Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (4/2010)

Recently, the July/August issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

Here is the contents:

- ***Christoph Thole***: "Anscheinsbeweis und Beweisvereitelung im harmonisierten Europäischen Kollisionsrecht – ein Prüfstein für die Abgrenzung zwischen lex causae und lex fori" – the English abstract reads as follows:

The harmonisation of European private international law has been heavily debated. However, the new Rome Regulations (Rome I and II) have not been fully scrutinized with respect to the distinction between procedural law and substantive law and its implications for the applicability of the lex fori-principle. This article focuses on two well-known issues of civil procedure law – prima facie evidence and obstruction of evidence. It examines the difficult question of how to deal with these legal institutes in private international law under the regime of the Rome Regulations.

- ***Götz Schulze***: "Moralische Forderungen und das IPR" – the English abstract reads as follows:

Moral claims articulate ethical positions of values which are hardly considered in the judicial discourse. This article first shows the moral implications of judicial claims in the field of the substantive civil law, which can be denominated as "minima moralia" of the civil law. Furthermore, moral claims exist as a social phenomenon. Their characteristic is the indeterminableness in claiming for an intrinsically pursued purpose which is regarded to be a good one. In Private International Law the ethical axiom of mutual recognition obtains a specific meaning. There, recognition refers to the claim of the other for being recognised. Thereby the other in Private International Law can be

both, the individual and the state. The claims for identity of states and individuals are shaped by the law. The law of a state has to be acknowledged as a cultural achievement. Therefore, if there is a strong link to the facts, legal ethics demand an application of foreign law as a question of respecting state and individual. Beyond cosmopolitically conceived legal ethics demand to amend the applied law by cultural virtues. The judicial "gateways" for such ethical aspects are the general clauses like the good faith. Thus, the "moral-data"-doctrine of Jayme obtains a legitimation by legal ethics. Furthermore, ethical virtues may gain recognition in non-governmental treaties such as the Washington-Conference-Principles on Nazi-Confiscated Art. For provisions that articulate moral claims without comprehending an enforceable legal consequence Jayme has developed the term "narrative norms". They allow to balance contradicting moral positions and claims by finding a compromise instead of strict all-or-nothing-results. This can be shown on the basis of the ruling in the Sachs-case, which has dealt with the restitution of Nazi-Confiscated art-posters (Kammergericht Berlin on 28 January 2010).

- ***Rolf Wagner/Ulrike Janzen***: "Das Lugano-Übereinkommen vom 30.10.2007" – the English abstract reads as follows:

The revised Lugano Convention has entered into force on 1 January 2010 between the EU, Norway and Denmark. Switzerland will probably join the Convention in 2011. The aim of the Lugano revision was to achieve parallelism between the provisions of Regulation (EC) No. 44/2001 ("Brussels I") and the Lugano Convention, as it had existed between the Lugano Convention of 1988 and the Brussels Convention of 1968. In addition, as the ECJ has decided the Lugano Convention falls entirely within exclusive Community competence, the EU Member States (except Denmark) are no longer Contracting Parties to the Convention. This article explains the history and the concept of the "new" Lugano Convention. Further on it aims at exposing the differences between the "old" and the "new" Lugano Convention as well as the latter's relationship with Regulation No. 44/2001.

- ***Christian Schmitt***: "Reichweite des ausschließlichen Gerichtsstandes nach Art. 22 Nr. 2 EuGVVO" – the English abstract reads as follows:

This article analyzes the scope of exclusive jurisdiction pursuant to Art. 22 no. 2

of the Brussels I-Regulation („Brussels I"). Besides investigating whether Art. 22 no. 2 of Brussels I is merely applicable to formal organ decisions, it mainly deals with the question whether preliminary questions have to be considered in determining the matter in dispute. The ratio of Art. 22 no. 2 Brussels I is to avoid contradictory decisions about the existence of the company and the effectiveness of its organ's decisions. Taking into consideration this ratio and the established case law by the ECJ which leads to a restrictive interpretation of the provisions of Art. 22 of Brussels I, this article comes to the conclusion that Art. 22 no. 2 of Brussels I is not applicable to cases in which the effectiveness of the organ's decision is merely a preliminary question.

- ***Marius Kohler/Markus Buschbaum***:" Die „Anerkennung" öffentlicher Urkunden? – Kritische Gedanken über einen zweifelhaften Ansatz in der EU-Kollisionsrechtsvereinheitlichung" – the English abstract reads as follows:

On October 14th, 2009 the European Commission presented a proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession. The proposed Regulation is aimed at unifying and simplifying the rules governing successions, increasing their predictability and providing more effective guarantees for the rights of heirs and/or legatees and other persons linked to the deceased, as well as creditors of the succession. In this context, the proposal is also aimed at guaranteeing that authentic instruments in matters of succession can move freely in the European Union. To this end the European Commission proposes to simply transfer the well-known concept of recognition as is used to enable the cross-border circulation of judicial decisions to authentic instruments. Kohler/Buschbaum seize upon this approach which they criticize as being inapt and even harmful to the objective of strengthening the free circulation of authentic instruments. In particular, it turns out that the approach chosen by the Commission would even serve to circumvent the – harmonised – provisions of Private International Law on validity and legal effects of the legal acts underlying authentic instruments. A French version of the article is available under www.iprax.de.

- ***Paul Oberhammer***: "Im Holz sind Wege: EuGH SCT ./. Alpenblume und der Insolvenztatbestand des Art. 1 Abs. 2 lit. b EuGVVO" – the English abstract reads as follows:

Three decades after the ECJ decision in the case Gourdain ./. Nadler, the ECJ has rendered three decisions relating to the scope of application of the Brussels I Regulation and the Insolvency Regulation with respect to litigation emerging from insolvency proceedings in 2009 (Seagon ./. Deko Marty Belgium, SCT Industri ./. Alpenblume and German Graphics ./. van der Schee). The contribution discusses the procedural history, the relevant issues and future effects of the ECJ's decision SCT Industri ./. Alpenblume in detail.

- ***Moritz Brinkmann***: "Der Aussonderungsstreit im internationalen Insolvenzrecht – Zur Abgrenzung zwischen EuGVVO und EuInsVO" – the English abstract reads as follows:

In German Graphics, a German title retention seller tried to enforce in the Netherlands an order for the adoption of protective measures by a German court against the trustee of the Dutch buyer. On a reference by the Hoge Raad, the ECJ clarified that Art. 25 II EuInsVO must be interpreted as meaning that the words "provided that that Convention is applicable" imply that it is necessary to determine whether a judgment falls inside the scope of application of the EuGVVO. Thus, the case raised once more the question of the scope of the exception provided for in Art. 1 II lit. b) EuGVVO, this time in a recognition and enforcement context. The court held that a seller's claim based on his reservation of title does not fall under Art. 1 II lit. b) EuGVVO.

In his comment, Moritz Brinkmann argues that the court's reasoning in German Graphics is convincing with respect to title reservation clauses. Here, the seller tries to recover a piece of property that is not part of the buyer's estate. Such a claim is independent of the buyer's insolvency and is not related to the insolvency proceedings. The mere fact that the order has to be enforced against the trustee is irrelevant. Title reserveration clauses, however, must be carefully dinstinguished from situations where the claimant is the owner of the asset in question by virtue of a fiduciary transfer of ownership for security purposes. Under such circumstances tha claim of the secured creditor – who is technically the owner – might nevertheless be characterized as a claim falling under Art. 1

II lit. b) EuGVVO. The author, furthermore, shows the consequences of the ECJ's decision for the validity of choice of court clauses.

- ***Jan von Hein***: "Die Produkthaftung des Zulieferers im Europäischen Internationalen Zivilprozessrecht" – the English abstract reads as follows:

The most recent decision of the ECJ on Article 5 No 3 of the Brussels I-Regulation, Zuid-Chemie v. Philippo's, deals with the interpretation of the provision in a case involving product liability. The ECJ held that the place where the harmful event occurred' designates the place where the initial damage occurred as a result of the normal use of the product for the purpose for which it was intended. Jan von Hein agrees with the decision, but criticises the lack of harmonisation of Art. 5 (3) of Brussels I with the new provision on the law applicable to claims for product liability in Article 5 of the Rome II-Regulation. He examines in detail whether and to which extent a harmonious interpretation of the two provisions is possible. He comes to the conclusion that the diverging policies and methodological foundations underlying Art. 5 No. 3 Brussels I, which follows the traditional principle of ubiquity, on the one hand, and Art. 5 Rome II, which is a variation of the cascade system of connecting factors pioneered by the Hague Convention on Product Liability, on the other, will inevitably lead to scenarios where jurisdiction and the applicable law do not coincide.

- ***Bettina Heiderhoff***: "Einzelheiten zur öffentlichen Zustellung" – the English abstract reads as follows:

The due and timely serving of documents, especially those instituting proceedings (writ of summons), is an essential element of judicial proceedings. However, when the address of the recipient (respondent to the claim) is unknown, most European legal systems allow service by publication. In the two cases at hand, the courts had to deal with the prerequisites of such a service by publication. The German Federal High Court (BGH) decided that service by publication may be excluded when the claimant has not invested enough effort in to discovering the address of the defendant. From a general perspective, this attitude seems convincing as it is important that fictitious forms of service be avoided whenever possible. It seems less convincing, however, that, through the introduction of the requirement of "sufficient effort", the rules on service by

publication (and, in particular, foreign rules) are softened and legal certainty and predictability are reduced.

- ***Reinhold Geimer***: "Zurück zum Reichsgericht: Irrelevanz der merger-Theorien – Kein Wahlrecht mehr bei der Vollstreckbarerklärung"

The article analyses a judgment given by the German Federal Court of Justice (BGH, 2 July 2009, IX ZR 152/06) confirming the predominant opinion according to which an exequatur decision given by a third state cannot be declared enforceable in other states. In derogation from a previous judgment (BGH, 27 March 1984 – IX ZR 24/83) according to which the principle of the inadmissibility of double exequatur does not apply in case of the application of the doctrine of merger, the BGH now held that also in these cases there was no reason to derogate from this principle and thus returned to the approach adopted already by the Supreme Court of the German Reich.

- ***Maximilian Seibl***: "Kollisionsrechtliche Probleme im Zusammenhang mit einem Mietwagenunfall im Ausland – Anknüpfungsgrundsätze, Haftungsbeschränkung und grobe Fahrlässigkeit" – the English abstract reads as follows:

Traffic accidents abroad prove to be one of the most relevant matters in the area of International Tort Law. As the Convention of 4 May 1971 on the law applicable to traffic accidents has not been signed by Germany the question as to which law governs such cases must be answered by the general International Tort Law provisions, i.e. by the Regulation (EC) No. 864/2007 (Rome II) or, in older cases, by Art. 40 EGBGB. The Federal Court of Justice of Germany (BGH) had to decide on a case in which two medical students had spent three months in South Africa together in order to pass practical education required for their studies. During their stay they had commonly rented a car. Both of them had assumed that the insurance modalities in South Africa in case of an accident were comparable to those in Germany, so that they had not contracted private insurance offered by the car rental company. In fact there was only the so-called "South African Road Accident Fund" which offered victims of car accidents compensation to the amount of 25.000 South African Rand (ca. 3.000 e) at that time. Since one of the students was not accustomed to driving on the left, she caused an accident after turning into a National Road resulting in

severe injuries to the other. The BGH held that according to Art. 40 (2) EGBGB German law as the lex domicilii communis was applicable in the case. As the application of this rule can lead to a situation where strict liability applies to the keeper of the car while there is no insurance available, there is a controversy in German literature as to whether or not this rule should be applied if rented cars are involved. However, in this case the BGH provided a solution in the area of substantive law by assuming the existence of a tacit nonliability clause, which generally proves to meet the interests of the parties involved better than a modification of the Private International Law provision. In respect to classification the question as to whether or not such a clause can actually be assumed to have been concluded is a question of the law applicable to the contract, which was German law in the case. On the other hand it is up to the applicable tort law to decide as to whether or not such a clause is effective. Since German law, however, was also applicable in respect to tort matters, there was no problem concerning a possible restriction on the effectivity of the tacit clause in the present case. As a result the driver in the case would only have been liable if she had acted with gross negligence. On principle, the standards of conduct derive from local data whose applicability does not depend on the respective International Tort Law provision. However, in case a lex domicilii communis exists, the standards of conduct in respect to the relation of passengers in the same car must be taken from this law, insofar it makes no difference whether the tortuous act was committed inland or abroad. Since the condition for gross negligence according to German law had not been met in the case, the BGH found for the defendant.

- ***Anna Radjuk***: "Grenzen der Anwendung des ausländischen Rechts in Russland" – the English abstract reads as follows:

In Russia, International Private Law was recently newly codified into the Russian Civil Code. Among others, new provisions with regard to the imperative norms and public policy were implemented. The present article investigates the impact of the imperative norms and public policy on the freedom of choice of law both in theory and practice from the time of the new codification.

- ***Christian Hoppe***: "Englisch als Verfahrenssprache – Möglichkeiten de lege lata und de lege ferenda"

The article presents a current attempt in Germany to admit – in certain cases – English as the language of procedure. Two German states ("Bundesländer"), North Rhine-Westphalia and Hamburg have presented a legislative proposal according to which special chambers for international commercial matters should be introduced which should, according to the proposal, litigate in English.

- ***Erik Jayme/ Carl Friedrich Nordmeier*** on a seminar held on 12 November 2009 at the "Pontifícia Unversidade Católica" in Rio de Janeiro on international maintenance law: "Neue Wege im Internationalen Unterhaltsrecht: Parteiautonomie und Privatisierung des ordre public Seminar in Rio de Janeiro"
- ***Erik Jayme*** on a conference held in Heidelberg on living wills and private international law: "Patientenverfügung und Internationales Privatrecht Tagung im Italienzentrum der Universität Heidelberg"

French Supreme Court Recognizes Foreign Gay Adoption

Yesterday, the French supreme court for private and criminal matters (*Cour de cassation*) held that an American judgment permitting the adoption of a child by the female partner of the mother was not contrary to French public policy and could be recognized in France.

The women were two doctors living in the United State. They had entered into a domestic partnership. The mother was a American national, while her partner was French. After the child was born, the Superior Court of the county of Dekalb, Georgia, permitted the adoption of the child by the French female partner of the mother in 1999. As a consequence, the birth certificate mentioned that the American woman was the mother, and that the French woman was a parent.

The Paris court of appeal had denied recognition to the judgment. The appeal

against their decision is allowed by the *Cour de cassation* which rules that the American judgement is recognised. The French text of the judgment of the *Cour de cassation* can be found here.

This decision is presented as historic by French newspaper *Le Monde*.

Van Den Eeckhout on Transnational Corporate Social Responsibility

Veerle Van Den Eeckhout, who is professor of private international law at Leiden university (the Netherlands) and the University of Antwerp (Belgium), has posted International Environment Pollution and some other PIL–Issues of Transnational Corporate Social Responsibility on RefGov and on SSRN. The Article is in Dutch. The English abstract reads:

> ***A case-study of the instrumentalisation of Private International Law in the year 2010: developments at the beginning of a new decade***
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> *On the 30th of December 2009, the court of The Hague accepted international competence in the case "Shell/Shell Nigeria". As the jurisdiction issues have been solved, legal proceedings can actually start.*
>
> *During these legal proceedings it is possible that issues about applicable law will come forward. In this article, the author focuses on Private International Law Issues as related to cases like Shell, without focusing however on the PIL-issues of the specific Shell case itself.*
>
> *The article focuses on the Rome II Regulation – the new European PIL-source including rules of applicable law on torts. The crucial question is the following: in how far does the Rome II regulation allow to declare applicable – if desired by the victims – Dutch tort law in cases of "Transnational Corporate Social*

Responsibility" as they might be brought in future against parent companies holding their seat in the Netherlands, either before the Dutch judge or before another European judge, especially if the claim of the victims concerns Parent Corporation liability for damages occurred in developing countries.

In her attempt to answer this question, the author gives some comments on the impact of national PIL-rules of EU-Member States – e.g. national rules about "surrogate law" – and the interaction of these rules with European interference in PIL, as well as on the impact of the way issues of "qualification" are solved by the EU-Member States – e.g. the complication of the delimitation between "tort law issues" and "corporate law issues" – and the interaction thereof with European interference.

In this analysis, issues about respect for Fundamental Rigths as related to Transnational Corporate Social Responsibility come forward. Particularly, the case of Transnational Corporate Social Responsibility shows how national practices of EU-Member States could lead to more – or less – respect for Fundamental Rights and, more in general, more – or less – protection of "victims", interrelating with European interference in PIL.

It can be freely downloaded here (extensive version) and here.

Dickinson on The Rome II Regulation: Supplement Now Available

Andrew Dickinson's monograph on **The Rome II Regulation – The Law Applicable to Non-Contractual Obligations** was published in December 2008, and subsequent contributions from courts and academics have been seen throughout 2009 and 2010. To ensure that his work stays up-to-date and comprehensive, Dickinson has published an **Updating Supplement** to

accompany the monograph. From the OUP website:

- This supplement updates The Rome II Regulation: The Law Applicable to Non-Contractual Obligations, which is the leading practitioner work which focuses on the Rome II regulation
- This supplement incorporates all major substantive developments since publication of the Main Work in December 2008 including the implementation of the Regulation in the UK, recent ECJ cases concerning other EC private international law instruments and new decisions of the English courts concerning the pre-Regulation rules of applicable law

> *Written by an experienced practitioner, who had substantial involvement in the consultation process leading to the regulation, offering valuable insight into the background and working of the regulation*
>
> *This updating supplement brings the Main Work The Rome II Regulation up to date and incorporates substantive developments since publication of the book in December 2008. In particular it draws attention to legislation implementing the Regulation in the United Kingdom, to recent ECJ cases concerning other EC private international law instruments, to new decisions of the English courts concerning the pre-Regulation rules of applicable law, and to recent books and journal articles providing further colour to the picture surrounding the Regulation since its adoption in January 2009. It is an essential purchase for all who already own the Main Work, and maintains its currency.*

You can buy the main work together with the commentary for £200, or just the supplement for £45.

Southampton Colloquium on Maritime Conflict of Laws

The Institute of Maritime Law at the University of Southampton, together with the

Universities of Oslo and Tulane, is hosting a colloquium on maritime conflict of laws on 1st -2nd October 2010. The programme looks excellent (it doesn't seem to be available on the web anywhere, so you'll just have to trust me on that). Details can be obtained from Mrs Anita Rogers-Ballanger – for contact information see the IML website.

Getting to know Spanish PIL Particularities

One of the most particular traits of the Spanish legal system results from art. 149.1.8 of the Constitution, under which "1. The State has exclusive jurisdiction over the following matters: 8- Civil legislation, without prejudice to the preservation, modification and development by Autonomous Communities of civil rights (…), where they exist."

Due to this possibility Spain has become a State characterized by legal pluralism; it is a "plurilegislative" State, that is, a single sovereign territory where several civil law coexist- though not, however, several jurisdictions.

The coexistence of different systems of civil law generates inter-regional conflicts. Only the State is empowered to make rules in relation to them. As said by art. 149.1.8: "In any case, [The State has exclusive jurisdiction over] the (…) rules for resolving conflicts of law (…)". The Autonomous Communities do not have competence on the subject.

The clarity of this provision has not prevented regional lawmakers from including criteria determining the spacial scope of the autonomous rules (see eg art. 188 of the Civil Law of Galicia, "Galicians are allowed to make a joint will either in Galicia or outside Galicia"), although, as repeatedly pointed out by the authors, in doing so they may be invading the exclusive jurisdiction of the State . In some cases, this trespass on the State exclusive competence has led to a constitutional complaint before the Constitutional Court.

Art. 16 Civil Code (Cc) contains the rule for solving inter-local conflicts: “Conflict of Laws that may arise from the coexistence of different civil laws in the country will be resolved according to the rules contained in Chapter IV”. This means that the lawmaker has chosen to extend the Spanish solution for private international situations to inter-local conflicts. The option has been criticized in academic circles, where the need for a specific solution has been highlighted considering the lack of analogy between the conflicts.

At any rate, art. 16 Cc must be understood beyond its literal meaning, that is, the reference to “the rules contained in Chapter IV” extends to any rule conceived to solve a conflict of laws in autonomous PIL system, and encompasses all solutions, regardless of the legislative technique used (eg, conflictual or unilateral) . Much more controversial is what happens with conventional (or European Community) regulation. The issue requires a detailed review for which we hope we will get an expert opinion sometime later this year.

In order to apply Chapter IV of the Civil code to inter-regional situations, art. 16 Cc replaces the nationality as connecting factor: “Personal Law will be determined by civil neighbourhood (*vecindad civil*)”. Regulation of the civil neighbourhood is a matter of exclusive jurisdiction of the State (see arts. 14 and 15 Cc).

Finally, art. 16 Cc excludes the provisions of paragraphs 1, 2 and 3 of Article 12 Cc: the rules on characterisation, renvoi and public policy will not apply to inter-local situations. Conversely, that apparently means that the prohibition of fraud (art. 12.4 Cc) remains in effect. However, despite some case law supporting the opposite view, scholars and academics reject that the fraud rule be applicable in merely inter-local situations. Another issue that we must leave open, to be (hopefully) explained by an expert contribution.

The Influence of Amicus Briefs

and Morrison

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The decision of the U.S. Supreme Court in *National Australia Bank* illustrates the influence of amicus briefs on the decisions of courts in the U.S. The Supreme Court expressly relied on the amicus briefs filed by foreign states and numerous international and European organizations, including the European Banking Federation, the International Chamber of Commerce, the French Business Confederation (MEDEF), and the Swiss Bankers Association. The Court held that the amici "all complain of the interference with foreign securities regulation that application of §10(b) abroad would produce, and urge the adoption of a clear test that will avoid that consequence. The transactional test we have adopted . . . meets that requirement."

In recent years, one or more amicus briefs were filed in 85% of the cases pending before the U.S. Supreme Court. Although the number of cases decided annually by the Supreme Court has not materially increased over the last fifty years, the number of amicus filings during that period has increased by 800%. Joseph D. Kearney and Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 744, 749 (2000).

As demonstrated by the *National Australia Bank* decision, the presence of amicus briefs increases the likelihood that the Supreme Court will grant certiorari, and the likelihood of success on the merits. See Paul Chen, *The Information Role of Amici Curiae Briefs in Gonzalez v. Raich*, 31 S. Ill. U. L.J. 217, 220 (2007). First, the filing of an amicus brief constitutes a signal that an amicus believes the case is important, and that the amicus is sufficiently concerned to fund the preparation of such a brief. From this perspective, an amicus brief helps the court identify the range of interests affected by the case beyond the parties themselves. Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 28 Am. Pol. Sci. Rev. 1109, 1112 (1988). In *National Australia Bank*, the amici included numerous international organizations concerned about the extraterritorial reach of U.S. law and the exposure to class action lawsuits for many non-US companies and banks. The amici also included non U.S. companies that are themselves party to foreign-cubed class action lawsuits in the U.S.

Second, the decision of the U.S. Supreme Court in *National Australia Bank* demonstrates that amicus briefs, including briefs of international and European organizations, have an impact on the courts' substantive decision-making process and the issues considered by the court, especially where the amicus provides unique information or a different perspective on the specific issues pending before the court.

Courts in the U.S. have held that, if interested entities wish to have a formal voice in a U.S. lawsuit, they should move to intervene in the case or file an amicus brief. *See, e.g., Reid L. v. Illinois State Board of Education*, 289 F.3d 1009, 1014 (7th Cir. 2002). Even in instances where the Supreme Court does not quote or cite an amicus brief, specific analyses of certain decisions of the Court demonstrate that justices are influenced by these briefs. "The arguments and information presented in the AC briefs had an impact on the Court's substantive decision-making, the issues the justices considered in deciding the case, the concerns they addressed in their opinion, and the arguments and information they marshaled to justify their positions." Chen, at 239. In the oral argument before the Supreme Court in *Morrisson v. National Australia Bank*, on March 29, 2010, Justice Breyer specifically referred to some of the amicus briefs filed in the case and asked the parties questions about them. Oral Argument Tr., Mar. 29, 2010, at 14:8-17; 40:21-41:18. Chief Justice Roberts also asked questions about the position of some of the non-U.S. amici. *Id.* at 50:9-14.

The influence of amicus briefs reflects the cultural approach of the common law, which contemplates that the development of a body of law should result from the aggregation of numerous individual decisions made by rigorous judges based on specific facts. This process of generalization begins with individual decisions. From this perspective, there is a significant difference between the judicial review exercised by the *Conseil Constitutionnel* in France through the *Question Prioritaire de Constitutionnalité*, which examines the constitutionality of a statute in the abstract, and the analyses performed by the U.S. Supreme Court and other federal courts, which always focus on concrete issues. *National Australia Bank* reflects that amicus briefs that have the most influence on the courts are those that address the specific issues in the case and that build on the parties' arguments and offer new perspectives within that framework.

Morrison, Securities Liability and Corporate Governance

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In the recent decision *Morrison v. National Australia Bank*, the U.S. Supreme Court has developed a new test for the extraterritorial applicability of U.S. securities liability. According to this new approach, the Securities Exchange Act 1934 applies only to litigation involving (1) transactions in securities listed on an American exchange, or (2) other securities, where the transaction took place in the territory of the U.S. The case was dismissed since it involved only plaintiffs who bought their shares on a foreign (Australian) exchange, and who sued an Australian issuer.

We believe that this decision is a major step in the right direction and that the case was correctly decided. The new test is certainly more appropriate than the legislative solution envisaged by the recently proposed Dodd-Frank Wall Reform and Consumer Protection Act (H.R. 4173 (111th Cong. 2d Sess.). In essence, this Act would reinstate the previous case-law, which had been chiefly developed by the Second Circuit. Nevertheless, we think that the doctrinal concept behind the Supreme Court's reasoning is not entirely satisfactory.

The new test bears surprising resemblance with the *lex mercatus* criterion, which has been discussed under European securities liability rules. According to this concept, the liability claim is governed by the law of the place where a securities transaction had been carried out. Such a test can lead to arbitrary results, especially where a security is traded in several markets or is cross-listed.

In a recent working paper, we develop an alternative concept for determining an appropriate conflicts-of-law rule. We start from the insight that there is another dimension to international jurisdiction in securities litigation, which has not garnered a lot of attention so far: Securities liability is a major corporate

governance enforcement mechanism. Hence, the question of the applicable law in securities claims has important implications for corporate governance and should be viewed in the broader context of the rules governing the applicable corporate governance regime.

We propose a global approach to the problem that departs from the role securities litigation plays for corporate governance. We show that, even though there are important differences between U.S. and European corporate governance, securities litigation in both systems fulfills the crucial function of ensuring that capital markets can exercise a control over corporate management by pricing and thereby judging the economic expediency of business decisions. Securities liability can be seen as only one facet of the larger regulatory context of corporate governance. From this starting point, we propose a holistic approach according to which the law governing securities fraud actions should be determined in the bigger context of the corporate governance regime applicable to a given issuer. The liability rules of a country should only be attached to such issuers that are subject to its disclosure duties in the first place because liability is only the mechanism to enforce the primary corporate governance (i.e. disclosure) rules. The consequence of this proposed 'bundling' between disclosure duties and liability would be that U.S. securities liability is only triggered where an issuer is subject to U.S. securities law because it is either registered with the SEC or intends to target a sufficient number of U.S. investors. By contrast, issuers who offer their shares in the U.S. according to Regulation S, or whose shares are only traded by third parties, do not bind themselves to the standards of U.S. law and hence should not be subjected to U.S. liability rules, even if the transaction takes place in the United States.

Our paper is available for download here (comments on this post and the paper generally should be made on *conflictoflaws.net*).

Securities Class Actions and Extra-Territoriality: a View from Spain

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In 2009 Spanish investors were surprised with the news that they were also affected by Madoff's fraud in so far as their credit entities were trusting their money to him. That was the case of Banco de Santander, which immediately reacted announcing that it was not responsible for the 2330 million € lost. Later on, Spanish and US-American lawyers presented a class action in Florida on behalf of two investors, from Chile and Venezuela, on the grounds that Banco de Santander and Optimal (its subsidiary seated in Florida) had been negligent and reckless while trusting a substantial part of their actives to Madoff, without performing to him and his company an audit with due diligence and according to financial market standards; all interested from Spain were invited to joint it. After the filing, Banco de Santander offered to reimburse private investors (not institutional ones), by issuing to them preferent shares. According to the Bank, the agreement was accepted by up to 90% of the investors, which seems not to be a bad outcome. The non-settled investors are still pouring into the Spanish judicial system, dealing individually with the Bank (see El Pais, 20.5.2010).

Unlike Morrison, securities were purchased in the US in the aforementioned case, and still, it casts thoughts obviously on the conduct test, but also on the effects test, putting into question the territoriality approach taken in Morrison. But it does not change the fact that the Banco de Santander's willingness to settle has been positively assessed by investors, which turns the issue to the availability of class actions in Spain. Spanish legislation lays down collective actions indeed; since 1985 groups have standing, but without further procedural development this possibility has remained dormant. Eventually and limited to consumer matters, collective actions were set up and they can be found now in the Spanish Civil Procedure Law, in particular in Article 11. Therefore, the aforementioned case could give rise to a group action in so far as private investors may be deemed consumers: but the truth is that the Spanish regulation is very

unfortunate, especially with regards to this kind of collective action, since it lacks a clear treatment of group members, e.g. not being stated which kind of right they have, either to opt out or to opt in. Even more worrying is the fact that the Spanish legislator has barely regulated the res iudicata issues, forgetting e.g. about settlements, when the general regime preserves third parties to proceedings from detrimental ones. All these issues make collective actions a rare species in Spain, not much helped by the granting free access to justice to associations entitled to protect consumers.

Spanish securities law provides investors with traditional claims on fraud or misrepresentation; information obligations are strengthened by the transposition of Directive 2004/108/EC. Besides, misconduct resulting in counterfeiting the balance sheet or the books which provoked damages to the company, to stakeholders or to third parties may be criminally prosecuted (Article 290 of the Spanish Criminal Code), as well as manipulation to modify prices, including that of securities. In Spain crimes open a door to collective action; civil liability may be claimed in criminal proceedings, either by the Public Prosecutor or by the victim or victims, who must act under the same representation, according to Article 103 of the Criminal Procedural Law. Anyway, the exceptional intervention of Criminal Law leaves investor protection to individual claims, which is nowadays insufficient.

So far, international cases regarding these issues have been seldom in Spanish judicial practice, so it would be difficult to report on extraterritoriality issues. Most of them stem from Lehman Brothers' bankruptcy and involved both Spanish investors and brokerage services. With this background, it is difficult to assess the extraterritoriality of US-law, especially because the Spanish justice system is open to claims against foreign co-defendants, although theoretically limited by the abuse of procedure clause. It seems to me that Morrison exemplifies a case in which this clause should intervene if presented in Spain. Beyond the exceptionality of this case, Morrison frames a debate to be addressed in Spain about how to protect investors in a global capital market.

A “View from Across” (in the Other Direction)

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From the standpoint of an outside observer with « a view from across », the practical result reached in the Morrison case seems reasonable. It is highly probable that in a similar situation – that is, supposing jurisdiction could be secured under the relevant rules applicable before, say the courts of Member States as against foreign-third-State-domiciled defendants AND imagining private attorney general actions for violations of trans-European securities regulations – courts over this side of the Atlantic (and for realistic symmetry, we’d need to think in terms of the rulings by the Court of Justice of the European Union as relayed by the courts of the Member States) would not (whatever the reasoning involved) have extended the scope of domestic economic regulation to an “F-cubed” action. However, the concrete result reached in this particular case is clearly not the point in issue. Nor indeed is there any reason not to adhere to the important policy objective of discouraging global forum-shoppers (or their lawyers) attracted by the well-known magnetic properties of US civil procedure in purely financial matters when private punitive-damage-actions are available. The real question is the *approach* adopted by the Supreme Court in its first decision relating to the ambit of the Securities and Exchange Act in an international setting.

I’ll simply emphasise a few points that might be of specific interest to European observers on the Supreme Court’s new “transactional test”. (I’ll refrain from speculating here as to the impact of the potential new “anti-Morrison” legislation to which Gilles has just posted the links), or to the difference it might have made on the overall result had Justice Kagan, who authored the US amicus brief favoring the “substantial conduct” test, been sitting on the Court). In order to define the reach of § 10(b) of the Securities Exchange Act 1934 (and thereby of SEC 10b-5), the Court decided that these various stringent informational/transparency requirements apply only to *transactions in securities listed on US exchanges* or otherwise sold within the US:

1. It comes as a surprise (and disappointment) to see the Supreme Court

turning its back on several decades of (what looked from over here like) a widely shared and carefully tailored functional approach (initiated by the Court of Appeals of the Second Circuit whose case-law is discussed extensively) to the determination of the scope of federal economic regulation, in favor of a bright-line rule based on a regression to the presumption against extra-territoriality. As the concurrence suggests, haven't we been there before? Well over here, we certainly have. Obviously, the EU is only just beginning to grapple with similar issues (first in respect of the extraterritorial scope of European competition law, then in diverse areas involving the international reach of directives, such as the Agency Directive in the controversial *Ingmar* case) but if intra-European (as opposed to the international reach of "federal" or trans-European legislation) conflicts are anything to go by (and indeed much has been written on this point within the US on the striking parallelism between methodological approaches in international arena and in intra-federal situations) then the quest for a "simple" or "certain" conflicts rule designed to provide legal security to economics actors has proved at best elusive, at worst unfair. Whether or not one decides to adhere to a dogmatic principle of territoriality or its contrary, surely the only real issue is whether it is reasonable in functional or policy terms, given the connections between the conduct, its effects and the market the statute was designed to regulate, to extend such a statute in a given case. It is doubtful indeed that the concept of "territoriality" is of much help.

2. Of course, framed in these terms, a functional approach provides little predictability. Over here, this has been a well-known war-cry since the mid-sixties against the importation of any form of American legal realism in the sphere of the conflict of laws (let alone any weird law-and or, worse, critical legal thinking in any other sphere, domestic or global…). However, it also seems clear (from over here) that in the particular case of the reach of US Securities regulation, the courts (and the Second Circuit in particular) have, over time, attempted to refine this test – albeit, as inevitable with any judicial-interpretation-in-progress, with results that may sometimes lack coherence – so that it seems a shame that these painstaking efforts be set aside in one fell swoop. It appears then that the real debate concerns canons of statutory construction which involve far more than the sole issue of the international reach of the Exchange Act and extends to the whole sensitive question of judicial law-making when

statutes are either silent or fuzzy in novel contexts. (Paradoxically, over here, the opposition between conservative originalists/fundamentalists and more policy or society-attuned liberals is considerably less violent than in the US on issues of statutory interpretation and the role of the courts, although one still comes across (in France) people who claim to believe that case-law interpreting the Code civil of 1804 is not a source of law, etc.; there are also signs of renewed debate on the role of the courts in the context of the new Constitutional review procedure in the French courts (the "QPC" 2010), over whether new Constitutional review should extend or not to judicial constructions of statutes). One is however struck by the fact that although the previous policy-based, conducts-and-effects approach practiced by the courts is stigmatized as having no textual foundation, one may also wonder, in turn, where exactly the dogma of territoriality comes from.

3. So we've been there before (I think). But even if we accept that bright-line rules and dogmatic presumptions have their virtues, and may indeed work adequately if the courts are allowed sufficient margin to set them aside, these issues on statutory interpretation do not address the crucial question of building an appropriate response to the various dysfunctions of global markets. Of course, as the Court very rightly points out, financial markets are the object of very different national conceptions of regulation: there is no shared/uniform answer to the question of what a securities fraud actually is (I'd personally go further, of course, to say that there is no uniform answer to anything, but that is no doubt quite beside the point). But the existence of "true" conflicts of economic relation is not new. In the area of antitrust, the Court's appeal to positive comity in such a context, in *Empagram*, seems more attractive from this side of the Ocean. More importantly, in a world that is complex and messy (as Hannah has excellently pointed out), would it not be more judicious to devote energy to defining the requirements of reasonableness in the scope given to domestic regulation rather than asserting the primacy of a "principle of territoriality" which is not only culturally conditioned in the common law tradition (as I have often explained elsewhere), undefinable as a general matter, and totally maladjusted to contemporary interconnected markets. Indeed, the concurring opinion of Justices Stevens and Ginsburg provides an excellent hypothetical to illustrate the way in which the court's territorial, transaction-based test is likely to

create a loophole for many types of securities fraud.

4. My last point will be a hotch-potch of observations which may only interest the European private international lawyer-observer. First, as I have often tried to make clear in a tradition of legal thinking in which the public/private distinction is still deeply ingrained, it is very hard here to contend that this is a conflict of "private" interests or private laws, notwithstanding the private actions/actors involved. Second, contrary to much that has been written, often misguidedly, over here on the *Vivendi* class litigation, this decision is not necessarily going to "protect foreign (French) interests" (whatever one may suppose them to be) nor prevent trans-Atlantic class actions including European investors as claimants or European firms as defendants, as long as the new transactional criteria are satisfied. Third, it seems a little strange that at a time when the US Supreme Court is prudently retreating from extraterritoriality (whatever its reasons), the EU is doing exactly the reverse. Its policy appears to be to extend the effects of EU legislation to situations which are largely connected to third countries (after *Owusu*, see the new Alimentary Obligations Regulation or the Succession draft proposal). Finally, as I have already had the opportunity to point out elsewhere, considerable energy is currently being put into the reform of the Brussels I Regulation, following hard on the heels of Rome I and II. That is of course all very well. But the Morrison litigation shows that our models are no doubt already out of date (methodologically, epistemologically). Instead of doing things like promoting party autonomy in contract throughout the world (the latest initiative of the Hague Conference on PIL!?) ought we not to be thinking ahead to the massive new types of difficulties that (for instance) cross-border/global securities fraud is now raising?