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?

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?

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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.