

**SYMPOSIUM: TRANSATLANTIC BUSINESS
TRANSACTIONS—CHOICE OF LAW,
JURISDICTION, AND JUDGMENTS
FOREWORD**

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The articles in this symposium were presented at a conference jointly organized by the Association of American Law Schools (AALS) and by the European Law Faculties Association (ELFA) at the University of Barcelona, Spain on June 1–3, 2003. The Barcelona meeting was the first jointly sponsored program ever organized by the leading law school associations in Europe and the United States—a surprising statistic, given the breadth and volume of contacts between U.S. and European legal scholars. The subject of the conference—the conflicts of legal systems that arise in transatlantic business transactions—was designed to engage European and U.S. scholars in a dialogue that would enrich our understanding of how complex issues of choice of law, judicial and legislative jurisdiction, and enforcement of judgments are handled by courts on either side of the Atlantic.¹

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1. In addition to the authors whose articles are included in this symposium, the AALS–ELFA conference in Barcelona included presentations by the following European and U.S. scholars: Professor Jurgen Basedow, Max Planck Institute for Foreign and International Private Law, Hamburg, Germany; Professor Amy Boss, Temple University; Alan Crain, General Counsel, Baker Hughes Inc., and Adjunct Professor, University of Houston Law Center; John Fellas, Hughes Hubbard and Reed, New York City; Professor Jane Ginsburg, Columbia University; Sir Roy Goode, Oxford University; Professor Gabrielle Kaufmann-Kohler, University of Geneva; Professor Catherine Kessedjian, University of Pantéon-Assas, Paris, France; Professor Joseph Lookofsky, University of

It is fitting that the first program ever jointly sponsored by the AALS and ELFA should deal with conflicts of law issues. The United States and its European trading partners are responsible for a vast array of international economic relationships of both a public and private nature that are subject to an expanding web of overlapping—and at times conflicting—legal norms developed by rule-making bodies at the international, regional, national, state, and local levels. International lawyers have long confronted the uncertainties that accompany international transactions, but as globalization and the interdependency of national economies have increased, the field of overlapping legal norms has also expanded in ways that magnify these uncertainties. Heightened concerns over national security after the terrorist attacks of September 11, 2001 have further engendered extraterritorial applications of security-based legislation, creating a new battleground of potentially conflicting legal norms in different countries that will continue to affect economic relations and business transactions.

The scholars who have contributed to this symposium are among the leading commentators on conflicts of law in Europe and the United States. The first article, presented as the keynote address at the conference by Professor Andreas Lowenfeld, introduces the major issues surrounding jurisdiction and choice of law that arise in transnational business transactions under an interconnected world economy. Professor Johan Erauw elaborates on the themes presented in this keynote paper, discussing rules developed within the European Union that help determine the applicable law in cross-border business transactions. Professor David Gerber examines the traditional legal theories that place limits on legislative and regulatory jurisdiction, and shows how these theories are being challenged in our era of globalization and economic interdependence. Mr. Layton and Ms. Parry discuss the same problem from a British perspective, focusing on British responses to the extraterritorial application of U.S. antitrust

Copenhagen; Professor Fausto Pocar, University of Milan; and Professor Miguel Virgos, Universidad Autónoma de Madrid.

laws.

The final three articles in the symposium deal with conflicts that arise from the concurrent jurisdiction of courts in different countries to settle the same dispute. Professor Linda Silberman's article is a valuable overview of the bases of jurisdiction to adjudicate disputes over foreign defendants applied in the United States, and of the ways in which courts in the United States deal with problems of "parallel litigation" in different countries. Professor Willibald Posch also examines adjudicatory jurisdiction, providing a European perspective on the problems associated with concurrent jurisdiction over transnational business transactions, from assertion of jurisdiction to enforcement of foreign judgments. Finally, Professor Stephen Burbank looks at two important doctrines used by U.S. courts confronted with problems of concurrent jurisdiction: *lis pendens* and *forum non conveniens*.

The scholars who came to Barcelona asked the same question: Why do the U.S. and European legal systems, which are linked by cultural and historical ties, deal so differently with basic questions of international jurisdiction? Catchwords such as "doing business," "attachment proceeding," "*forum non conveniens*," "treble damages," and "The Brussels Convention" signal conflicting views rather than a common heritage and a strong structural kinship. Paradoxically, to paraphrase Sir Winston Churchill: Europe and the United States are two continents separated by a common legal tradition.

On both sides of the Atlantic, international business transactions are governed by party autonomy, and it is understood that this autonomy should be restricted only in rare circumstances. Yet if one looks at the application of conflicts principles in any given problem area, one finds that Europe and the United States have gradually moved away from a shared understanding of common principles to a pattern of diverging views. Dispassionate analysis of the need for "internationally mandatory rules of competition law," which once dominated the discourse of U.S. and European scholars, has given way to diplomatic and doctrinal conflicts over the proper application of diverging national competition laws. In the field of tort law, we have witnessed heated disputes arising from lawsuits brought

before U.S. courts by victims of injuries and torts which happened in Europe and elsewhere, but for which the victims felt that they would not obtain adequate compensation before their "home" courts. Courts on both sides of the Atlantic will surely be forced to address future conflicts arising from heightened concerns over terrorism, as government agencies extend their extraterritorial reach in the pursuit of national security.

The Barcelona conference endeavored to take notice of the divergent views in conflicts doctrines, to compare the different perspectives, to analyze them in particular problem areas and regulatory systems, and to engage in case studies ranging from recognition policy to investment securities. This effort deepened the participants' understanding of the concepts and policies that dominate the conflicts of laws discussion on both sides of the Atlantic. It is precisely because of the divergent positions of U.S. and European concepts of choice of law, jurisdiction and judgments that the Barcelona exercise was important, and we are hopeful that it will be replicated by similar meetings sponsored by the AALS, ELFA and other organizations. Only by understanding each others' conflicts regimes can European and U.S. practitioners and scholars hope to mediate the negative effects (including the uncertainty that business abhors) that flow from our differences in approach. Increased understanding will foster a new and more complete range of arguments in conflicts issues brought before the courts, and will improve both the administration of justice in both Europe and the United States. Ultimately, the transatlantic business community, and the citizens who make up this community, will be the beneficiaries of this increased interaction.

As co-chairmen of the Planning Committee for the conference, we are grateful to the editors of the *Houston Journal of International Law* for publishing this symposium, making these papers available to a large number of scholars and legal practitioners in the United States, Europe and elsewhere. We are also grateful to our fellow Planning Committee colleagues: Professor Stefania Bariatti of the University of Milan (Università degli Studi); Professor Alegría Borrás of the University of Barcelona, which hosted the meeting; Professor

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Marc Fallon of the Catholic University of Louvain; Professor William Fisch of the University of Missouri–Columbia; and Professor Linda Silberman of New York University. Carl Monk, AALS Executive Director, and Jane LaBarbera, AALS Associate Director, deserve special credit for their outstanding work in organizing such a successful conference.