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FOREIGN LAW IN CIVIL LITIGATION

A COMPARATIVE AND
FUNCTIONAL ANALYSIS

SOFIE GEEROMS



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General Editor's Preface

Readers of the *Oxford Private International Law Series* will be familiar with Richard Fentiman's *Foreign Law in English Courts*. The emphasis in that book was on the position under English law. Dr Geeroms' monograph on *Foreign Law in Civil Litigation* takes a much wider perspective by looking at the position in no less than six different States: Belgium, England, France, Germany, the Netherlands, and the USA. These States have been carefully chosen as representing major legal traditions. Interestingly, there are differences in the treatment of foreign law not only between the common law and civil law States but also between individual civil law States.

The impressive level of detail means that this is an invaluable source for any lawyer faced with litigation in any one of these States. Moreover, any English lawyer reading the work cannot help but question basic principles of English private international law, in particular the principle that the foreign law must be pleaded by the parties concerned. The approach adopted is not only comparative but also functional. The analysis is sophisticated and shows how the law of procedure has a close connection with the institutions of a legal system, leading to the conclusion that there is no ideal procedural treatment of foreign law.

The stated aim of the *Oxford Private International Law Series* is to publish works of quality and originality in a number of important areas of private international law. *Foreign Law in Civil Litigation* admirably fulfils these criteria.

James Fawcett
Nottingham
July 2003

‘The periods in which countries have produced their greatest jurists, and exercised the widest influence, are those in which the concerns these jurists addressed were the least national.’

James Gordley, *Comparative Legal Research: Its Function in the Development of Harmonized Law*, 43 AM. J. COMP. L. 555, 567 (1995)
(referring to Ugo Mattei)

Acknowledgements

My interest in the subject-matter of this book arose rather incidentally by reading the interesting article of Professor Trevor Hartley in the *International Comparative Law Quarterly* of 1996. Holding an excellent combination of all kinds of interesting issues—procedural law, private international law, litigation, comparative law, legal theory—it seemed to me the perfect subject for a doctoral thesis. Practice at the Brussels Bar confirmed this interest, and so slowly but gradually the idea took form to do a profound comparative research on the issue of foreign law in civil litigation.

Research for the book was done at several places, partly in Belgium, partly in the United States, and partly in Switzerland. The following institutions and libraries were instrumental in enabling me to write the thesis and deserve explicit recognition: the excellent library of the law faculty of the K.U. Leuven, the impressive library of Harvard Law School, and last but not least, the library of the Swiss Institute of Comparative Law with its wonderful collection on private international law. My stay at Harvard Law School for one year was extremely enriching and determining to the style of the thesis. I benefited from lively discussions with Professor Arthur von Mehren, Professor Anne-Mary Slaughter, and Professor John Mansfield in their respective classes of conflict of laws, civil procedure, and evidence. I also greatly appreciated the critical remarks and comments of Professor Arthur von Mehren on my LL.M. paper. The work at the Swiss Institute of Comparative Law was also important to the formulation of my final position. The kind of legal opinions we provide on foreign law—often for the purpose of litigation—on the whole confirmed my position on foreign law in civil litigation. Other authors who have greatly inspired me and to whom credit must go are Professor Richard Fentiman, Professor Arthur Miller, Professor Stephen Sass, Professor Hans Jessurun d'Oliveira, Professor Th. De Boer, and Professor Imre Zajtay. I also greatly appreciated the linguistic remarks and comparative law comments of two common law colleagues, David Haljan and Nidhi Gupta.

The study was submitted as a *doctoraat* to the Law Faculty of the Katholieke Universiteit of Leuven in September 2001, which accepted it in February 2002. My main debt of gratitude goes to Professor Walter van Gerven, who supervised the thesis and presided over the faculty committee. Equally, I wish to thank the other members of the faculty committee, Professor Hans van Houtte, Professor Koen Lenaerts, Professor Laurence Gormley, and Professor Katharina Boele-Woelki for their valuable comments.

My gratitude is further extended to Professors James Fawcett and Richard Fentiman, who carefully read my original manuscript. Both have provided highly valuable suggestions, which I have largely followed and which were of great importance in improving the quality of the book. I am particularly grateful to Anna Rayne, who 'cleaned' the book of technical imperfections at copy-editing stage. In this regard, I would also like to thank my present colleague Nicole Mathé.

On the personal level, I am grateful to my parents, who have always encouraged me in my studies, work, and aspirations. I also wish to thank my husband Thomas for his patience with me during this intense period, for his great assistance in the finalization of the thesis, and for undertaking the lion's share of daily tasks. Last, but most importantly, I thank my first-born daughter Aster Lambert-Geeroms, whose cheerful character was a constant motivation to write the book in a very efficient and time-managed period. This book is dedicated to her.

The common law-inspired case analysis reflects my preference for the real world, and hopefully it makes it as such a useful companion for the practitioner. The use of strict systematic standards in classifying the types and rationales of the different responses reflects at the same time my more formal basic legal background. I have attempted to make the study current to Spring 2003, when the manuscript was submitted to OUP.

Abbreviations

A.A.	<i>Ars Aequi</i>	(Netherlands)
A.C.	Appeal Cases	(UK)
A.G.	Amtsgericht	(Germany)
ALR FED.	American law reports federal	(United States)
All E.R.	All England Law Reports	(UK)
AM. J. COMP. L.	American Journal of Comparative Law	(United States)
App. Cas.	Appeal Cases	(England)
ArbGG	<i>Arbeitsgerichtsgesetz</i>	(Germany)
Arr. Cass.	<i>Arresten van het Hof van Cassatie</i>	(Belgium)
BAG	<i>Bundesarbeitsgericht</i>	(Germany)
BGB	<i>Bürgerliches Gesetzbuch</i>	(Germany)
BGBI.	<i>Bundesgerichtsblatt</i>	(Germany)
BGH	Bundesgerichtshof	(Germany)
BGHZ	<i>Entscheidungen des Bundesgerichtshofes in Zivilsachen</i>	(Germany)
Bijl. Hand. II	<i>Bijlage bij Handelingen Tweede Kamer</i>	(Netherlands)
B.L.D.	Bulletin of Legal Developments	(UK)
Bull. Civ.	<i>Bulletin Civil</i>	(France)
B.W.	<i>Burgerlijk Wetboek</i>	(Belgium, Netherlands)
C.A.	Court of Appeal	(UK)
Cal.	California Reports	(United States)
Cal. App.	California Appellate Reports	(United States)
CAL. EVID. CODE	Californian Evidence Code	(United States)
Cass. belg.	Hof van Cassatie	(Belgium)
Cass. civ. fr.	Cour de Cassation, chambre civile	(France)
Cass. fr.	Cour de Cassation	(France)
Cass. soc. fr.	Cour de Cassation, chambre sociale	(France)
C. Civ.	<i>Code Civil</i>	(France)
CCM	<i>Code Civil de Monaco</i>	(Monaco)
Ch. D.	Law Reports Chancery Division (1875–1890)	(UK)
Cl. & Fin.	Clive and Finance	(UK)
C.P.	Court of Common Pleas	(UK)
CPO	<i>Civilprozeßordnung</i>	(Germany)

CPR	Civil Procedure Rules	(England)
DB	<i>Der Betrieb</i>	(Germany)
D.C. Cir.	United States Court of Appeals for the District of Columbia Circuit	(United States)
D.C.N.J.	District Court New Jersey	(United States)
D.C.Z.	United States District Court for the District of the Canal Zone	(United States)
Décr.	<i>Décret</i>	(France)
DE VERZ.	<i>De Verzekering</i>	(Belgium)
D. Guam	District Court of Guam	(United States)
Dist. Ct. App.	District Court of Appeal	(United States)
D. Jur.	<i>Dalloz Juridique</i>	(France)
D.P./D.	<i>Receuil Dalloz Périodique</i>	(France)
E.D. Mich.	Eastern District Reporter Michigan	(United States)
E.D.N.Y.	Eastern District Reporter New York	(United States)
E.D. Pa.	Eastern District Pacific Reporter	(United States)
E.D. Va.	Eastern District Reporter Virginia	(United States)
EEX	<i>Europees Executieverdrag</i>	(International)
EGGBG	<i>Einführungsgesetz zum Bürgerlichen Gesetzbuch</i>	(Germany)
Eng. Rep.	English Reports	(UK)
F. (2d)	Federal Reporter (second series)	(United States)
FED. R. CIV. P.	Federal Rules of Civil Procedure	(United States)
FGG	<i>Gesetz über die freiwillige Gerichtbarkeit</i>	(Germany)
FGO	<i>Finanzgerichtsordnung</i>	(Germany)
F.R.D.	Federal Rules Decisions	(United States)
F. Supp.	Federal Supplement	(United States)
Ger. W.	<i>Gerechtig Wetboek</i>	(Belgium)
G.G.	<i>Grundgesetz</i>	(Germany)
G.W.	<i>Grondwet</i>	(Belgium, Netherlands)
HaftpflG.	<i>Haftpflichtgesetz</i>	(Germany)
HARV. L. REV.	Harvard Law Review	(United States)
H.L.	House of Lords	(UK)
HLC	House of Lords' cases	(UK)
HR	Hoge Raad	(Netherlands)
Hrb.	<i>Handelsrechtbank</i>	(Belgium)
IOWA L. REV.	Iowa Law Review	(United States)
IPR	<i>Internationales Privatrecht</i>	(Germany)
IPRAX	<i>Praxis des Internationalen Privat- und Verfahrensrechts</i>	(Germany)

IPRSPR	<i>Die Deutsche Rechtssprechung auf dem Gebiete des internationalen Privatrechts</i>	(Germany)
JCP	<i>Juris-Classeur Périodique</i>	(France)
JDI	<i>Journal de Droit International</i>	(France)
J.L.	<i>Jurisprudence de Liège</i>	(Belgium)
J.L.M.B.	<i>Jurisprudence de Liège, Mons et Bruxelles</i>	(Belgium)
JOURNAL DU DR. INT.	<i>Journal du Droit International</i>	(France)
J.R.	<i>Juristische Rundschau</i>	(Germany)
J.T.	<i>Journal des Tribunaux</i>	(Belgium)
JUR. COM. BRUX.	<i>Jurisprudence Commerciale de Bruxelles</i>	(Belgium)
JUR. PORT D'ANVERS	<i>Jurisprudence du Port d'Anvers</i>	(Belgium)
J.Z.	<i>Juristenzeitung</i>	(Germany)
K.B.	<i>King's Bench</i>	(UK)
LG	<i>Landesgericht</i>	(Germany)
L.L.L.R.	<i>Lloyd's List Law Reports</i>	(UK)
L.J.K.B.	<i>Law Journal King's Bench</i>	(UK)
Lloyd's Rep.	<i>Lloyd's Law Reports</i>	(UK)
L.Q. REV.	<i>Law Quarterly Review</i>	(England)
MASS. ANN. LAWS	<i>Annotated Laws of Massachusetts</i>	(United States)
MDR	<i>Monatsschrift für deutsches Recht</i>	(Germany)
MICH. L. REV.	<i>Michigan Law Review</i>	(United States)
MOD. L. REV.	<i>Modern Law Review</i>	(UK)
NBW	<i>Nieuw Burgerlijk Wetboek</i>	(Netherlands)
N.C.P.C.	<i>Nouveau Code de Procédure Civile</i>	(France)
N.D. Cal.	<i>Northern District California</i>	(United States)
N.D. CENT. CODE	<i>North Dakota Century Code</i>	(United States)
NEV.	<i>Nevada Law Reports</i>	(United States)
NIPR	<i>Tijdschrift voor Nederlands Internationaal Privaatrecht</i>	(Netherlands)
NJ	<i>Nederlandse Jurisprudentie</i>	(Netherlands)
NJB	<i>Nederlands Juristenblad</i>	(Netherlands)
N.J.REV. STAT.	<i>New Jersey Revised Statutes</i>	(United States)
NJW	<i>Neue Juristische Wochenschrift</i>	(Germany)
NY	<i>New York Reports</i>	(United States)
N.Y. Civ.Prac. Act	<i>New York Civil Practice Act</i>	(United States)
N.Y. Jud. Council Rep.	<i>New York Judiciary Council Reporter</i>	(United States)
NYS	<i>West's New York Supplement</i>	(United States)

OGHBZ	Oberster Gerichtshof für die Britische Zone	(Germany)
O.J.L.S.	Oxford Journal of Legal Studies	(UK)
OLG	Oberlandesgericht	(Germany)
P.	Probate, Divorce, and Admiralty Division	(England)
PAK. L. REV.	Pakistan Law Review	(Pakistan)
Pas.	<i>Pasicrisie belge</i>	(Belgium)
QB	Queen's Bench Division	(England)
RABELSZ.	<i>Zeitschrift für ausländisches und internationales Privatrecht, begründet von Ernst Rabel</i>	(Germany)
Rb.	<i>Rechtbank</i>	(Belgium, Netherlands)
R.C.J.B.	<i>Revue critique de la jurisprudence belge</i>	(Belgium)
R.D.I.D.C	<i>Revue de droit international et de droit comparé</i>	(Belgium)
REC. COURS	<i>Recueil des cours de l'Académie de droit international de La Haye</i>	(International)
REV. CRIT. DIP	<i>Revue critique de droit international privé</i>	(France)
REV. DR. ULB	<i>Revue de Droit de l'Université Libre de Bruxelles</i>	(Belgium)
REV. NOT. B.	<i>Revue du Notariat Belge</i>	(Belgium)
REV. JUR. POL.	<i>Revue Juridique et Politique</i>	(Belgium)
REV. TRIM. DR. FAM.	<i>Revue Trimestrielle de Droit Familial</i>	(Belgium)
R.G.	Reichsgericht	(Germany)
R. G. A. R.	<i>Revue Générale des Assurances et des Responsabilités</i>	(Belgium)
R.G.Z.	<i>Entscheidungen des Reichsgerichts in Zivilsachen</i>	(Germany)
R.I.D.B/B.T.I.R.	<i>Revue internationale de droit belge</i>	(Belgium)
R.I.D.C.	<i>Revue internationale de droit comparé</i>	(France)
RiW	<i>Recht der internationalen Wirtschaft</i>	(Germany)
RvdW	<i>Rechtspraak van de Week</i>	(Netherlands)
Rv., Eerste Boek	<i>Wetboek van Burg. Rechtsvord., Eerste Boek</i>	(Netherlands)
R.W.	<i>Rechtskundig Weekblad</i>	(Belgium)
S.C.	Supreme Court Reporter	(United States)
S.D. Ala.	Southern District Reporter Alabama	(United States)

S.D. Fla.	Southern District Reporter Florida	(United States)
S.D. Ga.	Southern District Reporter Georgia	(United States)
S.D.N.J.	Southern District Reporter New Jersey	(United States)
S.D.Tex.	Southern District Reporter New Jersey	(United States)
SGG	<i>Sozialgerichtsgesetz</i>	(Germany)
S. Jur.	<i>Sirey Jurisprudence</i>	(France)
So. 2d.	Southern Reporter	(United States)
STAN. J. INT'L L.	Stanford Journal of International Law	(United States)
stAZ.	<i>Staatsanzeiger</i>	(Germany)
S.W.	South Western Reporter	(United States)
T.B.H.	<i>Tijdschrift voor Belgisch Handelsrecht</i>	(Belgium)
Tex. Ap.	Texas Courts of Appeals	(United States)
TEX. R. CIV. EVID.	Texas Rules of Civil Evidence	(United States)
T.G.I.	Tribunal de Grande Instance	(France)
T.L.R.	Times Law Reports	(UK)
T. NOT.	<i>Tijdschrift voor Notarissen</i>	(Belgium)
T.P.R.	<i>Tijdschrift voor Privaat Recht</i>	(Belgium)
Trav. Comité Fr. Dr. Int. Privé	<i>Travaux du comité français de droit international privé</i>	(France)
T. Rechtsgesch.	<i>Tijdschrift voor Rechtsgeschiedenis</i>	(Netherlands)
T.V.R.	<i>Tijdschrift voor Vreemdelingenrecht</i>	(Belgium)
U. CHI. L. REV.	University of Chicago Law Review	(United States)
U.S.	United States Supreme Court Reports	(United States)
U.S. App.	United States Appellate Courts Reporter	(United States)
U.S.C.A.	United States Code Annotated	(United States)
VA. J. INT'L L.	Virginia Journal of International Law	(United States)
VwGO	<i>Verwaltungsgerichtsordnung</i>	(Germany)
WARNRSPR.	<i>Warneyer, Rechtsprechung des RG oder BGH</i>	(Germany)
WET AB	<i>Wet van 15 mei 1829 houdende Algemene Bepalingen der Wetgeving van het Koninkrijk</i>	(Netherlands)
WET RO	<i>Wet op de rechterlijke organisatie</i>	(Netherlands)
WIS. L. REV.	Wisconsin Law Review	(United States)

WLR	<i>Weekly Law Reports</i>	(UK)
WM	<i>Wirtschafts-, Wertpapier- und Bankrecht Mitteilungen</i>	(Germany)
Wmv	<i>Wet Ministeriële Verantwoordelijkheid</i>	(Netherlands)
W.v.H.R.	<i>Weekblad van het Recht</i>	(Netherlands)
ZEUP	<i>Zeitschrift für europäisches Privatrecht</i>	(Germany)
ZFRV	<i>Zeitschrift für Rechtsvergleichende Rechtswissenschaft</i>	(Germany)
ZPO	<i>Zivilprozeßordnung</i>	(Germany)
ZR	<i>Zeitschrift für Rechtspolitik</i>	(Germany)
ZvGLRWiss	<i>Zeitschrift für Rechtsvergleichung</i>	(Germany)
ZZP	<i>Zeitschrift für Zivilprozeß</i>	(Germany)

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