels GmbH (13 July 2006), which is summarised here.

Federal Council of Germany adopts Resolution on Rome III Proposal

The Federal Council of Germany (*Bundesrat*) has adopted a resolution on the Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters ("**Rome III**").

The Federal Council adopts – in contrast to the UK and Ireland (see our older post) – in principle a positive attitude towards the proposal and welcomes the harmonisation of choice of law rules on divorce. However, the Federal Council makes also some reservations concerning the concrete approach. In particular there are criticisms that the proposal did not facilitate sufficiently a synchronism between jurisdiction and choice of law rules. Such a synchronism, which should be achieved by choosing the same connecting factors as well as the same hierarchy with regard to jurisdiction rules as well as choice of law rules, is regarded as a possibility to enhance the quality of judicature since then the *lex fori* would be applied in all cases which would lead to a speeding up of proceedings due to the fact that expert opinions would not be necessary anymore.

With regard to the individual provisions of the proposal the Federal Council took *inter alia* the following points of view:

1.) Art. 1 (2) Proposal (Art. 3a (1) new Regulation)

- The possibility of choice of court agreements is welcomed.
- With regard to the possibility to choose a court of the place which has been the spouses' last common habitual residence for a minimum period of three years it is remarked critically that in come cases a sufficient link to the present situation of the spouses might be lacking.
- In general Art. 3a (1) is criticised for not facilitating a sufficient synchronism with the rules on jurisdiction.

2.) Art. 1 (2) Proposal (Art. 3a (2) new Regulation)

- The possibility to conclude a jurisdiction agreement simply in written form is criticised. For the sake of legal certainty and the protection of the weeker party a notarial documentation of the choice of court agreement is suggested.

3.) Art. 1 (7) Proposal (Art. 20a (1) new Regulation)

- The possibility of choice of law agreements is welcomed.
- The importance of a synchronism between jurisdiction rules and choice of law rules is stressed.
- Art. 20a (1) (d): Since the applicable law was unclear if the spouses choose the law of the Member State "where the application is lodged" at the beginning of their marriage, the possibility to choose the law of this State should be restricted to a specified time.

4.) Art. 1 (7) Proposal (Art. 20b new Regulation)

- According to the Federal Council, priority should be given to "nationality" as the connecting factor since it was more stable than "habitual residence" and easier to ascertain – in particular in view of the increasing international mobility.
- Further it is noted critically that, according to the wording of Art. 20b, the applicable law is mutable – even after the divorce proceeding has been instituted – which was contrary to legal certainty. Therefore it is suggested that the applicable law should be immutable as soon as the divorce proceeding has been instituted. Concerning the question when a court shall be deemed to be seised a reference to Art. 16 Brussels II *bis* is suggested.

5.) Art. 1 (7) Proposal (Art. 20e new Regulation)

- The inclusion of a public policy reservation is supported.

The full resolution (Drs. 531/06) of 3 November 2006 is available here.