Guest Editorial: Dickinson on Trust and Confidence in the European Community Supreme Court?

Throughout 2008, CONFLICT OF LAWS .NET will play host to twelve guest editors: distinguished scholars and practitioners in private international law, who have been invited to write a short article on a subject of their choosing. It is hoped that these guest editorials will provide a forum for discussion and debate on some of the key issues currently in the conflicts world, and I would very much encourage everyone to post comments.

The first editorial is on "**Trust and Confidence in the European Community Supreme Court?**" by Andrew Dickinson.

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Trust and Confidence in the European Community Supreme Court

Under Article 10 of the EC Treaty, the relations between the Member States and the Community institutions are governed by a principle of loyal co-operation (Case C-275/00 *Commission v First NV* [2002] ECR I-10943, para 49). In the area of private international law, now within Title IV of the EC Treaty, that principle has manifested itself in the relationship of mutual trust between Member States'

judicial systems in the application of the Brussels I Regulation and its predecessor Convention (Opinion 1/03, *Lugano Convention* [2006] ECR I-1145, para 163; Case C-159/02 *Turner v Grovit* [2004] ECR I-3565, para 72). To a certain degree, that relationship is, of course, a fiction. Some Member State courts are unwilling to trust certain of their continental cousins, whose reputation (deserved or undeserved) precedes them. Others are wholly undeserving of the fiduciary responsibility (see Case C-7/98, *Krombach v Bamberski* [2000] ECR I-1935).

Importantly, however, the principle of loyal co-operation not only requires the Member States to take all measures necessary to ensure the application and effectiveness of Community law, but also imposes on the Community institutions reciprocal duties of sincere co-operation with the Member States (*Commission v First NV*, above). Accordingly, a relationship of "common trust" supposedly exists between the Member States, on the one hand, and the European Court of Justice, on the other, in the performance of the latter's primary function in ensuring that in the interpretation and application of the treaty the law is observed (EC Treaty, Art 220). In this connection, the question arises: "Is the Court of Justice really deserving of our trust?"

Three reasons, in particular, justify hesitation before giving an affirmative answer to that question. The first concerns the judicial, administrative, financial and procedural resources available to the Court. The current restriction on the number of judges and Advocates-General under the EC Treaty (Arts 221-222) inevitably restricts the number of cases that can be heard, particularly if (as is currently the case) the procedural rules entitle intervention by other interested parties and require a fixed, multi-layered procedure to be followed (ECJ Statute, Arts 20 and 23). Further, as the President of the Court of Justice has noted "the accelerated procedure laid down under Article 104a of the Rules of Procedure of the Court is not suited for dealing adequately with a high number of references for a preliminary ruling in areas such as visas, asylum and immigration, or judicial co-operation in civil and criminal matters" (see Council document 11759/1/07 REV 1 (en), p 3).

The result, inevitably, is delay in the administration of justice, a delay which is all the more important in situations in which the private rights and obligations of natural and legal persons are directly at stake. By way of example, of the four decisions of the ECJ in 2006 concerning the Brussels Convention, two (Case C-4/03, *GAT* and Case C-539/03, *Roche Nederland*) had been referred to the ECJ

in 2003. Little wonder, therefore, that a reference to the Court is seen in some quarters as a useful way to gum up proceedings (a "Luxembourg torpedo", perhaps) and focus the claimant's mind on settlement.

Happily, the ECJ has itself on more than one occasion taken the initiative in proposing amendments to its statute and rules to create a more streamlined and flexible procedure for certain references for a preliminary ruling in the area of freedom, security and justice (see Council documents 13272/06; 17013/06; 11597/1/07 REV 1 (en); 11824/07). Unfortunately, it appears that the Council and the Member States have yet to act on that initiative.

The second reason concerns the expertise of the Court in matters of private law, and private international law in particular. Thus, the potted biographies of the current members of the Court appearing on the curia website suggest that significantly less than half have any experience of private practice. Unsurprisingly, the background of most lies in the areas of public and European law, and only two CVs (those of the judges from Slovenia and Romania) refer to private international law. This suggests a significant imbalance, particularly given the increasing prominence of "private law" instruments in the Community *acquis*.

The third reason, arguably the most troubling, concerns the unfavourable impression given by the Court's reasoning in recent cases in this area, particularly those concerning the European jurisdiction instruments. Thus, the Court has appeared unconcerned by arguments raised concerning encouragement of abusive practices by litigants (*Turner*, above, para 53) and consequential difficulties in the due administration of justice (Case C-281/02, *Owusu v Jackson* [2005] ECR I-1383, paras 44-45). Suffice it to observe, to use one of the ECJ's favoured expressions, it is not so much the fact that these arguments were rejected as the manner in which the Court curtly swept them under the carpet. More recently, in Case C-98/06, *Freeport v Arnoldsson* (10 November 2007), the ECJ refused to acknowledge the doubts which it had generated through a careless (and unnecessary) comment in its judgment in its earlier decision in the *Réunion* case ([1998] ECR I-6511, para 50), seeking instead to explain away the comment on an implausible basis (see here for the discussion on this website). Had the Court said "we went further than both the decision and the terms of the 1968 Convention required" or even "we went further than the decision required and we can see why it has caused confusion and dissatisfaction in some quarters", its decision in *Freeport* would not have raised doubts. By deploying a judicial sleight

of hand, however, the Court calls into question, once again, whether it is deserving of our common trust as the arbiter of an increasingly broad civil justice regime under EC law.

Like the principle of mutual trust in other Member State courts which the ECJ has emphasised, it is a fiduciary relationship from which the "beneficiaries" are not free to withdraw. But the importance of the Court's role in our personal and professional lives is too important to allow the re-writing of history to pass without remark, particularly at a time when the ECJ is likely to exercise an increasingly significant role in the area of private law, as a result both of the recent tide of legislation under Title IV (the legacy of the rush to exercise competences created by the Treaty of Amsterdam and the Commission's scoreboard turning activity in the early years of this century) and the intended removal by the Reform Treaty of the restrictions (currently, EC Treaty, Art 68) on the right of lower Member State courts to refer cases for preliminary ruling on a question of EC law. Improvements in the Court's procedural rules (see above) may address some of the problems, but it is submitted that a more fundamental institutional reform is required. One option, which may merit further thought (and on which comments would be welcomed) would be to create a specialist "civil and commercial court" using the power conferred by Art 225a [256, post-Reform Treaty], with specifically tailored procedures and judges chosen for their expertise in, and sensitivity to, private law issues and the resolution of disputes between private parties. Absent reform of this kind, Europe's supreme court may acquire a reputation as a court of injustice, not of Justice.

(The February Guest Editorial will be by Professor Jonathan Harris; details to follow.)