Transnational Securities Class Actions – A Private International Law Perspective

The focus of the debate on this website and elsewhere following the US Supreme Court's *Morrison* judgment has been upon the extra-territorial reach of US securities law before a US court, involving a process of statutory interpretation to identify the existence of a "mandatory rule" without regard to potentially applicable foreign laws. Those who were fortunate enough to have attended Professor Linda Silberman's presentation on Transnational Securities Class Actions last week at the British Institute of International and Comparative Law heard not only a full account of the *Morrison* litigation and the legislative background and fall out, but also Professor Silberman's thoughts as to the wider private international law implications of the decision and of securities class actions in the United States and elsewhere.

From a private international law perspective, although Professor Muir-Watt has questioned the suitability of existing techniques to deal with the problems arising from the regulation of securities by private law, it does not seem inappropriate to use traditional terminology in identifying the questions that will likely arise in the coming years. As least from an English law perspective, there are still more questions than there are definitive answers.

The following is a (non-exhaustive) attempt to list certain key questions:

Applicable law (Choice of law)

- Putting to one side the potentially mandatory application of a country's own securities law as regulating issues of civil liability, what rules of applicable law (choice of law rules) should apply to claims made in transnational securities class actions?
- In particular:
    - How is the particular claim advanced in an individual case (or the particular issue) to be characterised (contract, tort, company law, other)?

- Should the standard rules of applicable law for the relevant general category of obligation (or issue) be applied or are special rules needed for securities claims or class actions in a cross-border context (i.e. are there, or should there be, characterisations specific to claims arising from trading in securities)?
- If the standard rules apply, how are they to be applied to the individual case? For example, depending on the nature of the relevant rule, where is the *lex loci delicti* or country of damage to be located?
- What is the impact, if any, of any rule of the *lex fori* excluding or limiting the enforcement of claims based on a foreign penal or other public law? On this last point, Professor Silberman suggested that a private law right of action under securities legislation may be so closely intertwined with the regulatory regime that it may not be possible to disentangle them, but the recent trend in England and Australia seems to be towards facilitating the enforcement of foreign securities law where the action is taken for the benefit of private individuals (see Robb Evans v European Bank Limited [2004] NSWCA 82; US SEC v Manterfield [2009] EWCA Civ 27).

Jurisdiction

- How should the court approach the question of jurisdiction, in particular with respect to foreign members of an "opt out" claimant class? Should those claimants be considered to have "submitted" to the jurisdiction as a result of certification of the class in accordance with local law requirements, or must they be treated in the first instance as persons joined to proceedings against whom a basis of jurisdiction must be shown to exist (in the same way as for a defendant, or on some modified basis)?

Recognition and Enforcement of Judgments

- Can a judgment in a securities class action (whether following trial or

approving a settlement) be recognised as having a preclusive effect, in favour of the defendant, as against foreign members of an "opt-out" claimant class who subsequently bring proceedings in another jurisdiction based on a cause of action which has been adjudicated by the foreign court or falls within the scope of the settlement? Here, Professor Silberman noted that U.S. courts certifying classes including foreign claimants have reached varying and inconsistent conclusions (reflecting, no doubt, differences in the expert evidence received by them) as to whether U.S. "opt-out" class action judgments would be recognised in particular foreign jurisdictions. In particular, she pointed to the class action certification in the *Vivendi* case (241 F.R.D. 213 [S.D. N.Y. 2007] – see comment, e.g., here and here) – in which the District Court had certified a class including U.K., French and Dutch investors (but excluding German and Austrian investors) having regard to the perceived likelihood that a U.S. judgment would be recognised and enforced in those jurisdictions against non-participating class members – and contrasted this to the clearly stated position of the French Republic in its Amicus Brief in *Morrison* (p. 26) that:

> *French courts would almost certainly refuse to enforce a court judgment in a U.S. 'opt-out' class action because … specifically, the 'opt-out' mechanism violates French constitutional principles and public policy.*

Equally, despite submissions to the contrary (see, e.g., A Pinna, "Recognition and Res Judicata of US Class Action Judgments in European Legal Systems" (2008) Erasmus Law Review, vol 1, issue 2, pp. 43-44), there appears presently to be no realistic prospect of a U.S. class action judgment being recognised by an English court as precluding the claims of an absent claimant who was not present in the U.S. at the time that the class was certified or the relevant notice published, and who did not actively opt-in to the class or otherwise participate in the proceedings or agree to submit to the jurisdiction of the U.S. court. In short, as a matter of English law, the U.S. court would not be considered as jurisdictionally competent to determine the rights and obligations of these absent class members and, although it would be considered to have competence to determine the rights and obligations of present class members and those who have opted in, the judgment with respect to those persons is unlikely to have any wider *res judicata* effect

against absent class members. The fact that the U.S. court may consider the named claimant and/or its lawyers to be authorised to represent absent class members is neither here nor there, as this is not an authority that is recognised under English private international law rules.

Even if the "competence" hurdle could be overcome, a successful class action defendant would undoubtedly face other obstacles in establishing the preclusive effect of a U.S. class action judgment in England. The English court may well conclude that the method of giving notice to the absent claimants of the existence of proceedings and requiring them to opt-out was insufficient and contrary to "principles of natural justice", so as to bar recognition of the judgment. More generally, the nature of the opt-out mechanism or other aspects of the class action procedure may be argued to be such as to make it contrary to public policy (for opposing opinions on this point, see the references in Pinna, above, fn. 69 and 70). Finally, in the case of a U.S. judgment approving a class action settlement, it seems doubtful whether the judgment meets the requirement that the judgment be "on the merits2 (*The Sennar (No. 2)* [1985] 1 WLR 490, 494 (Lord Diplock)) or, even if it were to meet that test and the other requirements for its recognition, whether recognition of the judgment would have the effect of binding the absent claimant contractually as if it, or its duly authorised legal representative, had concluded the settlement.

Questions of a different kind would, of course, arise if the class action judgment had been delivered, not by a U.S. court, but by a court of a State within the Brussels/Lugano Regime. Here, the opportunity for a review of the basis of jurisidiction is much more limited, and the most interesting questions relate to (1) the extent to which the absent claimant can oppose recognition through the public policy (Art. 34(1)) and default of appearance (Art. 27(2)) exceptions, (2) whether a court approved settlement must be recognised (cf. Case C-414/92, Solo Kleinmotoren v Boch [1994] ECR I-2237), and (3) identification of the law(s) to be applied in determining the preclusive effect of the class action judgment or court approved settlement (cf. Case C-420/07, Apostolides v Orams [2009] ECR I-0000, para. 66).

Against the background of the rapid growth internationally of collective redress regimes in this and other subject matter areas, and growing political and economic pressures to promote private regulatory enforcement, it appears not

unlikely that U.S. and European courts will become increasingly familiar with these private international law issues in the coming years as cross-border collective redress becomes an accepted part of the trans-national legal landscape. Legislative intervention, at least within the European Union, can also be foreseen (why have a button if you cannot press it?). For the time being, all we can say is "watch this space".