Flashairlines and Transatlantic Ping Pong

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> *As a moth is drawn to the light, so is a litigant to the United-States. If he can only get his case into their court, he stands to win a fortune. (Smith Kline & French Laboratories Ltd v. Bloch, Court of Appeal, 1983)*

This famous statement of Lord Denning illustrates perfectly how US American judges feel when seized by a foreign plaintiff in a product liability lawsuit against a domestic defendant. Since the 1970s' the spectre of forum shopping drove the US courts to abusively use the *forum non conveniens* doctrine resulting in a de facto jurisdictional immunity of domestic corporations when sued by foreign plaintiffs. In this context, court congestion and foreign nationality of the plaintiff have become the principal arguments used to justify dismissing a foreign plaintiff's suit on the ground of *forum non conveniens*. Looking at the past 40 years, it is difficult to identify any important product liability case where US courts accepted to retain their jurisdiction (the *Bhopal* case is perhaps one of the most prominent examples).

In this case, we can suppose that the Californian courts based their *forum non conveniens* issue on "public interest" considerations when they declined their jurisdiction to proceed on the liability product lawsuit filed by the 281 French plaintiffs against Boeing and its subcontractors. In this particular "judicial context", it seems to me that the French and US courts are not really displaying "judicial cooperation and mutual confidence" (as stated by the Paris Court of Appeal), but are rather engaged in a "*partie de bras de fer*" over the Atlantic, and this with unequal arms: As Gilles Cuniberti and Emmanuel Jeuland have explained very well in this online symposium, declaratory relief is unavailable under French civil procedure and I am also convinced that the Paris Court of Appeal ruled *contra legem* to enable the French plaintiffs to obtain a declaration that French courts lack jurisdiction. On the other side, I find it difficult not to support the

Court's attempts to help the French plaintiffs – for three basic reasons:

First, the US court's decision forces the French plaintiffs into the paradoxical move of petitioning a judgment declining jurisdiction. And second, if the defendants' strategy succeeds, we would have the startling result that not the plaintiffs, but the defendants hold the keys to choose their forum: the defendants successfully raise the *forum non conveniens* issue to avoid US justice and at the same time declare their readiness to submit to the French jurisdiction, which could be sufficient to establish jurisdiction (In fact, it is debated whether article 24 of the Brussels I regulation on jurisdiction and enforcement, which grounds jurisdiction on entering an appearance by the defendant, is only applicable, if the defendant is domiciled in one of the European Member States). Third and finally, it is equally startling for a continental European lawyer that the defendants' home courts cannot be the appropriate forum while, on the contrary, the home plaintiffs' forum is deemed to be convenient.

I am afraid that the *Cour de Cassation* is left with no other choice than reversing the Court of Appeal's decision, since the French civil procedure simply does not offer to a plaintiff declaratory relief to obtain from a court a judgment declining its jurisdiction. However, it is worthwhile noticing that, after a long debate, the French jurisprudence has accepted a declaratory relief to clear uncertainties about the *recognition* of a foreign judgment (*action en (in)opposabilité*). The Court of Appeal's decision could be the first step towards the admission of such a declaratory relief with regard to jurisdiction. In this context it should be noted that French civil procedure offers the judge the power to decline his jurisdiction *ex officio* (art. 92 CPC). This borne in mind, the Court of Appeal could have refused to rule on the declaratory relief action, and instead simply decline its jurisdiction ex officio (arguing that there is no ground of jurisdiction). In conclusion, the Court of Appeal did not much more than anticipate the result that it could have taken anyways (in application of art. 92 CPC). This aspect might be taken into account by the *Cour de Cassation*.

Related posts:

Flashairlines and judicial cooperation
Flashairlines and declaratory relief under French law
Flashairlines – Online symposium
French court declines jurisdiction to transfer dispute back to U.S. court

Flashairlines and Judicial Cooperation

Patrick Wautelet is a professor of law at the University of Liège (Belgium) and a specialist of private international law.

The *Flashairlines* ruling of the Court of Appeals is a prime example of cross-border cooperation between courts and as such deserves to be commended. I will not comment on the holding of the Court as to the existence of jurisdiction or the possibility for claimants to obtain a declaration to the effect that the court which they seized does not have jurisdiction – both matters falling under French law – save in order to underline that the ruling is an important one for the future development of declaratory relief in Europe. The striking feature of the opinion is my view the spirit of cooperation which permeates the whole ruling. The Court indeed reviewed its jurisdiction with full knowledge of the special context in which the dispute developed. In contrast to normal practice, where, even in the context of concurrent proceedings, a court is reluctant to involve itself with what is going on before the other court, the Court of Appeal fully considered what was at stake in the 'twin' proceedings pending in California. In fact, the Court of Appeal considered expressly that it has been « *invited* » to rule on its jurisdiction by the court in California. That the Court of Appeal would read an invitation in the latter court's ruling could in fact nicely be squared with the doctrine of comity whose operation has until now been limited to the relations between courts of English speaking countries.

Such close cooperation and openness on the part of the Court of Appeal is even more striking since, as is widely known, the doctrine of *forum non conveniens* is unknown and even foreign to the European continental thinking on jurisdiction. It is a testimony to the openness of the Court of Appeal that the court was willing to rule on its jurisdiction knowing that the only purpose of the exercise was (most likely) to comfort the jurisdiction of a United States court. In fact, even in specific circumstances where European regulations allow for such cooperation between courts of various countries – one thinks of the mechanism put in place by Article

15 of the Brussels IIbis Regulation – one has hardly witnessed enthusiastic reactions to the possibility of cross border judicial dialogue.

The readers of this blog will not have forgotten about the defunct Hague Judgments Convention. This ambitious scheme which attempted to replicate on a global scale the success of the 1968 Brussels Convention, provided a watered down version of the *forum non conveniens* doctrine. It is striking to note that the *modus operandi* adopted by the courts in California and France in the *Flashairlines* dispute comes very close to the one envisaged by the drafters of the late Convention: one court comes to the conclusion that another one is better placed and stays proceedings to allow the other one to determine whether to take up the case. Of how judicial practice on the two sides of the Atlantic has caught up with the idea of a 'silent dialogue' between courts which seemed unrealistic only a couple of years ago…

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FACULTY OF LAW, UNIVERSITY OF JOHANNESBURG – INSTITUTE FOR PRIVATE INTERNATIONAL LAW IN AFRICA

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- *An African private international law regime (?) – conclusions and lessons from a decade of case law in thirteen African countries* Mr R F Oppong (Lancaster University) foppong2000@yahoo.com
- *When could a South African court be expected to apply the CISG?* Ms M

Wethmar-Lemmer (University of South Africa) wethmm@unisa.ac.za

- *Constitutional values and the proprietary consequences of marriage in private international law – Sadiku v Sadiku (unreported) (T)* Prof J L Neels (University of Johannesburg) jlneels@uj.ac.za

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Article: The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts

Theodore Eisenberg (Cornell Law School) and Geoffrey P. Miller (New York University) have on the NELLCO Repository posted a working paper titled "The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts" (March 31, 2008, New York University Law and Economics Working Papers. Paper 124). Here is the abstract:

> *We study choice of law and choice of forum in a data set of 2,882 contracts contained as exhibits in Form 8-K filings by reporting corporations over a six month period in 2002 for twelve types of contracts and a seven month period in 2002 for merger contracts. These material contracts likely are carefully negotiated by sophisticated parties who are well-informed about the contract terms. They therefore provide evidence of efficient ex ante solutions to contracting problems. In prior work examining merger contracts, acquiring firms incorporated in Delaware tended to select Delaware law or a Delaware forum to govern disputes under the merger agreements less frequently than firms in other states (New York in particular) specified the law or forum of those states. For the broader variety of contracts analyzed here, the contracting parties rarely opt for Delaware law other than for merger contracts and*

contracts establishing Delaware business trusts. New York law is the favored choice, with New York law chosen in 46 percent of the contracts and Delaware law, the second most frequent selection, chosen in 15 percent of the contracts. New York law was overwhelmingly favored for financing contracts, but was also preferred for most other types of contracts. With respect to choice of forum, the major finding is that a litigation forum was specified only for 39 percent of the contracts. Among those 39 percent of contracts, New York is the favored forum, accounting for 41 percent of the choices, with Delaware a distant second and accounting for 11 percent of the forum choices. When a forum is specified it usually matches the contract's choice of law. We also explore the decision to designate a forum, mismatches between choice of law and choice of forum, and whether parties designate an exclusive litigation forum. Overall, New York law plays a role for major corporate contracts similar to the role Delaware law plays in the limited setting of corporate governance disputes.

The paper is available here.

Rome I – Final Text Released

As we noted in a previous post, the agreement reached by the European Parliament and the Council on the Rome I Regulation was transposed by the EP in its amendments at first reading to the initial Commission's Proposal. Once revised by the lawyer-linguists, this modified version of the Regulation would have been adopted by the Council, ending the codecision procedure.

The text resulting from the legal and linguistic revision is now available in all languages of the EU in the Register of the Council (doc. PE-CONS 3691/07 of 31 March 2008). Given the heading of the document (European Parliament and the Council), it can be assumed that **this is the final version of the Rome I Regulation** on the law applicable to contractual obligations.

According to current schedule (see the Rome I OEIL page), the text should be approved by the JHA Council in its meeting of 17/18 April 2008. Further

information will be posted as soon as it is available.

Rome I – Should the UK Opt In?

The Ministry of Justice has launched a public consultation on whether the UK should opt (back) in to the Rome I Regulation (see all Rome I entries on this site **here**.) The press release states:

> *The Rome I proposal will provide clarity over which law applies if a dispute arises over a contract made between people or businesses from different countries, allowing cross border trade to continue with confidence.*
>
> *When the European Commission first announced the proposals in 2005, the UK government took the unusual step of opting out of the proposals, as they would not have been in the interests of UK businesses. However, following intense negotiations, a substantially revised and hugely improved version has now been agreed.*
>
> *Announcing the publication of the 'Rome I – Should the UK opt in?' consultation today, Bridget Prentice, Parliamentary Under Secretary of State said:*
>
> *'The government has always said that we will not opt into EU measures which are not in our national interest. The original proposal was clearly not right for Britain, but the new and much improved regulation will help to ensure that the rules in this very technical area are applied uniformly. This will ensure a level playing field for British business in Europe.'*
>
> ### *Notes to editors*
>
> - *The 1980 Rome Convention was implemented into UK law by the Contracts (Applicable Law) Act 1990. It applies throughout the UK.*
> - *The original Rome I Regulation was released by the European Commission in December 2005.*
> - *The UK exercised its right not to opt in to the proposed Regulation in May 2006 [see our news item here]. This was only the second time that*

the UK had opted out of a Regulation under its special arrangements on Title IV of the Treaty establishing the European Community. To opt in, it will have to seek the permission of the European Commission, and agree a timetable for implementation.

- *Negotiations on the Rome I Regulation ended with political agreement among Member States in December 2007. Jurist-linguists are presently checking the text for linguistic integrity. The Regulation will be adopted at the next meeting of the Justice and Home Affairs Council in April of June. The main provisions of the Regulation will come into force 18 months later.*
- *The UK government negotiated on behalf of all UK jurisdictions, and the consultation paper is a joint project of the Ministry of Justice and the devolved administrations.*

The conclusion in the (lengthy) consultation paper itself is that,

> *The Government's assessment of the Regulation as a whole is that it would be in the national interest for the UK to apply it, subject to gaining the approval of the Commission. Not only have the initial problems with the Commission's proposal generally been resolved, but also in some significant respects the Regulation represents an improvement on the Convention. Moreover, the maintenance of a single European instrument continues to be of benefit, as it was under the Rome Convention.*

The questions posed by the consultation paper are:

- Is it in the national interest for the Government, in accordance with Article 4 of the UK's Protocol on Title IV measures, to seek to opt in to the Regulation? If not, please explain why.
- Should the Rome I rules apply throughout the UK if the UK opts in to the Regulation? If not, please explain why.
- Do you agree with the Partial Impact Assessment at Annex A of the consultation paper? If not, please explain why.

Your responses need to be received by the UK Government no later than **25 June 2008**.

Guest Editorial: Muir-Watt on Reshaping Private International Law in a Changing World

April's Guest Editorial is by Professor Horatia Muir-Watt: **Reshaping Private International Law in a Changing World**.

Horatia Muir Watt is Professor of Private International and Comparative Law at the University of Paris I (Panthéon-Sorbonne). She prepared her doctorate in private international law (University of Paris 2, 1985) and was admitted to the *agrégation* in 1986. She was then appointed to the University of Tours, then the University of Paris XI, before joining Paris I in 1996. She is Deputy Director of the Comparative Law Center of Paris (UMR de Droit comparé, Paris I-CNRS) and Editor in Chief of the *Revue critique de droit international privé*, the leading law review on private international law in France. She directs the Masters program in Anglo-American Business Law and co-directs the Masters program in Global Business law (Paris I/Institute of Political Science). She has been regular visitor to the University of Texas in Austin, where she has taught the Conflict of Laws. She lectured in July 2004 at the Hague Academy of International Law. Her course on "Aspects économiques de droit international privé" has been published in vol. 307 of the *Recueil des Cours*. She has published two other books: *Common law et tradition civiliste*, PUF 2006, with Duncan Fairgrieve (a pocket comparative study) and Droit international privé, PUF, 2007, with Dominique Bureau (a treatise in 2 volumes). She publishes numerous law review articles, contributions to Mélanges and legal encyclopedieas, case-notes and book reviews, introductions and prefaces (including, recently, The making of European Private Law: Regulatory Strategies and Governance, with Fabrizio Cafaggi, to be published, Sellier, 2008). A full list of her publications is available here.

Reshaping Private International Law in a Changing World

The past few decades have witnessed profound changes in the world order –

changes affecting the nature of sovereignty or the significance of territory – which require measuring the methodological impact of political and technological transformations on traditional ways of thinking about allocation of prescriptive and adjudicatory authority as between states. Myriads of issues arise in this respect within the new global environment, such as the extraterritorial reach of regulatory law, the decline of the private/public divide in the international field, the renewed foundations of adjudicatory jurisdiction (particularly in cyberspace), the implications of individual and collective access to justice in the international sphere, the impact of fundamental rights on choice of law, the ability of parties to cross regulatory frontiers and the subsequent transformation of the relationship between law and market. Indeed, one of the most important issues raised by globalization from a private international law perspective is the extent to which private economic actors are now achieving "lift-off" ((As Robert Wai has so aptly put it, in "Transnational lift-off and Juridical Touchdown: The Regulatory Function of Private International Law in a Global Age", 40 *Colum. J. Transnat*. L 209 (2002).)) from the sway of territorial legal systems. To some extent, traditional rules on jurisdiction, choice of law and recognition/enforcement of judgments and arbitral awards have favored the undermining of law's (geographical) empire, which is already threatened by the increasing transparency of national barriers to cross-border trade and investment. Party mobility through choice of law and forum induces a worldwide supply and demand for legal products. When such a market is unregulated, the consequences of such legislative competition may be disastrous.

An excellent illustration of the way in which rules on choice of law and forum, combined with a liberal regime relating to enforcement of foreign judgments, allow private confiscation of the governing law can be found in the circumstances which gave rise to the notorious Lloyd's litigation. ((Among many: *Bonny v. Society of Lloyd's* (3 F.3d 156, 7th Circuit, 1993) ; *The Society of Lloyd's v. Ashenden* (233 F.3d 473, 7th Circuit 2000).)) Here, securities offerings accompanied by inadequate disclosure on the American market managed to slip through the net of the federal Securities Acts. This example shows how "barrier-crossing" – escaping the sway of mandatory provisions by opting out of a legal system, and *de facto* redefining jurisdictional boundaries to suit oneself ((W. Bratton & J. McCahery, "The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second Best World", 86 *Georgetown L J* 201 (1997).)) – through the mobility conferred by unfettered choice of forum alters the

status of *lois de police* or internationally mandatory laws, which become merely "semi-mandatory" ((L. Radicati di Brozolo, "Mondialisation, jurisdiction, arbitrage: vers des règles d'application semi-nécessaires?", *Rev crit DIP* 2003.1.)) before the chosen foreign forum. Other well-known examples can be found in the field of tort, where the use of *forum non conveniens* to prevent access by the victims of accidents linked to delocalized industrial activities, to justice in the country of the (parent) corporate defendant, seals the downward spiral in which developing counties are trapped when economically dependant upon versatile foreign capital; lowering the cost of security, environmental protection, or social legislation will attract investment, but will maintain any liability incurred within the limits designed by the low standards of the *lex loci delicti* as applied by local courts. ((As the *Nike* case shows, the powerful market leverage of consumer arbitrage in the defendant's home country may contribute to remedy the problem through consumer refusal to buy products manufactured by means of child labour, etc: see *Nike Inc. v. Kasky* 539 US 654 (2003).)) Here, rules of jurisdiction and choice of law contribute to the "global tragedy of the commons", where in the absence of a central regulator or universally accepted standards of conduct, nothing prevents a state from abetting the exportation by its private sector of industrial costs (pollution, economies on social protection, etc) in the direction of the global community.

Insofar that it is felt desirable to ensure the "touch-down" of economic actors in this context, private international methodology may require considerable reshaping, so as to harness it to the new need for strong yet adjusted regulation of the consequences of private mobility and the inter-jurisdictional competition which it inevitably generates. Approaches developed in a world where the prescriptive authority of State was coextensive with territory are clearly no longer adapted to this function; this is particularly true of the methods inspired by the private interest paradigm on which continental Europe doctrine thrived throughout the second half of the twentieth century and is loath even today to abandon. ((On this point, I express courteous disagreement with Pierre Mayer, who has devoted a chapter of his excellent Hague lectures to challenging the relevance of the changes discussed here: "Le phénomène de la coordination des rdres juridiques étatiques en droit privé", RCADI t327 (2007).)) The message of this editorial is to the effect that private international law should adjust to the stakes involved in real world conflicts of laws, which do not, or do no longer, implicate purely private interests playing out on a closed field, ((This is the

"unilateralists' complaint": see P. Gothot, "Le renouveau de la tendance unilatéraliste", *Rev crit DIP* 1971.1; D. Boden, *L'ordre public : limite et condition de la tolérance (essai sur le pluralisme juridique).*)) but involve strong state policies or substantive values perceived as fundamental by the global community; in turn, it is mistaken and indeed harmful to continue to represent the rules designed to respond to these conflicts as being "neutral", since this leads to underestimate the needs generated by the novel ways in which national laws inter-relate in a global setting and prevents private international law from being fully invested with an appropriate regulatory function. ((There is nothing particularly surprising in the emergence of new needs in this field, insofar as they mirror those which increasingly affect the role and content of private law as a whole: see Cafaggi & Muir Watt, "The making of European Private Law: Regulatory Strategies and Governance", Sellier, forthcoming 2008.)) Just three examples (among many more) will serve to draw attention to the tectonic upheavals currently occurring and to the pressing need to devote further thought to the reshaping of traditional methods and approaches.

1. *Choice of law and economic due process.*

Within the European Union, the appearance of a market for law is not of course a mere and perverse side-effect of other policies geared to enhancing party autonomy. Carefully designed regulatory competition in the field of goods and services ((Jukka Snell*, Goods and Services in EC Law, A Study of the relationships between the Freedoms,* OUP 2002.)) has been shown to – deliberately – overturn the very concept of "monopolistic states", even in the field of public law and services. ((Ch. Kerber, Interjurisdctional Competition within the European Union", 23 *Fordham Int'l L J*. 217 (2000).)) Indeed, inter-jurisdictional mobility of firms, products and services is once again the means by which law is made to appear as offering on a competitive market, designed in turn to stimulate legislative reactivity and creativity. As illustrated in the global context, one of the market failures to be feared in the context of unregulated competition is the exporting of costs or externalities linked to legislative choices of which the consequences may affect other communities. However, in an integrated legal system, these risks are restricted by the existence of a central regulator, armed with tools such as approximation of substantive rules, or, where diversity is

deemed to be desirable, constitutional instruments designed to discipline the various States in their mutual dealings. ((In the US, these are the Commerce Clause, Due Process, Full Faith and Credit)) Here, as recent conflicts of laws implicating both economic freedoms and workers' rights have shown, the Court of justice is invested with an important balancing function which clearly overflows into the political sphere. ((*Viking* aff. C-438/05, *Laval* aff. C-341/05))

This is where uniform choice of law rules come in, as tools of governance designed to fulfill the requirements of economic due process on a Community level. Economic due process, which is now thought to explain the requirements of the Commerce Clause in the US federal Constitution, ((In the field of cyber torts, see J. Goldsmith & A Sykes, "The Internet and the Dormant Commerce Clause", 110 Yale L J 785 (2001).)) ensures that a given community does not impose costs on out of state interests which were not represented in its decision-making process. Thus, for instance, the cost of a law providing for lax standards of environmental protection should not be exported towards a neighbouring state with different priorities: in cases of cross-border pollution, environmental damage caused in the the latter state by firms legally using low standards of protection on the other side of the frontier must be internalized by application of the more protective rule. Posting workers employed under lax labor standards to a host state with higher social protection in order to benefit from the competitive advantage of low cost labor requires application of local law for the duration of the posting in order to avoid unhealthy distorsions of competiton between firms. To a large extent, recent choice of law provisions have integrated this change. ((See article 7 of the new Rome II Regulation for environmental torts and, in the field of employment relationships, the conflict of law provisions of the 1996 Posted Workers Directive.)) Typically, the recitals introducing Rome II attribute virtues to the determination of the applicable law which are far removed from the traditional private interest paradigm. There is still room for further improvement, however. Scrutinizing Rome II through the lenses governmental interest analysis, Symeon Symeonides has shown that in many cases, it would be desirable, as in the field of environmental pollution, to take account of true conduct-regulating conflicts, and to give effect if necessary to the prohibitive rules of the state of the place of conduct if its interest in regulating a given conduct is greater than the that of the state where the harm occurs, when it provides for a laxer standard of care. (("Tort Conflicts and Rome II: A View from Across", *Festschrift Ehrich Jayme*, Sellier, Munich, 2004, p. 935.)) For the moment, this result is only possible

through article 16. ((Article 17 does not seem intended to be interpreted bilaterally, and the escape clause of article 4-3 does not appear to allow an issue by issue approach.))

2. *The "new unilateralism"*

The requirements of human rights in cross-border cases are also bringing about profound methodological changes whenever the continuity of an enduring personal or family relationship requires the host state to refrain from refusing recognition under its own private international law rules. Thus, the progressive appearance of a "unilateral method of recognition of foreign situations", implemented both by the European Court of Justice, the European Court of Human Rights, and subsequently by national courts ((See CA Paris, 25th October 2007, not yet published, but a commentary posted by G. Cuniberti is available on this website.)) , ousts traditional bilateral choice of law rules and favors the cross-border validity of what look very like vested rights in fields such as adoption, other parent/child relationships, marriage, same-sex partnerships, etc. Grounds for such change have been discovered in fundamental rights and European citizenship, heralding an adjustment of the philosophical foundations of the conflict of laws to the ideology of recognition and identity which also forms the basis of contemporary European substantive law. ((See for instance, S. Rodota, *Dal soggetto alla persona*, Editoriale Scientifica, Rome, 2007))

Although the objective of recognizing existing personal or family relationships in cross-border situations is entirely legitimate, its implementation certainly requires further thought. Indeed, the common thread which seems to run through the case-law is the principle of non-discrimination. This principle appears both as a fundamental value in itself and, in a Community context, as an essential component of European citizenship. The implication of the new recourse to non-discrimination as a foundation for choice of law is that the traditional use of nationality or domicile as connecting factor generates unjustified discrepancies in the field of personal status. This may in itself suggest that non-discrimination as conflict of laws methodology is totally misguided. Among the most notorious illustrations of judicial use of this principle is the European Court of Justice's judgment in the *Garcia Avello* case. ((ECJ *Garcia Avello*, C-148/02, 2003.)) It was held to be discriminatory for a Belgian court to apply choice of law rules on personal status which lead to the name of a Belgo-Spanish child residing in

Belgium being governed by Belgian law, as if he was in the same situation as a child whose parents are both Belgian. The principle of non-discrimination, inherent in the concept of European citizenship, mandates that he benefit from the rules of Spanish law on this point. The Spanish perspective on the determination of the name of a Spanish child must be recognized in Belgium on the basis of non-discrimination. This reasoning is flawed. The Garcia-Weber child had been born and was still resident in Belgium, which might have provided additional credit to the claim of Belgian law to regulate his family name. By deciding the contrary, and thereby allowing the child to benefit from whichever set of rules he chose to invoke, the Court of justice seems to imply that the sole fact of possessing dual citizenship suffices to differentiate a child from those who possess only the nationality of the country of his or her domicile. Of course, a child with strong personal connections to two different communities may well encounter difficulties in as far as the coherence of his or her personal status is concerned, if each adopts a different stance (whether on name, validity of marriage, adoption, etc). Avoiding limping personal status in this sort of situation is one of the principal policies behind many choice of law rules. But here, the Court's reasoning is distorted because it purported to resolve a difficulty linked to the impact of cross-border mobility on individual status, whereas in fact, there was no such mobility under the facts of the case other than the dual citizenship of the child. It was not unreasonable in the present case that Belgium, which was the country of both citizenship and domicile, sought to regulate the child's name in the same way as that of other purely Belgian children living in Belgium. It would therefore have been far more satisfactory to look towards other principles which, mindful of identity and the protection of persons, have significant implications as far as choice of law is concerned, such as the fundamental right to protection of one's personal and family life under article 8 of the ECHR. Of course, one the proper basis for full faith and credit due to foreign situations is determined, the task for the future will be to define its precise requirements in this respect in practice.

3. *Conflicts of public law*

Is it still true, that, as is so often asserted, the conflict of laws is limited to the field of private law? It has been apparent for some time that the some of the most significant evolutions, for private international law purposes, induced by the new

quasi-federal environment in Europe, concern public, administrative or regulatory law. Such law is given extraterritorial effect, through mutual recognition; independant regulatory authorities appear, with a duty to cooperate transnationally; elaborate schemes allocate regulatory authority among the Member States. In particular, in the field of securities regulation, the 2001 Lamfalussy Report provided considerable impetus for transnational cooperation between regulatory agencies. Thus, borrowing on the Admission Directive, ((Consolidated Directive 2001/34 EC coodinating the condtions for admission of securities to official stock exchange listing.)) which has served as a model for securities regulation as a whole, the Community has established a complete system of decentralised supervision and enforcement of the harmonised regime, supported by cooperation between administrative authorities. ((See Niamh Moloney, *EC Securities regulation Oxford EC Law Library*, 2002, p.100.)) The interesting point is that the administrative duty to cooperate, which justifies negotiation and dialogue when it comes to deciding upon the shared exercise of regulatory authority, may also lead to administrative bodies having to apply foreign regulatory law, which means in turn that conflict of laws principles will need to extend, with certain adjustments, to the field of public law. For an academic discipline which was epistemologically harnassed to the public/private divide – or rather, the public law taboo – this is all something of a landslide. However, it is also remarkable that even before the courts, where traditional approaches tends to linger, there are signs that transnational litigation in regulatory fields is throwing up evidence of shared state interests – so much so that one author has suggested that such litigation, albeit subject to domestic economic law, may bring substantive regulatory benefits to the international community. ((Hannah Buxbaum, Transnational Regulatory litigation, 48 Va J Int'l L 251 (2006).))

Here again, however, there is room for debate as to the appropriate approach to public or regulatory conflicts. An academic proposal on the regulation of global capital markets through interjurisdictional competition, ((S. Choi & A. Guzman, « Portable reciprocity : Rethinking the International reach of Securities Regulation », 71 S. Cal. L. Rev. 903 (1998).)) building on the mutual recognition theme, rejects administrative cooperation as insufficient, time-consuming and overly costly in terms of monitoring compliance. Free choice by issuers and investors as to how, or according to which national rules, they should be regulated (a choice which would then be "mutually" recognised by all states participating in the

market according to a system of “portable reciprocity”) would supposedly enhance competition across the board and ensure a wide range of legal products catering for risk-takers and risk averse alike. Although this proposal will no doubt meet some scepticism on this side of the Atlantic, where there is less faith in the regulatory virtues of party freedom, it is extremely interesting, first, because it emphasises once again the radical change in the relationship (or at least in the perception of this relationship) between law and market in a global environment, where party mobility (whether through free choice or exit from the sway of mandatory rules) is already a reality. Second, because it includes in this reversal the activity of regulatory agencies, which to some extent would be functioning on a delocalised basis. If one links these ideas to equally intriguing recent proposals to delocalise the adjudicatory activity of the courts in order to enhance global efficiency with the cooperative consent of states, ((It has even been suggested that accessing the courts of a chosen jurisdiction can be seen as an “after-sale service” bundled with the choice of the applicable law in the field of contracts or corporate charters, so that such access should also be available extraterritorially in the form of delocalized courts, in the context of a competitive global market for legal services: see H. Hansmann “Extraterritorial Courts for Corporate Law”, *Yale Law School Faculty Scholarship Papers*, 2005, Paper 3.)) the vision of the global world it projects is quite startling. Clearly, private international law needs be ready to meet the challenge of its new regulatory rôle.

Flashairlines and Declaratory Relief Under French Law

Emmanuel Jeuland is a professor of law at Paris I University (Panthéon-Sorbonne) and a specialist of civil procedure.

In this post, I would like to offer some brief thoughts on the Paris Court of appeal’s judgment of the 6th of March 2008. It is my opinion that the legal foundation of the judgement as far as victims’ right to sue is concerned is questionable and is not consistent with the French procedural system.

The court of appeal held:

> *le juge français n'est pas saisi par voie d'exception de sa compétence internationale mais par voie d'action ce qui rend inopérant le disposition de l'article 75 CPC… l'action ayant pour objet l'obtention d'une décision sur la compétence internationale française est inséparable du contexte judiciaire dans lequel la demande s'insère et qu'elle n'est pas contradictoire avec la saisine du juge pour qu'il se prononce …*
>
> *le juge français ne peut être le seul à être exclu du débat sur sa compétence internationale dès lors que la question s'inscrit dans un contexte de confiance mutuelle qui appelle à une coopération et une coordination des systèmes judiciaires …*
>
> *les victimes ont un intérêt légitime et actuel à obtenir une décision française sur la compétence internationale en raison de la décision du juge californien .*

This statement means that the issue of international jurisdiction in *Flash Airlines* is not referred to the French judge by way of defence but by way of action, so that article 75 CPC which deals with the defence of lack of jurisdiction is not applicable. Article 75 states that "*where it is alleged that the court seized lacks jurisdiction, the party who shall proffer the plea shall have, under penalty of it otherwise being inadmissible, to provide reasons thereof and to indicate, at all event, court before which the matter should be brought*".

Nevertheless the *Cour de cassation* has held that an action claiming that the court lacks jurisdiction is not admissible since article 75 CPC indicates that the lack of jurisdiction is a matter of defence, not of action:

> *les exceptions d'incompétence figurant au nombre des moyens de défense, le demandeur n'est pas recevable à contester la compétence territoriale de la juridiction qu'il a lui-même saisie (Cass. 2° Civ., 7 December 2000, Bull. n°163).*

This sentence means that the issue of jurisdiction is a means of defence, therefore the claimant is not admissible to challenge the territorial jurisdiction of the court to which he submitted his case. The international jurisdiction is so close to the territorial jurisdiction, that rules of territorial jurisdiction are usually extended to international matter in French international litigation.

This case of the 7th of December 2000 is not a formalistic decision. The code of civil procedure is consistent. There are actions and defences. An action is defined by article 30: "*an action is the right, in relation to the originator of a claim, to be heard on the merits of the same in order that the judge shall pronounce it well or ill-founded*". An action deals with the main issue on the merits whereas the defences may be on the merits, on admissibility or on jurisdiction. Several scholars and judges wrote the code of procedural law with great attention (Motulsky, Cornu, Parodi, etc.). A defence of lack of jurisdiction has to be argued in limine litis (before the claim of non admissibility and before the defences on the merits).

An action is admissible if the claimant has a legitimate and present interest. It is why the declaratory action is not admissible, in principle, under French law. There are some rare exceptions especially in private international law but on the merits of the case not on procedural grounds. But the court of appeal does not consider that it is a declaratory judgment. The victim has a legitimate and present interest to sue. This interest to sue is the likeliness to obtain damages for the victims. Yet they don't claim damages, they submit a case to a judge in order to obtain from this judge that he refuses the case. The court of appeal indicates that there is no contradiction to declare admissible an action seeking that the court has no jurisdiction. It seems to me that it is not sufficient to say that there is no contradiction to avoid the contradiction (it looks like a "Competenz Competenz" rule or a preliminary reference to the French court). The risk is that lawyers try too often to use this new tool to determine jurisdiction. Courts would become on this point legal consultants.

The word "legitimate interest" is rarely used in case law. It used to be applied to prevent concubine to seek damages when her concubine had been killed in a traffic accident. This case law was reversed in 1970. The condition of legitimate interest is a moral condition. In fact the court of appeal takes perhaps into account the victims' interest to bring their action in California (because of discovery, punitive damages etc.). The equilibrium, the consistency and the integrity of French civil procedure is endangered by the court of appeal judgment.

The mutual trust and international cooperation is invoked by the court of appeal to justify its decision. But good willing does not make good decision. As a matter of fact the court of appeal does not like to be excluded of the debate concerning its own jurisdiction but that is a feeling, not a rule. There are other fields where

the international cooperation and trust have not been taken into account (e. g. evidence matter in application of the Hague convention of 1970 in American and French case law etc.). The court of appeal's judgment is more or less a unilateral disarmament. There is a need for an international convention which may be the new Lugano convention of the 30th October 2007 (JOUE n° L. 339, 21 déc. 2007, p. 3 ; Procédures 2008, n° 43, obs. Nourissat) which may be ratified by non European countries ! (nevertheless this convention is a copy of the Brussel regulation and so a European text).

Related posts:

Flashairlines – Online symposium
French court declines jurisdiction to transfer dispute back to U.S. court

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Flashairlines – Online Symposium

In a recent post, I reported how the Paris Court of appeal accepted to decline jurisdiction in order to meet the jurisdictional criteria of a U.S. court and enable plaintiffs, most of whom were French, to get back to California and resume proceedings there.

The *Flashairlines* litigation raises many fascinating issues. Here are just a few of them: were each of the courts calling for or even engaging into international judicial cooperation? Where does this case, that none of the courts initially wanted, belong? Should French (and more generally civil law) civil procedure be twisted in some of its most basic principles (availability of declaratory relief, conveniens analysis) in order to reach jurisdictional purposes, and which one?

In the days to come, *Conflictoflaws* would like to organise an online symposium on the case. We hope that many European and American scholars will want to share with us their thoughts on the issues it raises. If you are interested in participating, feel free to post comments or to contact us.

Related posts:

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The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons

Symeon Symeonides (*Williamette*) has posted "**The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons**" on SSRN (forthcoming in *Tulane Law Review, Vol. 82, No. 5, 2008*.) Here's the abstract:

> *This Article is an invited contribution to a symposium held at Duke University Law School under the title "The New European Choice-of-Law Revolution: Lessons for the United States?" [see here] The Article disputes part of this title by contending that, unlike its American counterpart, European private international law (PIL) has rejected the route of revolution and has instead opted for a quiet and continuing evolution. Nevertheless, this evolution has produced statutory rules and exceptions that resolve several categories of tort conflicts in the same way as American courts after four decades of "revolution," experimentation, and reinventing the wheel in each case. The quality and efficiency of these rules suggest that revolution is not necessarily the most productive nor quickest route to renewal and improvement. The Article concludes that the European experience can help American conflicts law overcome its innate anti-rule syndrome and develop its own rules without surrendering the methodological or substantive gains of the choice-of-law revolution. Thus, the Article answers affirmatively the question posed by the Symposium's subtitle.*
>
> *The Article also turns the Symposium's question in the opposite direction by asking whether the American conflicts experience holds any lessons for Europe. The Article concludes that a discerning examination of this experience can help European PIL in several ways, including fine-tuning its own choice-of-law rules,*

allowing more flexible exceptions, overcoming its own phobias against issue-by-issue analysis and depecage, and recognizing and appropriately resolving certain false conflicts

Download the paper from SSRN.