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.

American Society of International Law Call for Proposals

Many of our readers will be interested to know that the American Society of International Law is looking for proposals for its Annual Meeting program. Here is the announcement:

"ASIL welcomes ideas from its members for the 105th Annual Meeting program, Harmony and Dissonance in International Law. To view the 2011 theme statement, click here http://www.asil.org/annual-meeting-2011.cfm."

"The aim of the Annual Meeting is to promote discussion of important topics by

including a range of voices and perspectives. To this end, the ASIL Program Committee relies on the submissions process to identify important topics and knowledgeable speakers. The Program Committee will then create a program with the following goals in mind.

* Ensuring coverage of a wide range of important topics of current interest to ASIL members.

* Ensuring wide participation by individuals from a variety of backgrounds, both within each Annual Meeting and across Annual Meetings.

* Ensuring a place in the program for sessions organized by ASIL Interest Groups."

"Please be aware that, even if your proposal is included in some form in the final program, it may differ significantly from the original proposal out of a desire to achieve these three goals. The Program Committee will inform proposers by email about the status of their proposal(s) by late August."

"In order to suggest a topic or paper to the Program Committee, please click here http://www.asil.org/submission-panel-2011.cfm. The deadline for submissions is **Monday, June 28, 2010**."

Belgian Book on International Family Law

A Belgian book on International Family Law (*Relations familiales internationales – L'actualité vue par la pratique*) was recently published by Anthemis publishers.

This book which is the result of the joint efforts of 5 young authors who combine academic expertise with practical experience of international family law disputes, takes a practical approach to the most common international family law issues which may arise in Belgium. Looking at recent case law and developments in both

the EU and the Hague Conference, the book offers students, practitioners and interested readers insight into the cross-border relationships between spouses and partners and between parents and children. In order to offer the reader the most practical information, the book is framed around 50 practical cases, inspired by case law and the practical experience of the authors. These cases are discussed with a view to outline the reasoning which must be followed to determine which court has jurisdiction, which law will apply and how to cope with a foreign judgment.

Among the issues discussed by the authors are child abduction, cross-border adoption, foreign surrogacy agreements, recognition of foreign repudiation. In analyzing these issues, the authors take into account the latest case law on international instruments such as the Brussels IIbis Regulation and various Hague Conventions.

P. Wautelet (ed.), International Family law in practice, Anthemis publishers, 72 EUR, ISBN 978-2-87455-225-0.

The book is written in French.

Court of Appeal for Ontario Rejects "Fourth Defence" to Enforcement of Foreign Judgments

The long-running litigation between the United States and a group of defendants who operated a cross-border telemarketing business selling Canadian and foreign lottery tickets to Americans has reached another mile-post with the decision of the Court of Appeal for Ontario in *United States of America v. Yemec*, 2010 ONCA 414 (available here). The defendants were likely riding high before this decision, having done quite well in resisting the enforcement of the judgment of an Illinois

court finding them liable for $19 million and permanently enjoining them from telemarketing any product or service to anyone in the United States. But the tables are now turned, with the Court of Appeal for Ontario ordering enforcement of the Illinois judgment.

The most notable jurisprudential issue in the case concerns the scope of the defences at common law to an action to recognize and enforce a foreign judgment. At common law there are three central defences: fraud, denial of natural justice, and public policy. However, the Supreme Court of Canada indicated in *Beals v. Saldanha*, [2003] 3 S.C.R. 416 that this was not a closed list and in the appropriate circumstances a new defence might be created. In *Yemec* the motions judge of the Superior Court of Justice hearing the case was persuaded that there was a genuine issue requiring a trial on the question of a "fourth defence", namely "denial of a meaningful opportunity to be heard". The Court of Appeal has now held that there is no such defence: that concerns of this nature fall comfortably within the scope of the denial of natural justice defence. Further, on the facts, the appellate court found that the defendants were not denied an opportunity to be heard in the courts of Illinois (paras. 26-29).

The case is one of several in the wake of *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. 612 to enforce a foreign non-monetary order, namely the permanent injunction. The Court of Appeal found the criteria for enforcement set out by the Supreme Court of Canada in *Pro Swing* were met in this case (paras. 45-53).

The case raises one other interesting issue. The United States had, at the outset of the litigation in Illinois and Ontario, obtained a freezing order (*Mareva*) and a civil seizure order (*Anton Piller*). These interlocutory orders were subsequently dissolved, in part for failure of the United States to make full disclosure when moving *ex parte* to obtain the orders. The defendants then insisted on a damages inquiry under the undertaking in damages the United States had provided as a condition of obtaining the orders. The plaintiff argued that such an inquiry should not proceed, given that in effect the defendants were seeking to recover lost profits from a business the Illinois court had concluded was illegal. The Court of Appeal for Ontario held that the damages inquiry should proceed, stressing the importance of enforcing the general undertaking in damages (paras. 69-72). It did note, though, that there was evidence that the defendants had violated both Canadian and American law (paras. 78-83) and that accordingly it would be difficult for them to establish compensable damages. But they were entitled to try

(paras 85-86).