Third Issue of 2008's Revue Critique Droit Int'l Privé

The third issue of French *Revue Critique de Droit International privé* for 2008 will be released shortly. It will include four articles, all relating to conflict issues.

In the first article, Charalambos Pamboukis, who is a professor at the university of Athens, Greece, explores the renewal and metamorphosis of recognition as a method to address conflicts problems (*La renaissance-métamorphose de la méthode de la reconnaissance*). The English abstract reads:

> *The recent renewal of a methodology of recognition is the result of two factors. First, a political factor. Globalisation requires international coherence for private relationships, while the construction of Europe reconstitutes a community of laws. A paradigm change emerges. Second, a technical factor. Traditional conflict rules are not adapted to the recognition of legal relationships which already exist. The characteristic of the method of recognition is its function of confirmation and reception, and its object, which is a concrete, pre-existing legal relationship. It excludes any recourse to the conflict rule, but it does not necessarily represent an underhand form of lex forism nor does it signify reverse discrimination. But its scope is still uncertain, since it covers relationships which have been consecrated by an official but created by private actors. The latter distinction could contribute to clarify the much debated issue.*

In the second second article, Marie-Elodie Ancel wonders what the Rome I Regulation will change for distribution contracts (*Les contrats de distribution et la nouvelle donne du règlement Rome I*). The author, who is a professor of international private law at Paris Val-de-Marne (Paris XII) university, has kindly provided the following abstract:

> *According to French case law, distribution contracts are governed by the law of the manufacturer in the absence of a choice of law and the forum contractus is determined under Article 5.1 a) of the Brussels I Regulation. This study examines how the French Cour de cassation has been led to these solutions and how Article 4.1 and Recital 17 of the Rome I Regulation take the opposite*

course.

The third article is a comprehensive study of the Rome II Regulation by Geneva professor Thomas Kadner Graziano (*Le nouveau droit international privé communautaire en matière de responsabilité extracontractuelle*).

Finally, the fourth article is an essay on class actions in international private law building on the American *Vivendi Universal* case (*Régulation de l'économie globale et l'émergence de compétences déléguées : sur le droit international privé des actions de groupe (à propos de l'affaire* Vivendi Universal)). Its author is Horatia Muir Watt, who teaches at Paris I university.

At the present time, I do not have an English abstract for the last two pieces.

Book: Liber Amicorum Hélène Gaudemet-Tallon

The French publisher Dalloz has recently published a very rich collection of essays in honor of **Hélène Gaudemet-Tallon**, Professor Emeritus at the University of Paris II and Associate Member of the *Institut de Droit International*, one of French leading scholars in the field of conflicts of laws and jurisdictions (among her recent works, see *Le pluralisme en droit international privé, Richesses et faiblesse (le funambule et l'arc en ciel)*, General Course held in 2005 at the Hague Academy of International Law, and the forthcoming fourth edition of her authoritative book on the Brussels I reg., *Compétence et exécution des jugements en Europe*).

The volume, ***Vers de nouveaux équilibres entre ordres juridiques. Liber amicorum Hélène Gaudemet-Tallon***, includes 50 articles on almost all fields of Private International Law, written by leading academics.

Here’s the table of contents:

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Title: **Vers de nouveaux équilibres entre ordres juridiques – Liber amicorum Hélène Gaudemet-Tallon.** May 2008 (886 pages)**.**

ISBN : 978-2-247-07910-0. Price: EUR 98. Available from Dalloz.

(Many thanks to Gilles Cuniberti and Etienne Pataut)

ECJ on Hassett v South Eastern Health Board and Art 22(2) Brussels I

The European Court of Justice handed down judgment in ***Hassett v South Eastern Board*** on 2nd October 2008. It doesn't make for particularly interesting reading, so I'll be brief. The Irish Supreme Court referred the following question to the ECJ:

> *Where medical practitioners form a mutual defence organisation taking the form of a company, incorporated under the laws of one Member State, for the purpose of providing assistance and indemnity to its members practising in that and another Member State in respect of their professional practice, and the provision of such assistance or indemnity is dependent on the making of a decision by the Board of Management of that company, in accordance with its Articles of Association, in its absolute discretion, are proceedings in which a decision refusing assistance or indemnity to a medical practitioner practising in the other Member State pursuant to that provision is challenged by that medical practitioner as involving a breach by the company of contractual or other legal rights of the medical practitioner concerned to be considered to be proceedings which have as their object the validity of a decision of an organ of that company for the purposes of Article 22, [point] 2, of [Regulation No*

> *44/2001] so that the courts of the Member State in which that company has its seat have exclusive jurisdiction?*

Which the ECJ took to mean:

> *By that question, the national court is essentially asking the Court whether point 2 of Article 22 of Regulation No 44/2001 is to be interpreted as meaning that proceedings, such as those at issue before the referring court, in the context of which one of the parties alleges that a decision adopted by an organ of a company has infringed rights that it claims under that company's Articles of Association, concern the validity of the decisions of the organs of a company within the meaning of that provision.*

And to which they answered:

> *Point 2 of Article 22 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 is to be interpreted as meaning that proceedings, such as those at issue before the referring court, in the context of which one of the parties alleges that a decision adopted by an organ of a company has infringed rights that it claims under that company's Articles of Association, do not concern the validity of the decisions of the organs of a company within the meaning of that provision.*

The reasoning, such that it was, centred on the fact that allowing all disputes involving a decision by an organ of a company to come within Article 22(2) of the Brussels I Regulation (which is primarily there, so says the Jenard Report, to prevent conflicting judgments) would mean that it would apply to those disputes where conflicting judgments would *not* arise. That is beyond the scope of Article 22(2). As the doctors had not challenged the validity of a decision before the national courts (they were instead challenging the process (or lack thereof) of that decision, and so did not come within the defined scope of Art 22(2). Fair point, really.

(Hat-tip to Andrew Dickinson.)

Spanish PIL periodicals (II): Anuario Español de Derecho Internacional Privado

The Anuario Español de Derecho Internacional Privado is an annual magazine specialized in Private International law. It was born in 2000 on an ambitious initiative of Prof. Dr. José Carlos Fernández Rozas (Complutense University, Madrid), in order to provide the Spanish scientific community with accurate and updated information about conflicts of laws in a wide range of subjects, such as commercial arbitration, procedural law, contracts law, tort law, property rights or family and succession law. Besides doctrinal contributions, every volume includes reference to the latest legislative reforms, both Spanish or relating to the Community, and to the international agreements signed by our country in the field of Private International Law. Punctual news of the work in progress or achieved in different international forums (UNIDROIT, UNICUTRAL, The Hague Conference, etc) are also enclosed, as well as deep and critical studies of the jurisprudence and of the administrative Spanish practice on PIL.

The publication is constructed in different sections, some of which are fixed. Each issue begins with an ambitious doctrinal title that gathers relevant scientific contributions from Spanish and foreign authors -translated into Spanish. It is usually followed by a section on legislation (Textos legales), and another, quite exhaustive one, on case law (Jurisprudencia: each volume systematizes several hundreds of decisions of the Spanish courts). A third section reproduces practices materials (Materiales de la práctica española). The Anuario also reports on national and international congresses, meetings and seminars, and gives notice of the whole Spanish bibliography on PIL (research monographs as well as editorials), appeared throughout the year.

Contents of the Anuario's latest issue:

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Jurisdiction to Prevent the End of the World

Which court has jurisdiction to prevent the end of the world? Any, one would think: after all, the end of the world is likely to have serious consequences pretty much everywhere.

Is that why an American retired radiation safety officer and a Spanish science writer decided to initiate proceedings in Hawaï to stop the running of the new Large Hadron Collider, a giant particle accelerator operating on the Swiss-French border near Geneva? The plaintiffs fear that the Collider might create a black hole which would spell the end of the Earth. No doubt, that would have an impact even in Hawaï.

The defendants were the European Center for Nuclear Research (CERN), the U.S. Department of Energy, the U.S. National Science Foundation and the U.S. Fermi National Accelerator Laboratory (Fermilab). In an interview to the *New York Times*, one of the plaintiffs revealed that his strategy focused on American parties. He did not know whether CERN would show up, but he had added it as a party to save expenses. In any case, part of the project was funded by the Department of Energy and the National Science Foundation, and the magnets of the Collider are supplied and maintained by Fermilab.

The complaint argued that the defendants had failed to comply with American legislation, namely the National Environmental Policy Act (NEPA), and also with the European precautionary principle.

As the *New York Times* reported, on September 26, 2008, the Hawaï District

Court declined jurisdiction.

The order of the Court, which can be found here, is disappointing from a conflict's perspective. This is because Judge Gillmor was able to dismiss the action solely on domestic grounds. In other words, she held that the court lacked jurisdiction within the American legal system, as a federal court, which is not to say that an American state court would have lacked jurisdiction.

American federal courts are courts of limited jurisdiction. This means that this is for plaintiffs to demonstrate that the court has subject matter jurisdiction. Here, the plaintiffs solely argued that the court had federal question jurisdiction, i.e. that this was an action "arising under" U.S. federal law. The federal law that they put forward was NEPA. However, NEPA requires that there be a "major federal action significantly affecting the quality of the human environment" (42 USC §4332 (c)). The court finds that there was no such major federal action in that case. As a consequence, it rules that there is no federal question, and that it lacks jurisdiction on this ground as a U.S. federal court.

The court further rules that no other ground for subject matter jurisdiction were put forward by the plaintiffs and that they had the burden of doing so. Thus, there might have been other grounds to found the subject matter jurisdiction of the court. For instance, neither federal party jurisdiction, nor diversity jurisdiction are discussed.

Finally, the court rules that it does not need to address the issue of whether the plaintiffs had standing, given that their allegation of an injury was arguably "conjectural and hypothetical".

Meanwhile, a suit was also filed before the European Court of Human Rights (see the report of the *Telegraph* here). I don't know whether this action is more likely to be successful, but Strasbourg is certainly closer to Geneva than Honolulu.

Conference on Judicial Cooperation in South-Eastern Europe

The final program for the international conference titled **?Regional Cooperation in the Field of Civil Proceedings with an International Element**? was distributed this week. This is actually the sixth regional conference where academics and practitioners exchange their views and comments on different topics of conflict of laws and related areas. Commencing in 2002 in Niš (Serbia), these conferences continued in the following years in Maribor (Slovenia), Belgrade (Serbia), Zagreb (Croatia) and Be?i?i (Montenegro). This year the Faculty of Law of the Univeristy of Banja Luka (Bosnia and Hercegovina) is hosting the conference from 16 to 18 October 2008. The conference is to be held in the hotel Bosna.

The topics to be presented and discussed are divided into four sections as follows:

Comparative Legislation and Practice in the European Union Member States
Christa Jessel-Holst (Max Planck Institute for Foreign and Private International Law, Hamburg), *Regional Cooperation in the Field of Civil Proceedings with an International Element – the Case of South East Europe*
Bea Verschraegen (University of Vienna), *Critical Appraisal of Brussels II a Regulation*
Vesna Lazi? (Utrecht University and T.M.C. Asser Institute), *Improving Service of Judicial and Extrajudicial Documents in European Union: the Regulation (EC) No. 1393/2007 of 13 November 2007*

Comparative Legislation and Practice in the Countries of the Region
Bernadet Bordaš (University of Novi Sad), *Regional Cooperation for the Improvement of the National Courts Proceedings – Selected Practical Examples*
Suzana Kralji? (University of Maribor), *Problems of International Adoption in Slovenia*
Ivana Kunda (University of Rijeka), *Regional Cooperation in the Field of Civil Proceedings with a Cross-Border Element: Practice of the Croatian Courts in*

Applying the Hague and Bilateral Conventions
Toni Deskoski (University "Ss Cyril and Methodius" in Skopje), *International Legal Aid According to Bilateral Agreements Concluded by the Republic of Macedonia*
Vladimir ?olovi? (University Megatrend, Belgrade), *Regulating International Legal Aid in Insolvency Proceedings with an International Element*
Valerija Šaula (University of Banja Luka), *Regional Cooperation in the Field of Civil Proceedings with International Element in the Legislation and Practice of the Republic of Srpska*

Practical Problems
Nikola Sladoje, Assistant Minster of Justice of Bosnia and Herzegovina, *Practical Problems in Requesting and Providing International Legal Aid – Bosnia and Herzegovina Experience*
Mirko Živkovi? (University in Niš), *Municipal Civil Registers and Social Work Centres in Serbia – Some Issues of Private International Law*
Jasmina Alihodži? (University in Tuzla), *Presumed Reciprocity Principle in the Function of Efficient Implementation of International Legal Aid in the Region Countries*

Other Issues and Problems
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Predrag Cvetkovi? (University in Niš), *Relationship between the Communitarian and the Law of the World Trade Organization (WTO): Basic Considerations*

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Incorporation of 2000 Hague Convention in English Law

I reported earlier on the entry into force of the 2000 Hague Convention on the International Protection of Adults.

An interesting issue is the application of the Convention in England and Wales. The United Kingdom ratified the Convention, but only for Scotland. However, in the English *Mental Capacity Act* 2005, it is provided that the Convention applies in England and Wales.

Richard Frimston was able to clarify the situation in the following comment:

> *The Ministry of Justice have clarified the position. The United Kingdom has under Article 55 declared that its ratification only extends to Scotland. This is so notwithstanding the fact that section 63 of the Mental Capacity Act 2005 (the Act) specifically states that Schedule 3 of the Act gives effect in England and Wales to Convention XXXV (in so far as the Act does not otherwise do so), and makes related provision as to the private international law of England and Wales.*
>
> *SI 2007/1897 makes it clear that both section 63 and Schedule 3 have taken effect from 1 October 2007 save that by paragraph 35 of the Schedule to the Act, paragraphs 8 [jurisdiction in relation to non residents], 9 [jurisdiction in relation to convention countries], 19(2) and 19(5) [protective measures made by convention countries], Part 5 [co-operation with convention countries], and paragraph 30 [Article 38 certificates given by convention countries] only come into force, when Convention XXXV itself enters into force under Article 57.*
>
> *However this does not mean that England & Wales has ratified. The existing declaration under Article 55 still operates and although Convention XXXV is effective in England & Wales, England & Wales has not yet actually ratified the Convention.*
>
> *Paragraphs 8, 9, 19(2) and 19(5), Part 5, and paragraph 30 however are not limited to coming into force solely when England & Wales ratifies, but only when Convention XXXV itself enters into force. Therefore these provisions will*

also come into force in England & Wales on January 1 2009. Convention XXXV therefore will have full effect in England & Wales from January 1 2009, but for the purposes of the law in Scotland, France or Germany, England & Wales has not ratified.

The UK Ministry of Justice has made it clear that "England & Wales is committed to extending Convention XXXV as soon as possible. The work for this is under way".

Schedule 3 does of course now set out the private international law in England & Wales and therefore in addition to setting out the rules for jurisdiction and recognition in England & Wales Schedule 3 also sets out the applicable law and therefore the rules as to which lasting powers are or are not valid. A lasting power validly made in South Australia by a person habitually resident in South Australia is now valid whenever the power was made. An English Enduring Power of Attorney made by a person habitually resident in a state where such powers are not valid, may now be invalid, even if made at a time when Schedule 3 to the Act did not apply.

The difficulty that Schedule 3 extends Convention XXXV to the applicable law issues of Lasting Powers not only of adults subject to incapacity but also to all Lasting Powers, including those of persons not subject to incapacity remains. Other ratifying states will not recognise this extension of the Convention.

What is remarkable about the *Mental Capacity Act* is that it makes applicable in a domestic legal order an international treaty which is not applicable from an international perspective. Thus, in effect, the domestic law incorporates the international convention in the domestic legal order. In this case, as the UK is working on extending the application of the Convention to England and Wales, it seems close to an early entry into force.

In other instances, however, states have incorporated international conventions that they had ratified for cases beyond their scope. This was the case of Italy which decided to incorporate the Brussels Convention into Italian law to replace its common law of jurisdiction in civil and commercial matters (see art. 3 of the 1995 Italian law of international private law).

Is that acceptable for the contracting states of the relevant Convention? For the

organisation which supervised the negotiation of the relevant convention such as the Hague Conference?

Spanish PIL periodicals: la Revista Española de Derecho Internacional

The Revista Española de Derecho Internacional (REDI) is one of the main Spanish magazines concerning Private and Public International Law. Dating back to 1948, 57 volumes (two issues per volume; half-yearly periodicity) have already been published. Since 1997 the magazine belongs to the Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales (AEPDIRI), and is co-edited by the Asociación and the Boletín Oficial del Estado (BOE).

Aiming to keep the members of the scientific community informed about what is happening in International Law in Spain and its environment, the magazine is opened to contributions from Spanish and foreing authors (though preference is given to the Latin-American Community and European authors). The unique determinant criteria are the interest and current importance of the subject, a suitable development and the scientific quality of the proposed contribution. The language of publication is normally Spanish.

Works are published either as Estudios or Notas. Both are doctrinal studies; they both require to be favourably reported by some member of the editorial board, or by some specialist by request of this organ. The difference between Estudios and Notas lies in the number of pages (up to 40 for Estudios, no more than 18 for Notas) and the depth of the approach (usually the departure point of a Nota is a recently passed resolution, or new legislation presenting special interest). Together with them each REDI issue contains four fixed sections dealing with jurisprudence (case law), practice, news (about congresses, seminars, meetings, etc, concerning Public and Private International Law worldwide), and a selection of the latest Spanish and foreing bibliography on Private and Public International Law. The “jurisprudence” section deserves a special mention: it contains the most

important resolutions on Public and Private International Law passed either by Spanish or International Courts (the European Court of Justice, the European Court of Human Rights) in the months preceding the publication of each REDI issue. The most significant paragraphs of each resolution are reproduced, accompanied by a short doctrinal comment.

These are the contents of the future REDI issue (2008-1), expected soon:

I. ESTUDIOS

- SÁNCHEZ LEGIDO, ÁNGEL, Garantías diplomáticas, no devolución y prohibición de la tortura (Public International Law)
- ESPINIELLA MENÉNDEZ, ÁNGEL, La "europeización" de decisiones de Derecho privado (Private International Law)

II. NOTAS

- TORRES CAZORLA, Mª. I., La reactivación de los Consulados Honorarios en la práctica española de las últimas décadas (Public International Law)
- CRESPO NAVARRO, ELENA, La Segunda Conferencia de Paz de La Haya (1907) y la posición de España (Public International Law)
- LARA AGUADO, ÁNGELES, Adopción internacional: relatividad de la equivalencia de efectos y sentido común en la interpretación del Derecho extranjero (Private International Law)
- ESPALIÚ BERDUD, CARLOS, ¿Un derecho de paso "inocente" por el mar territorial de los buques extranjeros que transportan sustancias altamente contaminantes? (Public International Law)
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- Jurisprudencia española y comunitaria en materia de Derecho internacional privado

IV. PRÁCTICA

- Crónica de la política exterior española

V. INFORMACIÓN Y DOCUMENTACIÓN

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- 1. Las decisiones sobre admisibilidad dictadas por el TEDH con motivo de la ilegalización de determinados partidos políticos y agrupaciones de electores del País Vasco y Navarra, por F. Lozano Contreras
- 2. Acción judicial lateral en la lucha contra la impunidad, por P. Zapatero
- 3. El inversor ante la nueva situación jurídica de Bolivia y Ecuador en el Centro Internacional de Arreglo de Diferencias relativas a Inversiones (CIADI), por P. J. Pascual Vives
- 4. Los métodos alternos de solución de controversias comerciales entre los Estados miembros del Sistema de la Integración Centroamericana (SICA), por O. Mejía Herrera
- 5. ¿Un nuevo escenario en las relaciones Unión Europea-Federación Rusa?, por A. Blanc Altemir
- 6. La Alianza de Civilizaciones aún respira: la Declaración de Buenos Aires entre América del Sur y los Países Árabes, de 21 de febrero de 2008, por C. Díaz-Silveira Santos
- 7. La evaluación entre iguales: ¿un método efectivo?, por C. Gutiérrez Espada y Mª. J. Cervell Hortal
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Conference: “La matière civile et commerciale, socle d’un code européen de droit international privé?” (Toulouse, 17 October 2008)

An interesting conference will be hosted in **Toulouse, on 17 October 2008**, by the *Institut de Recherche en droit européen, international et comparé* (IRDEIC) of the University of Social Sciences of Toulouse: **“La matière civile et commerciale, socle d’un code européen de droit international privé?“** (The civil and commercial matters, core of a European Code of Private International Law?).

The symposium will focus on the three cornerstones of the EC Private International Law in civil and commercial matters, namely the Rome I, Rome II and Brussels I regulations, evaluating their consistency under the point of view of basic principles, structure and solutions. The underlying question is whether these pieces of European legislation can be constructed as the hard core of a European PIL code, with its own general theory and specific principles and methods, which could be extended to other fields of the conflict of laws, towards the establishment of the area of freedom, security and justice envisaged by the EC Treaty.

A more detailed presentation (in French) of the colloquium, and the complete programme are available on the conference’s webpage. Here’s an excerpt:

Ouverture du colloque: *H. Roussillon*, Président de l’Université des Sciences Sociale de Toulouse I; *B. Beignier*, Doyen de la faculté de droit de l’Université de Toulouse I.

Président de séances: *M. Bogdan* (Université de Lund)

- 9:00 – *M. Fallon* (Université Catholique de Louvain): “Les éléments d’un code européen de droit international privé”.
- 9:20 – *C. Hahn* (DG JLS, Commission européenne): “Les objectifs visés et les fondements de la compétence dans les textes de référence”.
- 9:40 – *S. Francq* (Université Catholique de Louvain): “Les champs d’application (matériel et spatial) dans les textes de référence”.
- 10:00 – Débats
- 11:00 – *F. Pocar* (Université de Milan): “Le choix des sous catégories et des éléments de rattachement dans les textes de référence”.
- 11:20 – *H. Muir Watt* (Université Paris I): “L’autonomie de la volonté dans les textes de référence”.
- 11:40 – *S. Poillot Peruzzetto* (Université de Toulouse I): “L’ordre public et les lois de police dans les textes de référence”.
- 12:00 – Débats

Présidente de séances: *H. Gaudemet-Tallon* (Université de Paris II)

- 14:00 – *C. Kessedjian* (Université Paris II): “La relation des textes de référence avec le droit primaire”.
- 14:20 – *M. Wilderspin* (Commission européenne): “La relation des textes de références avec le droit dérivé (et principalement les directives service et commerce électronique”.
- 14:40 – *A. Borrás* (Université de Barcelone): “La relation des textes de référence avec les textes internationaux”.
- 15:00 – Débats
- 16:00 – *J.S. Bergé* (Université de Paris Ouest Nanterre La Défense): “Les textes de référence et la dynamique interprétative de la Cour de justice”.
- 16:20 – *L. Idot* (Université de Paris II): “Le cas du droit de la concurrence dans les textes de référence”.
- 16:40 – Débats
- 17:00 – Synthèse: *P. Lagarde* (Université de Paris I).

No participation fee is required. Participants should register before 30 September (see the conference’s leaflet).

(Many thanks to Federico Garau, Conflictus Legum blog)

Second Issue of 2008's Revue Critique de Droit Int'l Privé

The second issue of the French *Revue Critique de Droit International Privé* was released some time ago. It contains one article and several case commentaries. A table of contents can be found here.

The title of the article is the Forum of Necessity (*Le for de nécessité : tableau comparatif et évolutif*). It discusses this head of jurisdiction which seems peculiar to the civil law of conflicts in respect of Belgian, Swiss, French and Dutch international private law. The authors are Valentin Rétornaz, a research assistant at Neuchatel university (Switzerland), and Bart Volders, a member of the Brussels bar and an adjunct professor to the university of Anvers, Belgium. The English abstract reads:

> *This study contains a comparative analysis of the institution known as the « forum of necessity ». Familiar to many legal systems and given pride of place in several codes of private international law, it allows a court normally without jurisdiction over a case, to decide it nevertheless in order to avoid a denial of justice. The principle behind it is an elementary principle of justice according to which no cause of action should be refused access to a court. The simplicity of such an objective may be deceptive insofar as the means to achieve it are concerned. The « forum of necessity » may indeed be difficult to manage in concrete circumstances, as the cases examined here well show. This study first attempts to draw from the main legal texts and academic writings its general characteristics and the conditions under which it allows a court to exercise jurisdiction. Then, cases and specific commentaries are examined in order to formulate some general principles.*