# Book: The External Dimension of EC Private International Law in Family and Succession Matters

The papers presented at the international conference held in March 2007 at the University Carlo Cattaneo of Castellanza (see our previous post), and a final report drafted on the basis of the discussion that arose in the colloquium, have been published by CEDAM, under the editorship of *Alberto Malatesta*, *Stefania Bariatti* and *Fausto Pocar*: "**The External Dimension of EC Private International Law in Family and Succession Matters**".

Here's an excerpt from the *Foreword* of the volume:

> *Under the 2005 Framework Programme for Judicial Cooperation in Civil Matters, the European Commission funded an International Research Project presented by the University Carlo Cattaneo of Castellanza on the EC harmonisation of Private International Law and the external relations in family and succession law.*
>
> *A group of scholars coming from various European countries agreed to undertake the task of carrying out an in-depth analysis of the scope of the Community powers in the field of Private International Law in the above matters, with special reference to relationships connected with third States.*
>
> *The focus on family and succession law was deemed crucial in the light of the many initiatives of the European Community in this field pursuant to Articles 61(c) and 65 of the EC Treaty, and of the hot debate they raised about the need itself of such measures and their content. On the other hand, in the course of the Research Project, the European Court of Justice rendered the long-awaited Lugano Opinion (Opinion No 1/03), that provided some general guidelines about the future external dimension of the Community action in the conflicts of laws and its role in the international community.*

And this is the table of contents (available as a .pdf file on the publisher's website):

**Introductory Speech** – *Fausto Pocar*: The "Communitarization" of Private International Law and its Impact on the External Relations of the European Union;

**First Part – EC EXTERNAL RELATIONS AND PRIVATE INTERNATIONAL LAW**

- *Alberto Malatesta*: The Lugano Opinion and its Consequences in Family and Succession Matters;
- *Andrea Santini*: The Doctrine of Implied External Powers and Private International Law Concerning Family and Succession Matters;
- *David McClean*: Bilateral Agreements with non-Member States after the Lugano Opinion;
- *Stefania Bariatti*: Bilateral Agreements with non-Member States after the Lugano Opinion: Some Procedural Issues.

General Discussion

- *Laura Tomasi*: The Application of EC Law to non-Purely intra-Community Situations.

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**Second Part – GENERAL PROBLEMS OF EC PRIVATE INTERNATIONAL LAW WITH REGARD TO RELATIONS WITH THIRD STATES**

**Section 1: Jurisdiction, Recognition and Enforcement of Judgments and Administrative Cooperation**

- *Alegría Borrás*: Lights and Shadows of Communitarisation of Private International Law: Jurisdiction and Enforcement in Family Matters with regard to Relations with Third States;
- *Etienne Pataut*: International Jurisdiction and Third States: A View from the EC in Family Matters;
- *Andrea Bonomi*: The Opportunity and the Modalities of the Introduction of Erga Omnes EC Rules on Jurisdiction;
- *Marta Pertegás*: Recognition and Enforcement of Judgments in Family and Succession Matters;
- *Roberto Baratta*: Short Remarks on EC Competence in Matters of Family

Law;
- *William Duncan*: Administrative Cooperation with regard to the International Protection of Children.

General Discussion

- *Carola Ricci*: Habitual Residence as a Ground of Jurisdiction in Matrimonial Disputes: From Brussels II-bis to Rome III;
- *Gaetano Vitellino*: European Private International Law and Parallel Proceedings in Third States in Family Matters.

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**Section 2: Applicable Law**

- *Kurt Siehr*: Connecting Factors, Party Autonomy and Renvoi;
- *Peter McEleavy*: Applicable Law and Relations with Third States: The Use and Application of Habitual Residence;
- *Th. M. de Boer*: Unwelcome Foreign Law: Public Policy and Other Means to Protect the Fundamental Values and Public Interests of the European Community;
- *Johan Meeusen*: Public Policy in European Private International Law: In Response to the Contribution of Professor Th. M. de Boer on "Unwelcome Foreign Law";
- *Carmen Parra Rodríguez*: Characterisation and Interpretation in European Family Law Matters;
- *Luigi Fumagalli*: Characterization in European Private International Law: Short Notes on the Interpretation Process from Independence to Functionality and Return (to the Tradition).

General Discussion

- *Cristina Mariottini*: The Internal and External Dimensions in the Harmonization of European Conflict Rules on the Administration of Estates.

**Final Report***: Alberto Malatesta*.

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Title: **The External Dimension of EC Private International Law in Family and Succession Matters**, edited by *Alberto Malatesta*, *Stefania Bariatti* and *Fausto Pocar*, CEDAM (Studi e pubblicazioni della Rivista di diritto internazionale privato e processuale, n. 71), Padova, 2008, XIV-392 pages.

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*(Many thanks to Gaetano Vitellino, University "Carlo Cattaneo" of Castellanza, for the tip-off)*

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# BIICL event: Cross-border insolvency of financial groups

As part of the BIICL's 2007-2008 Seminar Series on Private International Law the BIICL organizes on Thursday 17 April 2008 17:30 to 19:30 (at British Institute of International and Comparative Law, Charles Clore House, 17 Russell Square, London, WC1B 5JP) a seminar titled "Financial Groups: A Fragmented EU Insolvency Regime". The seminar will deal with cross-border insolvency of financial groups; In the event of the insolvency of a financial group, within the EU, banks, insurance companies and other financial institutions are subject to different insolvency regimes. The purpose of the seminar is to analyse and explain how the different insolvency regimes might operate in the event of a default triggering the insolvency of a group of financial companies. Jurisdiction to open main insolvency proceedings may be allocated to the state in which the centre of main interests of the legal entity is located (under the EU Insolvency Regulation) or where the registered office and/or head office is based (e.g. under the EU Directive on Winding up of Credit Institutions). When cross-border insolvency extends beyond the EU, the UNCITRAL Model Law on Cross-Border Insolvency may come into play. The result is a complicated patchwork of regulation, which does not fit easily with the way in which multinational financial groups conduct cross-border business.

Gabriel Moss QC and John Breslin, an Irish barrister, will tackle a case study

involving the collapse of a financial group (see below), following a brief description of the legislative framework by Jane Welch, and an outline of the history of the EU Insolvency Regulation and in particular the development and interpretation of the concept of "centre of main interests" by Professor Ian Fletcher. The seminar is chaired by Mr. Justice David Richards. The case study that will be analysed and discussed involves a group containing a UK bank and its Irish fund-raising subsidiary, a management company incorporated in Gibraltar and a UK insurance company. The sub-prime crisis leads to the insolvency of the Irish subsidiary and the other group companies. For more information about the seminar, its Chair, speakers and sponsor, have a look at the website.

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# Rome I: Statements by the Council and the Commission on Insurance Contracts and by the French Delegation on Consumer Contracts

Following our post on the release of the final text of the Rome I Regulation, an internal document by the *General Secretariat of the Council* to the *Permanent Representatives Committee* (COREPER) confirms that the new Regulation will be soon adopted by the Council (doc. n. 7689/08 of 7 April 2008):

> *5. The Permanent Representatives Committee is therefore asked to confirm agreement and* ***advise the Council to:***
>
> - ***adopt the Regulation, as set out in PE-CONS 3691/07 JUSTCIV 334 CODEC 1401, as an "A" item at a forthcoming meeting****;*
> - *decide to enter in the minutes of that meeting the statements set out in the addendum to this note.*
>
> *After being signed by the President of the European Parliament, the President of the Council and the Secretaries-General of the two institutions, the*

*legislative act will be published in the Official Journal of the European Union.*

Quite surprisingly, as regards the participation of the United Kingdom in the adoption of the Regulation, a footnote of the document states:

*In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland have given notice of their wish to take part in the adoption and application of this Regulation.*

This is probably a mistake, since the United Kingdom has not so far officially opted in (see Recital n. 45 of the Regulation), and a consultation paper on the matter was launched last week by the Ministry of Justice (see our post here).

[**UPDATE on the position of the United Kingdom**: a revised version of the document has been released – doc. n. 7689/1/08 REV 1 of 9 April 2008 -, where it is clearly stated that, at present, "[i]n accordance with Articles 1 and 2 of the Protocol […] and without prejudice to Article 4 of the said Protocol, the United Kingdom is not taking part in the adoption of this Regulation and is not bound by it or subject to its application"]

**Two statements** are set out in the Addendum (doc. n. 7689/08 ADD 1 of 7 April 2008): one by the Council and the Commission, relating to the new conflict rule **on insurance contracts** (Art. 7 of the new Regulation), and one by the French delegation, **on the consistency between the rule on applicable law in consumer contracts** (Art. 6) **and future revisions of Brussels I Regulation** as regards the provisions relating to jurisdiction in the same matter (Section 4, Articles 15-17 of Brussels I Reg.). Here's the text:

***DECLARATION BY THE COUNCIL AND THE COMMISSION RELATING TO THE LAW APPLICABLE TO INSURANCE CONTRACTS***

*The Council and the Commission note that the rules contained in Article 7 essentially reflect the legal situation as regards applicable law as presently included in the insurance Directives. Any future substantive revision of the present regime should take place in the context of the review clause of this Regulation.*

***DECLARATION BY THE FRENCH DELEGATION RELATING TO ARTICLE 6 OF ROME I ON THE LAW APPLICABLE TO CONSUMERS***

*In view of the importance of conflict-of-law rules in international private law, and in order to achieve the objective, laid down in Article 153 of the EC Treaty, of ensuring a high level of consumer protection within the Community, France wishes to state that, in the revision of Regulation 44/2001 EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the provisions relating to jurisdiction (section 4 of Brussels I) must be consistent with Article 6 of the Regulation applicable to contractual obligations (Rome I), concerning the law applicable to consumer contracts.*

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# Summer Seminar in Urbino

Readers of the blog may be interested in this summer seminar where many courses on conflicts are taught.

The seminar has been hosted by the university of Urbino, Italy, for 50 years. Courses of Private International Law, Comparative Law and European Law are taught either in French or in Italian (with a translation in the other language). Professors are not only Italian (L. Mari, T. Ballarino) and French (H. Muir Watt, B. Audit) but also German (E. Jayme) or Portuguese (M. Rui Moura Ramos, D. Pina).

The program of the 2008 Seminar can be found here.

I personally participated to the seminar years ago and had a great time, so I can only recommend it!

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# Dutch Supreme Court Refers Questions on Article 5(3) Brussels I Regulation

**Hoge Raad, 4 April 2008, *Zuid-Chemie/Philippo's Mineralenfabriek* Nr. C06/310HR** (link is to decision in Dutch).

On Friday 4 April, the Dutch Supreme Court (Hoge Raad) made a preliminary reference to the ECJ, with regard to the interpretation of article 5(3) of Regulation 44/2001 (jurisdiction in matters relating to tort). What follows is a short description of the facts as they emerge from the Supreme Court's decision and a provisional translation of the referred questions.

In July 2000, Zuid-Chemie, a producer of fertilizers in Sas van Gent (NL), bought two cargoes of 'micromix' from HCI Chemicals Benelux in Rotterdam (NL). HCI, who were unable to produce this micromix on their own, ordered the product from Philippo's, in Essen (Belgium), and delivered all necessary ingredients bar one at Philippo's factory. In consultation with HCI, Philippo's bought the missing ingredient (zinc sulphate) from a company called Poortershaven, established in Rotterdam (NL). Philippo's produced the micromix at her factory in Essen, where Zuid-Chemie took delivery. Zuid-Chemie, subsequently, used the micromix in multiple cargoes of fertilizer-products, some of which were sold to (foreign) buyers. It has become clear since then that the zinc sulphate obtained from Poortershaven was contaminated with cadmium, as a result of which the produced fertiziler is unusable. Zuid-Chemie has claimed damages in tort from Philippo's in the District Court (Rechtbank) in Middelburg (NL) . Philippo's alleged delict ("onrechtmatige daad") consists of having produced a product that has caused damage in the course of its normal use.

Philippo's argues that the Dutch court does not have jurisdiction, because in its view *the place of delivery of the contaminated micromix* – in Essen (Belgium) – should be regarded as 'the place where the harmful event occurred' (art. 5(3) Brussels I Regulation). Zuid-Chemie argues that the place where the harmful event occurred is *the place where different components (including the contaminated micromix) were mixed into the final product*, which was at its

factory in Sas van Gent (NL).

At first instance, the District Court noted that 'the place where the harmful event occurred' could be both the '*Handlungsort*' and the '*Erfolgsort*' (both terms used in the Dutch text, as is common in Dutch decisions), and concluded that Essen was the place where Zuid-Chemie suffered initial damage ("initiële schade") because that was the place where the contaminated micromix was delivered *ex works*. The Court of Appeal in The Hague (Gerechtshof 's-Gravenhage) has upheld this decision, noting that the place of production of the contaminated micromix (Essen) should be regarded as the '*Handlungsort*'.

In his Opinion in the Case (of 1 February 2008), Advocate General Strikwerda, observed that the ECJ had not yet pronounced itself on the question of whether "the distinction between '*Handlungsort*' and '*Erfolgsort*' is limited to situations involving a tortious act which leads to physical damage to persons or property" and whether, "in the case of tortious acts which cause non-physical damage and purely economic loss no such distinction should be made, even where this damage is the direct (initial) consequence of the damage-causing act ("schadebrengende feit")" (par. 14).

Following the suggestion of the Advocate General, the Supreme Court, in its decision of 4 April 2008, referred to the ECJ the following questions:

1. In the case of a tortious act as alleged by Zuid-Chemie, what damage should be regarded as the initial damage resulting from this act: the damage resulting from the delivery of the defective product, or the damage resulting in the course of the normal use for which this product was intended?
2. In case the latter option is correct: may the place where this damage occurs be regarded as 'the place where the harmful event occurs' only where the damage consists of physical damage to persons or property, or is this allowed also when (for the time being) merely economic loss has been suffered?

# The Croatian Administrative Court Ruling: Foreigners Eligible for Compensation for, or Return of, the Property in Croatia Taken During the Communist Era

On 14 February 2008, the Administrative Court of the Republic of Croatia rendered the first decision that will enable the return of the nationalised property to a foreigner. The right to return of or the right to be compensated for the apartment building, located in the centre of the Croatian capital Zagreb and taken immediately after the Second World War, has been recognized to Zlata Ebenspanger, a Brazilian national, i.e. to her son who stepped into her procedural position upon her passing away. The Administrative Court annulled the first-instance administrative decision rejecting the application and along with the instructions on the proper interpretation of the Act remitted the case back for decision by the same body.

According to the initial text of the 1996 Compensation for the Taken Property during the Yugoslav Communist Government Act, former owners had no right to request the return of property or compensation for it if on the day this Act was rendered they did not have Croatian citizenship at the time the Act was rendered (Article 9). The Act further provided that the right to return/compensation does not exist in case where an international treaty has already settled that matter (Article 10). It was additionally prescribed that persons (natural and legal) not having Croatian citizenship were not eligible, except in cases where an international treaty specifically provided otherwise (Article 11). The Constitutional Court of the Republic of Croatia was asked to rule on the constitutionality of the cited provisions. In 1999, the Constitutional Court declared the limitations concerning the foreign natural (but not legal!) persons unconstitutional and the respective provisions void (Decision docket number U-I-673/96, published in Official Gazette of the Republic of Croatia 39/1999, accessible here). In its reasons the Constitutional Court stated:

*Differentiating former owners on the basis of their legal bond to a certain state (i.e. on the basis of citizenship) – when at the same time some are granted the compensation (Croatian nationals) while others are not at all granted this right – is unjust and cannot be justified by the need to protect some other important constitutional or other right. All the more since to all persons, Croatian nationals and those who are not, the property was taken by the same means, at the same time and on the basis of the same legal grounds, and their property – if still preserved – remained in the Republic of Croatia owned by the state or other legal entities.*

*Differentiation in the volume of potential rights of Croatian nationals and foreigners is common (and not contrary to the Constitution) in cases when the legal entities are regulated under the public laws or laws concerning the commencement of the employment relation. Nonetheless, when the relations concerning the property are at stake such differentiation in such a general, wide-ranging form cannot exist and it is contrary to the Constitution.*

*For these reasons, by the law that will be adopted instead of the void one, the former owners who are not Croatian citizens should in principle be granted the right to compensation or return of the property, and defined the preconditions under which these persons will be granted the right to compensation. The right of foreigners to have the immovable returned to them should be regulated in accordance with the provisions of other acts on the rights of foreigners to acquire immoveable on the territory of the Republic of Croatia.*

In 2002, the Croatian Parliament passed the Act Amending and Supplementing the 1996 Compensation for the Taken Property during the Yugoslav Communist Government Act (Official Gazette of the Republic of Croatia 80/2002 and 81/2002) which, amending Article 10 and deleting Article 11, on top of the part of Article 9 being deleted by the Constitutional Court, made it possible for foreign natural persons to acquire the right to be compensated for the taken property yet only if so determined by an international treaty. Until recently, the interpretation of this provision was that if the state, whose citizenship the applicant has, has not concluded an international treaty in respect to these matters with the Republic of Croatia, its citizens cannot be granted the right to compensation or return of property. A case in point is a decision of the Administrative Court of the Republic of Croatia, Us-10052/2004 of 28 April 2005, accessible via this link.

However, the interpretation of this Act has been reversed in the latest decision of 14 February 2008. According to this precedent, the requirement of an international treaty is no longer a preclusive element, although the provision actually says so. Namely, the Administrative Court did not rest solely on the linguistic interpretation, but took account of the fact that the Constitutional Court erased the part of Article 9 which set the precondition of applicant's Croatian citizenship and concluded that right to be compensated belongs to all foreign natural persons in respect to which the issue of the taken property has not been resolved by an international treaty. This interpretation has been taken at the February 2008 session of the respective section of the Administrative Court which is available here. Whether this interpretation may be considered justified is indeed arguable, but the outcome seems to be in accordance with the principles highlighted in the Constitutional Court decision.

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# Flashairlines and Transatlantic Ping Pong

*Christelle Chalas is a lecturer at Paris VIII Faculty of Law and the author of a book on Discretionary Exercise of Jurisdiction in Private International Law (in French).*

> *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

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# 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…

Related posts:

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

# Seminar on PIL at the University of Johannesburg

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

Morning seminar on private international law Thursday 17 April 2008

- *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.