Colon on Choice of Law and Islamic Finance

Julio Colon has posted Choice of Law and Islamic Finance on SSRN.

> *The past decade has seen the rapid growth of Islamic finance on both international and domestic levels. Accompanying that growth is a rise in the number of disputes that implicate Islamic law. This remains true even when the primary law of the contract is that of a common law or civil law country. If judges and lawmakers do not understand the reasoning of Islamic finance professionals in incorporating Shariah law, the result could be precedents and codes that hamper the growth of a multi-trillion dollar industry. This note compares the reasoning of the English court in Shamil Bank v. Beximco Pharmaceuticals to the practice of forums specializing in Islamic finance dispute resolution. The note then addresses other perceived difficulties in applying Islamic law in common law and civil law courts. The practice of Islamic finance alternative dispute resolution (ADR) forums shows a consistent reliance on the use of national laws coupled with Shariah. Also, there are cases showing that U.S. courts and European arbitrators are willing to use Islamic law. Research indicates that the decision in Shamil Bank v. Beximco Pharmaceuticals was not consistent with the intentions of the parties or the commercial goals of Islamic finance. Finally, this note concludes that it is not unreasonable for a Western court to judge a case if the dispute arises out of an Islamic finance agreement.*

The Paper is forthcoming in the *Texas International Law Journal*.

Lugano Convention Grand Slam –

Iceland Comes Out of the Cold

It should be noted that, on 25 February 2011, Iceland ratified the 2007 Lugano Convention, the last signatory to do so (see here). Accordingly, the 2007 Lugano Convention entered into force for Iceland on 1 May 2011. This follows the ratifications of the EU, Denmark and Norway (effective 1 January 2010) and Switzerland (effective 1 January 2011).

The Future of Private International Law in Australia: papers and podcast now available

For those unable to attend the recent seminar in Sydney "The Future of Private International Law in Australia" — see my post here — papers and a podcast are now available here. The speakers were:

- The Honourable Justice Paul Le Gay Brereton AM RFD, Judge of the Supreme Court of New South Wales and co-author of *Nygh's Conflict of Laws in Australia* (8th ed);
- Dr Andrew Bell SC, New South Wales Bar and co-author of *Nygh's Conflict of Laws in Australia*;
- Thomas John, head of the Private International Law Section of the Commonwealth Attorney-General's Department; and
- Professor Andrew Dickinson, Professor in Private International Law at Sydney Law School and one of the specialist editors of *Dicey, Morris & Collins: The Conflict of Laws*.

Suing France instead of Foreign Diplomats

Foreign diplomats enjoy diplomatic immunities in France. This is a rule of customary international law, which was also codified in the 1961 Vienna Convention on Diplomatic Relations. This means that employees of foreign diplomats will be unable to enforce judgments against their employer if the latter does not comply with applicable labour law. Right, but in France they may be able to sue the French state instead.

Modern Slave

Ms Susilawati had been hired by a diplomat from the sultanate of Oman who was serving at UNESCO in Paris. The job was to be a housemaid at the home of the diplomat, a five bedrooms apartment in Paris' 16th *arrondissement*. The French press has reported that the 34 year old woman had been hired in Jakarta for 200 USD per month, which was four times what she was making in Indonesia, 30% more than what she was paid when she worked in Ryad for a Saudi prince, but not quite the French minimum wage. Indeed, she was meant to work 7 days a week. That, too, was not exactly compliant with French labour law.

A neighbour called Amnesty International, who alerted the French committee against modern slavery . The case was taken to French labour courts, which eventually ordered the diplomat to pay her € 33,000 in unpaid salaries. The French jugdment could not be enforced, however, as the diplomat enjoyed an immunity from execution. Why would he pay, after all: he had honored the contract. He is reported to have explained:

> *She got all her salary. She was happy and lived very well. Then she disappeared from my house.*

The employee then petitioned the French state to have it pay instead. The French Ministry of foreign affairs refused. The employee challenged that decision before French administrative courts. She eventually won before the French supreme court for administrative matters (*Conseil d'Etat*) which, in a judgment of February 11th, 2011, held that the French state was strictly liable, and ought to

compensate for the loss of the employee.

Egalité des citoyens devant les charges publiques

To reach that result, the *Conseil d'Etat* applied a half century old common law rule providing for the liability of the French state for the application of international treaties. In 45 years, it is only the third time that the court has compensated a plaintiff pursuant to this rule.

Under French administrative law, the French state may be found liable for the application of treaties under two conditions. The first is that the relevant treaty should not have excluded all forms of compensation of victims of its application. The second rule is that the loss suffered should be "special and severe". The foundation of this tort is that citizens should be equal before "public burdens" (*charge publiques*). It is pretty hard to translate the concept in English, but it certainly includes the burdens of the legal system. In other words, nobody should suffer disproportionately from the application of the law, and if someone was to, he could be compensated for that uncommon and severe loss, which could then be characterised as being "special and severe".

So, had Ms Susilawati really suffered a special loss? The ~~diplomat~~ French state argued that she had not, and the argument was found to be convincing by the lower courts. There was nothing uncommon for the employee of a diplomat about being unable to enforce a judgment against his employer, and whether there were only few diplomats was irrelevant, the lower administrative courts found. The *Conseil d'Etat* reversed. It held that, for the purpose of assessing whether the loss suffered was special, the lower courts should have inquired whether the victims of similar acts were numerous or few (later in the judgment, the court actually gives its answer by stating that they are few). The court also ruled that the loss suffered was severe, but did not elaborate on this finding, and in particular did not refer to the particular circumstances of the employment.

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 reli-gious 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 sus-picion 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 citi-zens' speech and other First Amendment interests at home and abroad. At the same time, it respects foreign expressive and religious cultures and ex-pands the First Amendment's extraterritorial domain. The Article cri-tiques 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 con-ditions 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 *Morrision 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)