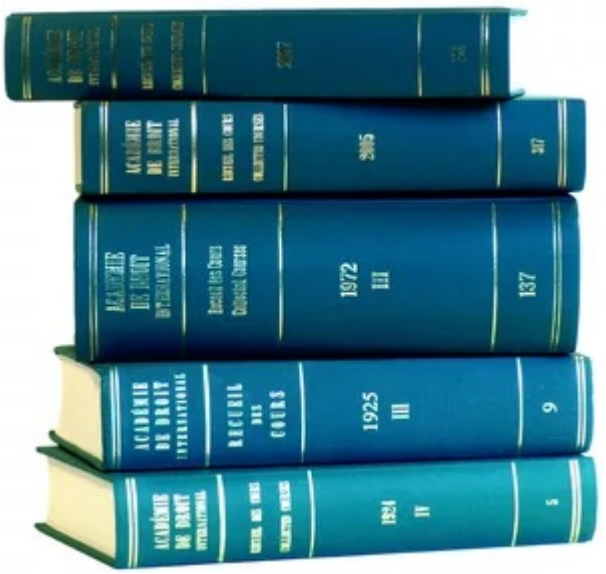
Esplugues on New Dimensions in the Application of Foreign Law by Courts (and Arbitrators) and Non-Judicial Authorities



The issue of “foreign law” and its application, long considered essential to the functioning of private international law (PIL), continues to trigger interesting discussions and debates.

In this context, Professor Dr. Carlos Esplugues (University of Valencia) has recently published a special course entitled *New Dimensions in the Application of Foreign Law by Courts (and Arbitrators) and Non-Judicial Authorities* in the *Collected Courses of the Hague Academy of International Law – Recueil des cours*, Volume 449, which offers new perspectives on this long-discussed topic.

In this course, Prof. Esplugues discusses the traditional state-centred and binary ("domestic vs. foreign") perspective and views it as outdated. He argues that the application of foreign law cannot be treated as a single, unified reality and that understanding the topic requires a broader, "propedeutic" approach that takes into account the functioning of PIL as a system with internal contradictions, pressures, and limitations.

The blurb reads as follows:

Private international law is a field of law that is particularly permeable to its environment. This openness to the outside world has historically manifested itself in the question of the application of foreign law, the answers to which, far from being strictly legal, have also reflected political, economic and geostrategic reasons. Starting from this premise, the course will, firstly, assess the validity of the equation "foreign law = foreign State private law", based on the triple idea of the reformulation of the role of the State at the national and international levels, the acceptance – even encouragement – by the State of the presence of private providers of legal services, and the reappearance of normative realities outside the State, which enjoy varying degrees of acceptance and sympathy. Second, it analyses the usual incoherence between theoretical positions on the nature of applicable law and their practice in most places in the world. This is done, thirdly, overcoming the traditional US-Eurocentric approach to the subject by opening up the study to the responses of a large number of jurisdictions outside the US and Europe, where the future of the discipline will be decided.

The table of contents, in its main lines, is as follows:

Introduction. A polymorphic issue requiring a global and asymmetric approach

Chapter I. Beyond the legal discourse: Geopolitics, Private International Law and the admission of foreign law

1. Those early days when PIL did not exist

2. The emergence of the first PIL responses
3. A step further: The development of the principle of comity (and vested rights)
4. The paths diverge: Continental Europe, Anglo-Saxon countries and Ibero-America
5. Diving into the fog: Admitting, as a rule or exception, the possible application of foreign law

Chapter II. The playing field for foreign law: The pier and the quicksand
1. First: The changing terrain for foreign law
2. Second: The end of the State's judge as the sole actor in the process of applying foreign law
3. Third: The evolving and relative meaning of "application" of foreign "law"
4. A slippery issue and the fluctuating reality of PIL: Not such a beautiful friendship

Chapter III. The nightmare in practice: How is foreign law applied?
1. The application of foreign law by national authorities
2. The system in practice: The link between the treatment of foreign law before national authorities and its legal, factual or hybrid consideration
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5. A fully particular world: The application of the law governing the substance of the dispute by the arbitrators

Epilogue. The never-ending story . . . until the consolidation of AI?

Bibliography