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

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

Daniel Schimmel is a partner at Kelley Drye & Warren LLP, New York.

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

Wolf-Georg Ringe is a Lecturer at the University of Oxford. Alexander Hellgardt is a Senior Research Fellow at the Max Planck Institute in Munich.

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

Laura Carballo teaches at the University of Santiago de Compostela, Spain. She is author of Las acciones colectivas y su eficacia extraterritorial (problemas de recepción y trasplante de las class actions en Europa)*, De conflictu Legum, vol. 12, 2009*

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)

Horatia Muir Watt is a Professor at the School of Law of Sciences Po, Paris.

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?

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

Geneviève Saumier teaches at McGill University, Montreal.

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.