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Tracing Foreign Law: The *Bodum* Case

Reacting to the epistemic poverty of orthodox comparative law, which hardly goes beyond the identification of foreign law (and which may in effect content itself with slipshod identification), the argument from tracing holds that a more sophisticated interpretive yield — a deep or thick understanding of foreign law — is possible and must be achieved. To illustrate tracing's empowering reach, reference is made to the 2010 *Bodum* decision of the U.S. Court of Appeals for the 7th Circuit.

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Article 1156 French CC (1804) states that the common intention of the parties must prevail over the literal meaning of contract terms.

Article 1341 French CC (1804) states that no proof by witnesses is to be received against or beyond the contents of deeds.

Chief Judge Frank Easterbrook

Expert testimony is “expensive” and imparts “an adversary’s spin”.

“English-language descriptions of French law” are “objective”.

Judge Richard Posner

Experts are “selected on the basis of the convergence of their views with the litigating position of the client”.

“[P]ublished materials [...] provide neutral illumination of issues of foreign law”.

Judge Diane Wood

“Exercises in comparative law are notoriously difficult”.

“[M]any [published articles or treatises, written particularly for a U.S. audience] will not [perform the same service as testimony from an acknowledged expert in foreign law]”.