Breaking News: the End of Morrison?

The very next day after the US Supreme Court released its decision in *Morrison*, the US Congress passed a bill which pretty much overrules the Supreme Court decision.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (at 1330) provides:

> *b) EXTRATERRITORIAL JURISDICTION OF THE ANTIFRAUD PROVISIONS OF THE FEDERAL SECURITIES LAWS.—(1) UNDER THE SECURITIES ACT OF 1933.— Section 22 of the Securities Act of 1933 (15 U.S.C. 77v(a)) is amended by adding at the end the following new subsection: ''(c) EXTRATERRITORIAL JURISDICTION.—The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of section 17(a) involving—*
>
> *''(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or*
>
> *''(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.''.*

If this provision was to enter into force, it would overrule to a large extent *Morrison*. The reason why is that the issue in *Morrison* never was whether Congress had the power to regulate foreign activities, or whether US Courts had jurisdiction over disputes which were not strongly connected to the United States. The issue was merely to interpret what the US Congress meant when it passed the *Securities Act* 1933 and did not provide clearly for the extraterritorial reach of the *Act*. If this Act was to be passed, Congress would eventually say what it meant, and such statement would obviously control.

Qualifications

I understand that the American legislative process is not yet complete, and that it is still necessary that President Obama signs the new Act, which has not yet been done.

Also, it is unclear that the new act actually provides for a private cause of action. It could be therefore, that *Morrison* is only partially overruled: see the first comment of the Act by Julian Ku over at *Opinionjuris*.

Securities Class Actions and Extra-territoriality: A View from Canada

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Securities class actions are a relatively new phenomenon in Canada for two main reasons. First, class procedures are available across the country only since 2004 (though since 1978 in Quebec and 1992 in Ontario). Second, until very recently, only traditional claims of fraud or misrepresentation were available to investors. Since 2005, however, most Canadian provinces have amended their securities legislation to introduce a right of action in secondary market liability for continuous disclosure (see for e.g. (Quebec, Ontario, BC). This action is particularly attractive as it does not require plaintiffs to prove any reliance although it is usually accompanied by damages limitations and a loser-pays rule for costs. Given the constitutional division of power, there is currently no federal securities law or class action legislation in Canada. As a result, multijurisdictional securities class actions can arise in Canada in an interprovincial sense as well as in an international sense. Moreover, many major Canadian firms are listed on both Canadian and US exchanges. In all of these cases, challenges in terms of jurisdiction and applicable law can occur.

The arrival of these new causes of action has had an immediate impact on the number of securities class action filings in Canada. While the period 1997 and 2007 yielded between one and five a year, there were 10 claims filed in 2008 and 9 in 2009. In terms of value, ongoing claims are seeking close to 3 billion

Canadian dollars (1 CDN$ = .94 US$). During the 2002-2008 period, there were 9 Canada/US cross-border settlements compared to 11 domestic settlements. Of the 21 pending actions, eight involve claims where parallel actions are also under way in a US jurisdiction – often the result of a so-called copy-cat action filed in a Canadian jurisdiction. (Data sources can be found here and here.)

So far, only one action (against IMAX) has been certified in Ontario as a global class specifically including investors who purchased on either the TSX or NASDAQ exchanges, whether Canadian or not. The Ontario legislation specifies that claims can be brought against an issuer reporting in Ontario or an issuer with a "real and substantial connection to Ontario". This second and potentially extra-territorial jurisdictional criterion has not been tested in court yet.

This brief overview of the legislative context for securities class actions in Canada exposes the uncertainty facing both potential plaintiffs and defendants given the paucity of judicial interpretation of the new statutory claims. The recent Ontario decision in the IMAX case suggests that choice-of-law challenges are not a bar to certification of a class that includes investors from several jurisdictions within and outside Canada. This is consistent with decisions in class actions outside the securities field, where Canadian courts have been receptive to multijurisdictional actions whether in terms of certification or recognition of foreign settlements. Despite some doctrinal debate on the constitutional aspects of those decisions, the Supreme Court of Canada has recently refused to intervene, deferring to provincial legislators the task of dealing with the complexity inherent to these cross-border disputes.

The US Supreme Court's decision in *Morrison* is unlikely to signal any important change for Canadian investors or class counsel. The fact that so many Canadian corporations are registered with American exchanges should give them access to US courts. For claims against firms listed only in Canada, investors whether local or foreign can seek remedies largely equivalent to those available under American law in most Canadian provinces. If anything, the ruling in *Morrison* might increase traffic towards Canadian courts given their potentially greater openness to multijurisdictional securities class actions.

Extraterritorial Reach of U.S. Securities Law? What Extraterritorial Reach?

Hannah Buxbaum is Executive Associate Dean for Academic Affairs and Professor of Law at the Indiana University Maurer School of Law in Bloomington, Indiana. Her article on multinational securities class actions was cited in both the majority opinion and Justice Stevens' concurring opinion in Morrison v. NAB.

Even from this side of the Atlantic, I could hear the cheers of many European scholars and practitioners – not to mention corporations – greeting the U.S. Supreme Court's decision in *Morrison*. That decision foreclosed one particularly difficult kind of transnational securities case, the "foreign-cubed" class action (foreign investor, foreign defendant, foreign investment transaction). That much was expected by virtually all observers – after all, as the Justices recognized during oral argument, it's hard to understand why Australia's regulatory choices should be displaced by U.S. law in a case involving Australian investors, an Australian issuer, and an Australian exchange. But the Court went substantially further, adopting the bright-line test that had been proposed by the respondents: it held that Section 10(b) of the Securities and Exchange Act of 1934 – the source of the implied right of action for investors harmed by securities fraud – applies only to fraud in connection with securities transactions *that occur within the United States*. In other words, the only plaintiffs who can sue under Section 10(b) are those who purchase their securities on U.S. exchanges or in other transactions in the United States. This test then bars not only foreign-cubed claims, but some forms of "foreign-squared" claims (e.g., U.S. investor, foreign defendant, foreign investment transaction) as well.

At one level, I find the result in the case gratifying. As I have argued here and here, the application of U.S. law in cases that are so closely connected to other countries brings our private enforcement mechanism into unwelcome conflict with foreign regulatory regimes. Various aspects of U.S. substantive and procedural law are viewed as unacceptable in most other legal systems: the lack of a loser-pays rule; contingency fees; opt-out class actions; our discovery rules; and – critical in these securities claims – our use of fraud-on-the-market as a substitute for a showing of actual reliance. In situations presenting such conflict between the interests of different countries, principles of international comity, as well as international-law limits on the application of domestic law, would dictate restraint.

Yet I find the Court's *rationale* in the case somewhat less gratifying. The decision is presented as one that rests on the presumption against extraterritoriality. Justice Scalia's opinion for the majority begins by quoting *Aramco* on that presumption: "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." The presumption can be overcome by a showing that the legislation in question was in fact meant to apply beyond U.S. territory. But hasn't that showing been made? The classic form of "extraterritoriality," after all, is *effects-based* regulation — the application of U.S. law to conduct that occurs in another country on the basis of the harm that results within the United States. (This form of extraterritorial regulation was not at issue in *Morrison*, which involved U.S. conduct, not U.S. effects.) The majority would presumably permit this kind of extraterritoriality, since it would permit the application of U.S. law to fraudulent conduct abroad as long as that conduct occurred in connection with a U.S. transaction in securities. In other words, in the Court's view, the issue is not that 10(b) can't apply to foreign *fraud* — it's that Section 10(b) can't apply to any fraud at all (foreign or domestic) in connection with a foreign *transaction*. This is really not a question of extraterritoriality – it's a question of the category of interests that, in the view of the majority, Section 10(b) is designed to protect. In defining the "objects of the statute's solicitude" as domestic exchanges and transactions alone, the Court is cutting back on the scope of that section. Thus, the decision appears to flow not so much from a concern about international conflict (though the Court does mention that), but from a more general concern about the overuse of the private right of action under Section 10(b). To that extent, as Justice Stevens notes in his concurrence, it is simply one more step in the Court's "continuing campaign to render the private cause of action under Section 10(b) toothless" (see, for instance, Central Bank of Denver (eliminating aiding and abetting liability), Dura Pharmaceuticals (heightening pleading requirements for allegations of loss causation), and Tellabs (raising the threshold for pleading scienter)).

Recognizing that the presumption against extraterritoriality had been overcome would not necessarily have led to a different result in this case. In his fine dissenting opinion in the 1993 *Hartford Fire* antitrust case, Justice Scalia notes that "if the presumption against extraterritoriality has been overcome ..., a second canon of statutory construction becomes relevant: '[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains.'" On that basis, keeping in mind principles of international comity and the need to avoid unnecessary interference with the interests of other nations, the Court could have concluded (properly, as I have argued) that it would be unreasonable to apply U.S. securities law in cases so closely connected with other jurisdictions. This approach would have brought the Court to the same result in *Morrison*, but in a way that linked more closely with its previous jurisprudence in the antitrust context, and that focused more closely on the relevant international conflicts. In my view, such an analysis would have been preferable.

The outcome in *Morrison* will do a lot of good – it will bring much-needed clarity to jurisdictional analysis under the U.S. securities laws, and will eliminate regulatory conflict with other countries. Yet it is also somewhat unsatisfying, for the reasons I gave in my article when describing the bright-line test as a "second-best solution:" it retreats to an artificially territorial approach rather than grappling with the messy reality of the global capital markets. What if, as is often the case with foreign defendants, there's a group of U.S. holders of ADRs as well as foreign holders of common stock? Wouldn't there be efficiencies to be gained in avoiding duplicative litigation in multiple jurisdictions? Or what if a dual-listed foreign company deliberately releases fraudulent information in the United States, knowing that even after paying resulting damages to its U.S. investors, it would come out ahead because foreign investors wouldn't be able to mount a successful private action? Wouldn't there be a U.S. interest in deterring such fraud, reducing private enforcement costs within the United States? There are U.S. (and shared) regulatory interests at stake in such situations that cannot be accommodated by the bright-line test. Perhaps, after all, we must await legislation for the final accounting of those interests – as in Section 7216 of the proposed financial reform bill, which would preserve a broader scope of application of U.S. antifraud law at least in public enforcement proceedings.

Extraterritorial Reach of US Securities Law: Online Symposium

As reported yesterday by Trey, the US Supreme court has delivered a landmark decision on the extra-territorial reach of US securities law and class actions.

This decision was much awaited, not only in the United States, but also in many other jurisdictions. For quite some time, non US corporate entities were complaining about US assertions of jurisdiction over disputes which were strongly connected to foreign jurisdictions (but not necessarily unconnected to the USA).

In France, a great example has been the *Vivendi* litigation. In this case, a major French corporation, Vivendi, was sued before a US federal court by shareholders, many of whom were French nationals who had bought their shares in France. The US Court retained jurisdiction, and eventually found that Vivendi had indeed violated US securities law. The case was presented by many French scholars and practitioners as an unreasonable assertion of jurisdiction by the US Court over a dispute which was essentially French.

Yet, one could barely say that New York had no interest whatsoever in deciding this case. Vivendi had also sold shares on the New York Stock Exchange. Some of the shareholders were therefore also American. Directors of Vivendi had moved to New York where they lived, managed the group and were found to have made financial misrepresentations. Vivendi initiated proceedings in France claiming that French shareholders had abused their right to freely choose the forum where they wished to bring action by suing in the USA. The Paris court of appeal dismissed the action on the ground that New York being connected to the dispute, it was perfectly legitimitate for shareholders to initiate proceedings in the USA.

Can non US corporations both benefit from the New York Stock Exchange and avoid the jurisdiction of US courts if they violate US securities law? Can you both have your cake and eat it?

In the days to come, *conflictoflaws.net* will hold an online symposium on the extraterritorial reach of US securities law and class actions. Scholars from both the United States and other jurisdictions will offer their thoughts on the reasonableness of the US practice. All readers are invited to participate to the symposium by posting comments (contributions are also welcome).

- **Transnational Securities Class Actions – A Private International Law Perspective (Dickinson)**
- **The Importance of Amicus Briefs and Morrison (Schimmel)**
- **Morrison, Securities Liability and Corporate Governance (Ringe & Hellgardt)**
- **Securities Class Actions and Extra-Territoriality: a View from Spain (Carballo)**
- **A "View from Across" (in the Other Direction) (Muir Watt)**
- **Securities Class Actions and Extra-territoriality: A View from Canada (Saumier)**
- **Extraterritorial Reach of US Securities Law? What Extraterritorial Reach? (Buxbaum)**

The *Opinio Juris* blog is also hosting an online symposium on *Morrison*. Here are links to the posts thus far:

- Just Call him Antonin Scalia: Anti-Imperialist (in the Extraterritorial Application of U.S. Laws)
- International Securities Fraud Makes Supreme Court Debut
- Morrison and Extraterritoriality: More Thoughts

- Morrison and the Effects Test

US Securities Laws and Extraterritoriality

In a landmark decision, the United States Supreme Court ruled last week in the case of Morrision et al. v. National Australia Bank Ltd. et al. that Section 10(b) of the Securities Exchange Act does not provide a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges. This case, besides resolving the precise issue presented–namely, the extraterritorial reach of the US securities laws–will be important reading for scholars and practitioners interested in the so-called presumption against extraterritoriality in United States law.

Update: this decision will be the subject of the talk to be given by Prof Linda Silberman of NYU at BIICL in London on 6th July, under the chairmanship of (Lord) Lawrence Collins. This will be a rare opportunity to hear a leading US expert speak on this important subject. (Her article criticising the previous law was cited by the US Supreme Court.) See here for details.

Rosenberg and McCloud on Choice of Law in Class Actions

David Rosenberg, who is a professor of law at Harvard Law School, and Luke McCloud, who is a third year student at HLS, have posted A Solution to the Choice-of-Law Problem of Differing State Laws in Class Actions: Average Law on SSRN.

In this essay, we show why and how to apply the average of differing state laws to overcome the choice-of-law impediment currently blocking certification of multi-state federal diversity class actions. Our main contribution is in demonstrating that the actual law governing a defendant's activities involving interstate risk is in every functionally meaningful sense the same regardless of whether it is applied in disaggregated form state-by-state at great cost or in aggregated form on average at far less cost. We refute objections to using the average law approach, including that average law subjects defendants to a law of which they lacked notice at the time of the underlying conduct; fails to accurately reflect and enforce the substantive differences among the governing state laws; and undermines the sovereign lawmaking power of states to enact their distinctive policy preferences. To facilitate use of the average law approach, we also sketch the means for practically implementing the average law solution in different types of class action to determine a defendant's aggregate liability and damages.

Shah on Ethnic Minorities and Transjurisdictional Marriages

Prakash Shah, who is a Senior Lecturer at Queen Mary, University of London, has posted Inconvenient Marriages, or What Happens When Ethnic Minorities Marry Trans-Jurisdictionally on SSRN. The abstract reads:

This article presents evidence of a trend in the practice of British immigration control of denying recognition to marriages which take place trans-jurisdictionally across national and continental boundaries and across different state jurisdictions. The article partly draws on evidence gleaned from the writer's own experience of being instructed as an expert witness to provide opinions of the validity of such marriages, and partly on evidence from reported cases at different levels of the judicial system. The evidence demonstrates that decision making in this area, whether by officials or judges, often takes place in *arbitrary ways, arguably to fulfil wider aims of controlling the immigration of certain population groups whose presence in the UK and Europe is increasingly seen as undesirable. However, and quite apart from the immigration control concerns underlying such actions, the field throws up evidence of the kinds of legal insecurity faced by those whose marriages are solemnized under non-Western legal traditions and calls into question respect for those traditions when they come into contact with Western officialdom.*

The Article is forthcoming in the *Utrecht Law Review* 2010.

Brilmayer and Anglin on Choice of Law and the Metaphysics of the Stand-Alone Trigger

Lea Brilmayer (Yale Law School) and Raechel Anglin (Bingham McCutchen LLP) have published Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger in the latest issue of the *Iowa Law Review.*

This Article provides a novel account for the choice of law revolution of the 1960s and 1970s and, building on our new conceptualization of the choice of law revolution, this Article argues for a fundamental shift in modern choice of law—a shift toward a multifactor future.

Whereas previous scholars have uniformly conceived of the transition from the dominant first Restatement of Conflict of Laws to modern choice of law theory as a legal realist rejection of vested rights, this Article argues that judges were motivated to move away from the first Restatement because they found inequitable its single-factor results. The first Restatement relies on a single contact with a state to determine which state's law applies in a multistate dispute, and this Article concludes that when that contact "stands alone"—i.e., is the only contact with that state—judges find the result dictated by the first

Restatement to be arbitrary and unjust. When faced with such "lopsided" factual scenarios, judges have moved away from the first Restatement.

However, because judges and scholars alike have consistently misdiagnosed the underlying problem, as this Article demonstrates, modern choice of law theories suffer from the same single-factor flaws that plague the first Restatement. Thus, this Article argues for a multifactor approach to choice of law. This Article argues that a multifactor approach will have three significant advantages: (1) avoidance of controversial jurisprudential premises; (2) reduction of extraterritoriality; and (3) greater flexibility for judges. Perhaps most importantly, by properly identifying the root cause of the first Restatement's ills, this Article paves the way for greater theoretical clarity and simplicity, leading to more equitable results in choice of law.

The article can be freely downloaded here.

Nebraskan defamation law to be challenged under the South African Constitution

The recent decision of the Eastern Cape High Court in Grahamstown (South Africa) in Burchell v Anglin 2010 3 SA 48 (ECG) deals with cross-border defamation in a commercial context. The plaintiff (who runs a game reserve and a hunting safari business in the vicinity of Grahamstown) alleged that the defendant made defamatory statements about him to a booking agent in Sydney, Nebraska (USA). Most of his safari clients originated from this agent. However, the bookings suddenly and dramatically decreased and, according to the plaintiff, this was due to defamatory statements made by the defendant to the agent. Accordingly, he instituted action for general damages and loss of profit.
Crouse AJ decided that the lex loci delicti was the law of Nebraska as the defamatory statements were heard and read in that state. However, although

“[weighing] heavily in the balancing scale” (par 124), the place of the delict was in final instance “only to be used as a factor in a balancing test to decide which jurisdiction would have the most real or significant relationship with the defamation and the parties” (par 128). Nevertheless, taking into account the other connecting factors (listed in par 124), the judge decided that the law of Nebraska would prima facie be applicable.

In the process, the judge rejects the double actionability rule of the English common law (par 113). She refers in some detail to foreign case law (from the UK, Canada and the USA) and to foreign commentators (including Harris and Fridman). Her views are similar to these found in Forsyth’s Private International Law (2003) 339-340, the leading textbook on Southern African private international law.

However, according to Crouse AJ, the defamation laws of Nebraska needed to pass constitutional muster to be applied by a South African court: “In South Africa the highest test for our public policy is our Constitution. Just as all South African law is under public scrutiny, so any foreign law which a court intends to apply in South Africa should be placed under constitutional scrutiny. I must therefore decide whether the law of Nebraska passes constitutional muster in South Africa before deciding I can apply [the] same” (par 127). The court is therefore of the opinion that constitutional norms are always of direct application. (A similar view may be found in the recent judgement of the Supreme Court of Appeal in Lloyd’s v Classic Sailing Adventures 2010 SCA 89 (31 May 2010) per www.justice.gov.za/sca.) The issue of conflict with constitutional norms was referred to decision at the end of the trial (par 127). This may lead to an interesting decision as US defamation law is perceived to be pro-defendant (the defendant alleges that his statements are protected under the US constitution) (par 121) while South African defamation law is, in comparison, more favourable to the plaintiff, also due to constitutional provisions.

Conflict between the Marine

Insurance Act 1906 (UK) and South African insurance legislation

In Lloyd's v Classic Sailing Adventures (Pty) Ltd 2010 ZASCA 89 (31 May 2010) (available from www.justice.gov.za/sca) the South African Supreme Court of Appeal held that sections 53 and 54 of the South African Short-Term Insurance Act 53 of 1998 are rules of immediate application that cannot be excluded by a choice of law. English law was chosen as the proper law of the insurance contract. The court held that, in as far as the Marine Insurance Act 1906 (UK) was in conflict with the South African provisions, it would not be applied. Section 53 deals with the effect of non-disclosure and misrepresentations and "is designed to protect insured parties who are ignorant, careless or uneducated from unscrupulous insurers who attempt to escape liability" (par 24). Section 54 deals with the effect of a contravention of a law on a policy and "ensures that a policy is not avoided only because the insured has contravened a law" (par 24). In an important obiter dictum, the court indicates that constitutional norms are invariably of direct application (par 25). A similar view was recently adopted in Burchell v Anglin 2010 3 SA 48 (ECG), in the context of cross-border defamation.