

Fellmeth on Int'l Law and Foreign Laws in US Legislatures

Aaron Fellmeth, who is a professor of law at Arizona State University College of Law, has posted an *insight* on *International Law and Foreign Laws in U.S. Legislatures* on the site of the American Society of International Law.

Beginning in 2010, legislators in half of the U.S. states proposed—and in two states adopted—a series of bills or state constitutional amendments designed to restrict the use of international law and foreign laws by state (and sometimes federal) courts. This Insight will summarize the trend in adopting legislation hostile to international law and foreign laws and briefly discuss its causes and consequences.

The rest of the *Insight* is available [here](#).

Zick on The First Amendment in Trans-Border Perspective

Timothy Zick, who is a professor of law at William and Mary Law School, has published *The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation* in the last issue of the *Boston College Law Review*. The abstract reads:

This Article examines the First Amendment's critical trans-border dimension—its application to speech, association, press, and religious activities that cross or occur beyond territorial borders. Judicial and scholarly analysis of this aspect of the First Amendment has been limited, at least as compared to consideration of more domestic or purely local concerns. This Article identifies two basic orientations with respect to the First Amendment—the provincial and the cosmopolitan. The provincial orientation, which is the traditional account,

generally views the First Amendment rather narrowly—i.e., as a collection of local liberties or a set of limitations on domestic governance. First Amendment provincialism does not fully embrace or protect trans-border speech, press, and religious activities; it views certain foreign ideas, influences, and ideologies with suspicion or hostility; and it envisions a rather minimal extraterritorial domain. First Amendment cosmopolitanism, which this Article offers as an alternative orientation, takes a more global perspective. It embraces and protects cross-border exchange and information flow and preserves citizens' speech and other First Amendment interests at home and abroad. At the same time, it respects foreign expressive and religious cultures and expands the First Amendment's extraterritorial domain. The Article critiques provincialism on various grounds. It offers a normative defense of First Amendment cosmopolitanism that is both consistent with traditional First Amendment principles and better suited to twenty-first century conditions and concerns. The Article demonstrates how a more cosmopolitan approach would concretely affect trans-border speech, association, press, and religious liberties.

Judicial Cooperation in Civil Matters and Private International Law in the 2008-2011 case-law of the ECJ

The School of Law of the Autónoma University of Madrid (UAM) will host the first *UAM International Conference on European Union Law. Recent trends in the case law of the Court of Justice of the European Union (2008-2011)* on July, the 14th and 15th. Besides the opening and closing lectures by prominent jurists, there are panels on the institutional system of the EU, competition law, citizenship and free movement of persons, external action, social policy and internal market. Most interesting for the readers of this blog, there is also a panel

on “Judicial cooperation in civil matters and Private International Law”, which will be chaired by *Paul R. Beaumont* (Aberdeen University) and *Francisco Garcimartín Alférez* (Autónoma University of Madrid). *Elena Rodríguez Pineau* (Autónoma University of Madrid) will be the speaker in the panel. Andrej Savin (Copenhagen Business School), Giacomo Biagioni (University of Cagliari) and Luis Carrillo (University of Girona) and Patricia Orejudo (Complutense University of Madrid) will also intervene.

Registration forms must be submitted before July 1, 2011. For more information about the congress and to register for the event please visit: www.uam.es/cidue.

Monestier on the Illusory Search for Res Judicata of Transnational Class Actions

Tanya J. Monestier, who teaches at the Roger Williams University School of Law, has posted Transnational Class Actions and the Illusory Search for Res Judicata on SSRN. The abstract reads:

The transnational class action – a class action in which a portion of the class consists of non-U.S. claimants – is here to stay. Defendants typically resist the certification of transnational class actions on the basis that such actions provide no assurance of finality for a defendant, as it will always be possible for a non-U.S. class member to initiate subsequent proceedings in a foreign court. In response to this concern, many U.S. courts will analyze whether the “home” courts of the foreign class members would accord res judicata effect to an eventual U.S. judgment prior to certifying a U.S. class action containing foreign class members. The more likely the foreign court is to recognize a U.S. class judgment, the more likely that an American court will include those foreigners in the U.S. class action.

Current scholarship accepts propriety of the res judicata analysis, but questions

the manner in which the analysis is carried out. This Article breaks from the existing literature by arguing that the dynamics of class litigation render the res judicata effect of an eventual U.S. class judgment inherently unknowable to a U.S. court ex ante. In particular, I argue that certain “litigation dynamics” – specifically the process of proving foreign law via experts, the principle of party prosecution, and the litigation posture of the action – complicate the transnational class action landscape and prevent a court from accurately analyzing the res judicata issues at play. This is exacerbated by the “structural dynamics” of class litigation: the complexity of foreign law on the recognition and enforcement of judgments; the newness of class action law in most foreign countries; and the distinction between general and fact-specific grounds for non-enforcement of a U.S. class judgment. Accordingly, I argue that U.S. courts should abandon their illusory search for res judicata. Instead, courts should avoid the res judicata problem altogether by employing an opt-in mechanism for foreign class plaintiffs, whereby such plaintiffs are not bound unless they affirmatively undertake to be bound by U.S. class judgment. An opt-in mechanism for foreign plaintiffs also provides several advantages over the current opt-out mechanism: it allows all foreign claimants to participate in U.S. litigation if they so choose; it provides additional protections for absent foreign claimants; it respects international comity; and it sufficiently deters defendant misconduct.

The paper is forthcoming in the *Tulane Law Review* (Vol. 86, p. 1).

Tip-off: Antonin Pribetic

New Alien Tort Statute Case At The United States Supreme Court:

Kiobel, et al., v Royal Dutch Petroleum Petition Filed

In *Kiobel, et al., v Royal Dutch Petroleum, et al.*, lawyers for 12 individuals seeking to hold major oil companies legally responsible for human rights abuses in Nigeria in the 1990s have asked the Supreme Court to overturn a federal appeals court's ruling that corporations are immune to such claims in U.S. courts. The law at issue is the Alien Tort Statute, a law that dates from the first Congress in 1789 but has grown in importance after a wave of lawsuits over the past three decades — lawsuits that were originally aimed at individuals, and then began targeting corporations in 1997. Prior coverage of the ATS has appeared on this site [here](#) and [here](#), and discussions of this very case have appeared [here](#), [here](#), [here](#), [here](#) and [here](#). As Lyle Denniston at the SCOTUSBlog puts it, “[t]he new petition raises what may be the hottest international law issue now affecting business firms,” and is “[i]n essence, the . . . ultimate test of what Congress meant when . . . it gave U.S. courts the authority to hear claims by foreign nationals that they were harmed by violations of international law.”

Last September, the Second Circuit Court became the first federal court to rule that ATS does not apply at all to corporations, but only to individuals. The panel split 2-1, and the en banc Court divided 5-5 in refusing to reconsider the panel result. The Petitioners at the Supreme Court now seek to challenge that result and argue that “[c]orporate tort liability was part of the common law landscape in 1789 and is firmly entrenched in all legal systems today. The notion that corporations might be excluded from liability for their complicity in egregious human rights violations is an extraordinary and radical concept.”

The *Kiobel* petition puts two questions before the Justices. The first issue is jurisdictional, and questions whether the Circuit Court should have reached the issue of corporate immunity at all. Indeed, neither side had raised the issue of whether ATS applied to corporations in the district court; that question was accordingly not decided by the district judge, and was not an issue sent up to the Circuit Court. The Circuit Court panel majority, without deciding any of the issues actually sent up on appeal, acted *sua sponte* to conclude that it had no jurisdiction to decide the case because the ATS did not apply to corporations. The petition suggests that the Justices should summarily overturn the Circuit Court on this

basic procedural point and remand the case for further proceedings.

The second question is the merits question: whether corporations are immune from tort liability for war crimes, crimes against humanity, and other human rights abuses perhaps even amounting to genocide, or whether they are liable as any private individual would be under ATS. On that point, there is a direct conflict between rulings of the Second Circuit and the Eleventh Circuit, and the issue is currently under review in the D.C., Seventh and Ninth Circuits as well. “Today,” the petition says, “corporations may be sued under the ATS for their complicity in egregious international human rights violations in Miami or Atlanta, but not in New York or Hartford. This is contrary to the congressional intent that the ATS ensure uniform interpretation of international law in federal courts in cases involving violations of the law of nations.”

The corporate defendants will have a chance to oppose the petition before the Justices act on it, and it is also possible that the Justices may seek the views of the federal government. No action on the petition will come until the Court’s next Term, starting in October.

Morrison Scorecard: One Year In Review

It has been nearly a year since the United States Supreme Court issued its decision in *Morrison v. National Australia Bank Ltd.*, 561 U.S. __ (June 24, 2010), pulling back the extraterritorial effect of Section 10(b) of the Securities and Exchange Act of 1934. The Court in *Morrison* commanded that “when a statute gives no clear indication of an extraterritorial application, it has none.” Then, in determining whether the particular claim at issue sought an extraterritorial application of a federal statute, the Court looked to the “focus” of that statute, which is not necessarily the “bad act” prohibited by the statute, but “the object[] of the statute’s solicitude.” The statute at issue in *Morrison* was § 10(b) of the Securities Exchange Act, which makes it illegal for “any person . . . to use or

employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance.” The Court noted that § 10(b) focused “not upon the place where the deception originated, but upon purchases and sales of securities,” and thusly concluded that “[t]hose purchase-and-sale transactions are the objects of the statute’s solicitude. It is those transactions that the statute seeks to regulate; it is parties or prospective parties to those transactions that the statute seeks protect.” Accordingly, the Court determined that § 10(b) was limited in scope “to purchases and sales of securities in the United States.” Because the sales of securities at issue in *Morrison* occurred on a foreign stock exchange, the Court affirmed dismissal of the plaintiffs’ claims even though the deceptive conduct occurred in Florida. Previous coverage of the decision in *Morrison* has appeared on this site [here](#), [here](#), [here](#), [here](#), [here](#) and [here](#)

At the time it was decided, the broader impact of *Morrison* was uncertain. It is now apparent, however, that the decision has had a significant impact on limiting the extraterritorial application of a number of federal statutes providing civil remedies to private plaintiffs—not just the antifraud provisions of the Securities and Exchange Act. Criminal statutes, as we will see, have fared better in *Morrison*’s wake.

As it might be expected, *Morrison* has had a dramatic impact on securities fraud cases with foreign elements. *Morrison* itself was an “f-cubed” case, meaning that it involved foreign plaintiffs, a foreign defendant and foreign securities. More “f-cubed” cases have followed suit, and been dismissed from the federal courts. See *In re Vivendi Universal, S.A. Securities Litigation*, 02-CV-05571 (S.D.N.Y. Feb. 22, 2011). All the same, however, the presence of one or more domestic elements has not been sufficient to overcome the strong presumption against extraterritoriality expressed in *Morrison*. The placement of a “buy order” in the United States by U.S. citizens does not render the transaction at issue a domestic one, and bring the case within the purview of U.S. securities laws. See *In re Alstom SA Sec. Litig.*, No. 03 Civ. 6595 (VM) (S.D.N.Y. (Sept. 13, 2010) (dismissing claims even though the stock transactions at issue here were “initiated in the United States”) and *Plumbers’ Union Local No. 12 Pension Fund v. Swiss Reinsurance co., et al.*, No. 08 Civ. 1958 (JGK) (S.D.N.Y. Oct. 4, 2010) (“the mere act of electronically transmitting a purchase order from within the United States” to a foreign

exchange does create a “domestic purchase.” “[J]ust as the situs of the a defendant’s allegedly deceptive conduct is irrelevant to the transactional test [developed in *Morrison*], so too is the situs of the plaintiffs’ alleged injury.”). Nor does the closing of a transaction in the United States, see *Quail Cruise Ship Management Ltd. v. Agencia de Viagens CVC Tur Limitada*, No. 09-23248-CIV (S.D. Fla. Aug. 6, 2010) (holding that “*Morrison*’s central holding would be undermined if parties could elect United States securities law merely by designating” the United States as the place to close a transaction that otherwise has no connection to this country); the choice of U.S. law and forum in a stock purchase contract, see *Elliott Associates, et al. v. Porsche Automobil Holding SE, et al.*, 10 Civ. 0532 (HB) (S.D.N.Y. Dec. 30, 2010); and the listing of the same or similar securities on a U.S. exchange. See *Absolute Activist Value Master Fund Ltd. v. Florian Homm, et al.*, 09 CV 08862 (S.D.N.Y. Dec. 22, 2010) (holding that the “mere fact that a stock is listed on a domestic exchange does not give rise to a claim under domestic securities laws when the shares are purchased elsewhere”); *In re Vivendi Universal, S.A. Securities Litigation*, 02-CV-05571 (S.D.N.Y. Feb. 22, 2011) (admitting that the fact that foreign shares were “listed” on the NYSE and “registered” with the SEC gave the court “pause,” but holding that such listing and registration alone “cannot carry the freight that plaintiffs ask it to bear” because it is “contrary to the spirit” of *Morrison*); *In re Royal Bank of Scotland (RBS) Group PLC Securities Litigation*, 09 Civ. 300 (S.D.N.Y. Jan. 11, 2011) (same).

Morrison has been applied to limit the extraterritorial reach of other federal statutes as well. The Racketeer Influenced Corrupt Organizations Act (RICO) is notoriously silent as to any extraterritorial application. Federal courts have consistently held post-*Morrison* that the RICO Act’s “solicitude” is the how a pattern of racketeering acts affects an domestic enterprise, not how those acts effect a domestic plaintiff. Like the location of the relevant stock exchange in the securities context, the important point for determining the extraterritorial effect of RICO claims is the location of the enterprise. See *Cedeno, et al. v. Intech Group, Inc.*, 09 Civ. 9716 (S.D.N.Y. Aug. 25, 2010) (RICO does not “evidence any concern with foreign enterprises,” and thus does not apply extraterritorially to claims by a foreign plaintiff against a RICO enterprise comprised of the “[t]he foreign exchange regime of the government of Venezuela.” It is not enough to allege that predicate acts of money laundering involved transfers into and out of the District by U.S. banks); *European Community v. RJR Nabisco, Inc.*, 2011 U.S.

Dist. LEXIS 23538 (E.D.N.Y. Mar. 8, 2011) (holding that it is the location of the RICO enterprise that mattered to the extraterritoriality analysis under *Morrison*, and that making that determination “should focus on the decisions effectuating the relationships and common interest of its members, and how those decisions are made.” Plaintiffs’ RICO claims were dismissed because “the Complaint, when read as a whole, strongly suggests [that] the money laundering cycle [engaged by the alleged enterprise] was directed by South American and European criminal organizations, . . . [and] not [by] Defendants in the United States”). These courts have eschewed any continued reliance on the “conduct and effect test” traditionally used to determine RICO’s extraterritorial application. See *Norex Petroleum Limited v. Access Industries, Inc., et al.*, No. 07-4553-cv (2d Cir. Sept. 28, 2010) (applying *Morrison*’s “bright line rule” as to extraterritoriality and holding that RICO does not reach the alleged conduct of an enterprise “to take over a substantial portion of the Russian oil industry”. The statute’s express reference to “foreign commerce” and the explicit extraterritorial effect of certain predicate acts in the RICO statute were not enough to demonstrate that the statute had extraterritorial effect).

Finally, and most recently, *Morrison* has been applied to narrow the reach of the Robinson-Patman Act, which proscribes the payment of bribes and kickbacks. The court dismissed a claim concerning the payments made to Iraqi and Indonesian officials because “the language of [that Act] contains no intention that it is to apply extraterritorially.” See *Newmarket Corp. v. Afton Chemical Corp.*, 2011 U.S. Dist LEXIS 54901 (E.D. Va. May 20, 2011).

Of course, in many of these same contexts (and a few others), courts have rejected Defendants’ attempts to dismiss federal civil claims on the basis of *Morrison*. See, e.g., *In re Le Nature’s Inc. v. Krones, Inc.*, 2011 U.S. Dist. LEXIS 56682 (W.D. Pa. May 26, 2011) (holding that a domestic RICO enterprise still falls within the ambit of the RICO statute, despite the presence of foreign predicate acts); *Stansell v. BGP, Inc.*, No. 8:09-cv-2501-T-30AEP (M.D. Fla. Mar. 31, 2011) (holding that, despite *Morrison*, “Congress . . . clearly intended the ATA have extraterritorial application” and “provide[] civil remedies for victims of international terrorism”); *Love v. Associated Newspapers, Ltd.*, 611 F.3d 601 (9th Cir. July 8, 2010) (due to the “sweeping language” of the Lanham Act, “we see no need to revisit our case law regarding extraterritorial application” as a result of *Morrison*’s holding with respect to the Securities and Exchange Act) And, to be

sure, many of the decisions discussed above are presently on appeal. So, at the time of writing, the long-lasting effect of *Morrison* remains to be seen. But on the basis of what we are seeing so far, *Morrison* appears to be having a dramatic impact on limiting the subject matter jurisdiction of U.S. courts in a variety of civil cases.

Criminal cases, however, have been treated a bit differently. Soon after the *Morrison* decision, the Dodd-Frank Act revived extraterritorial application of the anti-fraud provisions of the securities laws by authorizing actions brought by the Securities and Exchange Commission involving “conduct occurring outside the U.S. [that] has a foreseeable substantial effect within the U.S.” In other criminal and enforcement contexts, too, federal courts have been more willing to find that criminal statutes express a “clear indication of . . . extraterritorial application.” See *United States v. Weingarten*, No. 09-2043-cr (2d Cir. Jan. 18, 2011) (holding that 18 U.S.C. § 2423(b) was intended by Congress to criminalize travel by a U.S. citizen between two foreign countries to have sex with a minor) and *United States v. Finch*, 2010 U.S. Dist LEXIS 104496 (D. Haw. Sept. 30, 2010) (holding that 18 U.S.C. §§ 201(b)(2)(A) and (C), concerning bribery and fraud committed against the United States by an officer of the United States, is not “limit[ed] to domestic enforcement”). Courts have also been willing to find that the application of certain criminal statutes to foreign schemes does not offend the holding in *Morrison*. See *United States v. Coffman*, 2011 U.S. Dist LEXIS 14600 (E. D. Ky Feb. 14, 2011) (the use of U.S. mail to effect a foreign scheme to defraud does not offend *Morrison*) and *United States v. Mandell*, 2011 U.S. Dist LEXIS 27064 (S.D.N.Y. Mar. 16, 2011) (“The fact that defendants engaged in some conduct abroad does not mean that that conduct and conduct here in the United States is not covered by the [criminal] mail and wire fraud statutes.”). The outcomes of these cases suggest that criminal laws are being treated differently than civil laws, and that courts have continued to expand the extraterritorial application of U.S. criminal law in *Morrison*’s wake. But see *U.S. v. Philip Morris USA, Inc.*, No. 99-2496 (D.D.C. Mar. 2011) (nullifying its prior decision applying prospective injunctive relief against a foreign criminal RICO defendant)

Intersection of Child Abduction Process and Refugee Claim

The Court of Appeal for Ontario has released its decision in *A.M.R.I. v. K.E.R.* (available [here](#)). The decision deals with the intersection of the law relating to children who advance a refugee claim and the law on returning abducted children under the Hague Convention.

A girl of 12 had travelled from Mexico, where she lived with her mother (who had custody), to Ontario to visit her father (who had access rights). There she disclosed that she had been abused by her mother. She made a refugee application and the Immigration and Refugee Board of Canada found her to be a refugee as a result of the abuse. After she had lived in Ontario for about 18 months, the mother applied under the Hague Convention for her return to Mexico. The Superior Court of Justice ordered that she be returned, and she was – in quite a remarkable way which violated her right to dignity and respect (para. 7). On appeal, the Court of Appeal reversed that decision. It set aside the order of return and ordered a new hearing on the Hague Convention application.

One of the key concerns for the court was the child's lack of participation in the Hague Convention application. That application was, in effect, heard *ex parte*, with no submissions in support of the child's remaining in Ontario (para. 31). The court set out some important procedural protections that must be provided to the child (para. 120).

The court also had to grapple with the interplay of the statutes that implemented the Refugee Convention and the Hague Convention. It rejected the argument that the implementation of the latter (provincial law) was unconstitutional by virtue of it violating the implementation of the former (federal law). The court held that the two could be read and applied together without a division of powers conflict (paras. 62-71).

The court held that when a child has been determined to be a refugee, a rebuttable presumption arises that there is a risk of persecution if the child is returned (para. 74) and thus a risk of harm (para. 78). This then must impact the analysis under the Hague Convention.

The application judge had not accorded any weight to the refugee status and accordingly had erred in law. The judge also failed to consider the exceptions in the Hague Convention that allowed the court to refuse to order a child's return.

Punitive Damages and French Ordre Public

F.X. Licari's article "The Difficulty to Enforce US Punitive Damages Award in France: A Critical Comment of the First Ruling of the French Court of Cassation (La Compatibilité de Principe des Punitive Damages Avec l'Ordre Public International: Une Décision en Trompe-L'oeil de la Cour de Cassation?)", published in *Recueil Dalloz*, No. 6, p. 423-427, 2011, is now available at SSRN . The abstract reads:

"In an important decision issued on December 1st, 2010, the Cour de cassation held that an award of punitive damages is not, per se, contrary to public policy, adding however that this principle does not apply when the amount awarded is disproportionate with regard to the damage sustained and the debtor's breach of his contractual obligations.

In this case, the foreign judgment was from California. The plaintiffs had been awarded \$1.39 million USD in compensatory damages and \$1.46 million USD in punitive damages. This was found to be clearly disproportionate because, as the Court held, the amount of punitive damages was clearly higher than the amount of compensatory damages (a very large difference of \$70,000 USD). It dismisses an appeal from a judgment from the Poitiers Court of appeal."

F.X Licari is maître de conférences at the University of Metz.

Commercial Conflict of Laws Course - Sydney Summer School in Oxford, July 2011

As part of the University of Sydney's Summer School Programme, there will be a Commercial Conflict of Laws course at Magdalen College, Oxford on 11-12 and 14-15 July 2011. It will be taught by Andrew Bell and Andrew Dickinson. From the website:

Objectives

- *Focus on commercial disputes with a transnational dimension.*
- *Determine the features which characterise transnational commercial litigation, where the forum is itself a matter of dispute.*
- *Identify and apply techniques for determining the law applicable to contractual and non-contractual claims.*
- *Compare and contrast the approaches to commercial private international law topics in Australia, UK and the European Union*

Content

The importance of venue in commercial litigation; Australian, UK and European approaches to jurisdiction; techniques of forum control; the law relating to anti-suit injunctions; the role of jurisdiction and arbitration agreements; introduction and ascertainment of foreign law; provisional measures, including freezing injunctions; rules of applicable law for contractual and non-contractual claims; and the distinction between substance and procedure..

The course is open to everyone, and may be of special interest to Australian lawyers working in London. Further details can be found on Sydney's website.

Radicati on Res Judicata of Arbitral Awards

Luca Radicati di Brozolo, who is a professor of law at the Catholic University of Milan and a partner at Bonelli Errede Pappalardo, has posted Res Judicata in International Arbitral Awards on SSRN. The abstract reads:

The paper analyses the sources of the res judicata effect of international arbitral awards. It discusses the problems inherent in the application of the rules of domestic law governing the res judicata effects of national judgments and the approach of international arbitrators and of national courts. It then proposes the development of ad hoc transnational principles to govern the subject matter, and focuses in particular on the Recommendations on Res Judicata in International Commercial Arbitration of the International Law Association.