French Case on Lis Pendens under Brussels II bis Regulation

The French Supreme Court for Private and Criminal Matters (*Cour de cassation*) handled an interesting decision earlier this year on lis pendens under Regulation 2201/2003 of 27 November 2003 (Brussels IIbis).

In this case, two spouses initiated divorce proceedings in England and France **the same day**. The spouses were French nationals who had married in 1996 before moving to England in 2004 with their child (born in Japan). On March 24, 2005, the husband introduced an action in France under Article 3(b) of the Regulation (common nationality of the spouses). On the same day, the wife introduced an action in England under Article 3 (a) of the Regulation (habitual residence).

Which court, then, was to retain jurisdiction?

The wife provided evidence of the time when her husband was served with the English relevant documents: 12:30 pm, at his work place. French trial judges found that, by contrast, the husband was unable to provide evidence of the time when the French court had been seized.

In a judgment of 11 June 2008, the *Cour de cassation* held that he had the burden of proof, and that it was therefore for him to prove that the French court had been seized earlier than the foreign court on the relevant day. As a consequence, the court ruled that the English court had been seized first, and that the French court had been right to stay its proceedings.

In any case, in the meantime, the English High Court had actually ruled on the merits in a judgment of 13 July 2007. It seems that its jurisdiction was not challenged, as the defendant did not enter into appearance in England.

Impossible n'est pas francais

Unlike other French proceedings, divorce proceedings are not initiated by serving the other party, but by filing with the court. In the present case, this raises two issues.

First, it is somewhat paradoxical to ask the husband to provide evidence to a

court of the time when *that* court was seized. One would have hoped that the court would know. And it is even more paradoxical to tell him that he looses if he cannot bring such evidence.

Second, none of the French courts involved in that case cared for the fact that there was no mechanism to certify the time when the proceedings were filed. I suspect that the standard receipt mentions only the day. The argument was put forward that, as a consequence, parties in different states were not put on an equal footing. Indeed, if most French courts are unable to provide evidence of the time when they are seized, this will mean that other courts of the EU which can provide such evidence will always be seized first, at least from a French perspective.

New Publication: Kruger on EU Jurisdiction Rules and Third States

T. Kruger, *Civil Jurisdiction rules of the EU and their impact on third States*, Oxford University Press, 2008, 442p.

This new publication by the South African author Dr Thalia Kruger examines the civil jurisdiction rules of the EU, contained in Council Regulations 44/2001 (Brussels I), 2201/2003 (Brussels II*bis*), and 1346/2000 (Insolvency Regulation) through the lens of third States. The Regulations have been created for EU Member States and cases with elements in two or more of these States. However, in practice questions have arisen about which of the national civil jurisdiction rules can still be used when parties from third States are concerned. There were the cases of *Turner*, *Owusu*, and the *Lugano Opinion*, to mention just those that have reached the European Court of Justice. These cases have shown that the demarcation between EU law and national law in the sphere of civil jurisdiction is not always clear-cut.

The book is built around four cornerstones, which are used for the determination of the regulations' applicability. The first is the defendant and his, her, or its domicile, nationality, habitual residence, or, in the case of the Insolvency Regulation, centre of main interests: what is the effect if that is in a third State? This part of the book also examines bases of jurisdiction linked to the place of the performance of a contract or the commission of a delict or tort and how the domicile of the defendant is relevant in finding whether or not the regulations should be applied. The second cornerstone is exclusive jurisdiction, such as that based on immoveable property. Here it is not some aspect of the defendant that determines applicability of the regulations, but rather the property or other exclusive element. The third cornerstone is the choice by the parties of where they want their dispute to be heard. The fourth cornerstone is a procedural one and deals with the rules of *lis pendens*, *forum non conveniens*, related actions, and anti-suit injunctions. The book concludes with recommendations for the amendment of Brussels I to take the situation of third States into account more explicitly.

This book is published in the Private International Law Series of Oxford University Press. It is a reworked version of Thalia Kruger's PhD thesis, completed in 2005 at the Katholieke Universiteit Leuven under Professor Hans Van Houtte's supervision.

Publication: Heidelberg Report on the Application of Regulation Brussels I

The General Report of the Study on the Application of Regulation Brussels I in the (former) 25 Member States (Study JLS/C4/2005/03) has recently been published:

"The Brussels I Regulation 44/2001

Application and Enforcement in the EU”
edited by *Burkhard Hess*, *Thomas Pfeiffer* and *Peter Schlosser*

The study has been conducted under the direction of *Prof. Dr. Burkhard Hess*, *Prof. Dr. Thomas Pfeiffer* (both Heidelberg) and *Prof. Dr. Peter Schlosser* (Munich) on behalf of the European Commission.

The report is based on interviews, statistics and practical research in the files of national courts and includes several recommendations with regard to a future improvement of the Regulation. In particular, the report proposes to delete the arbitration exception in Article 1 No. 2 (d) in order to bring ancillary proceedings relating to arbitration under the scope of the Brussels I Regulation which will be one of the topics discussed at the forthcoming **Conference on Arbitration and EC Law** taking place in Heidelberg from 5th to 6th December.

The Table of Contents is available here.

More information on the book can be found at the website of Hart Publishing as well as the Beck Verlag.

ISBN: 9781841139012; Sept 2008; 256pp; £66; US$138
Customers in the UK, Europe and Rest of World can place orders directly with Hart Publishing, Oxford, UK
Customers in the US can place orders with International Specialised Book Services, Portland, Oregon

See for more information on this study also our previous posts which can be found here , here and here.

Publication: Festschrift Jan Kropholler

Recently, the Festschrift in honor of *Prof. Dr. Jan Kropholler* titled

“Die richtige Ordnung
Festschrift für Jan Kropholler zum 70. Geburtstag”

(The Right Order. Festschrift for Jan Kropholler on his 70th birthday) edited by *Dietmar Baetge*, *Jan von Hein* and *Michael von Hinden* has been published.

The English abstract reads as follows:

> *The present collection of essays in honor of Jan Kropholler celebrates a scholar of international distinction who has exerted a decisive influence on the development of conflict of laws and the international unification of private law in the past decades. The volume contains contributions that span the whole range of Kropholler’s academic interests, from the harmonization of substantive private law to general questions of private international law, specific areas (family law, contracts, non-contractual obligations) and, in particular, international civil procedure. A recurrent theme is the rapidly growing Europeanization of these subjects.*

The Festschrift includes the following contributions:

- *Claus-Wilhelm Canaris:* Teleologie und Systematik der Rücktrittsrechte nach dem BGB
- *Axel Flessner:* Friktionen zwischen der internationalen und der europäischen Vereinheitlichung des Privatrechts
- *Herbert Kronke:* Transnational Commercial Law: General Doctrines, Thirty Years On
- *Stephan Lorenz und Frank Bauer:* Rücktritt und Minderung bei erfolgreicher Nacherfüllung? Zugleich zur Gefahrtragung während der Nacherfüllung
- *Dietmar Baetge:* Auf dem Weg zu einem gemeinsamen europäischen Verständnis des gewöhnlichen Aufenthalts. Ein Beitrag zur Europäisierung des Internationalen Privat- und Verfahrensrechts
- *Peter Hay:* Comments on Public Policy in Current American Conflicts Law
- *Christian Heinze:* Bausteine eines Allgemeinen Teils des europäischen Internationalen Privatrechts
- *Karl Kreuzer:* Gemeinschaftskollisionsrecht und universales Kollisionsrecht. Selbstisolation, Koordination oder Integration?

- *Ralf Michaels:* Die europäische IPR-Revolution. Regulierung, Europäisierung, Mediatisierung
- *Thomas Pfeiffer:* Hybride Rechtslagen. Zu den Strukturen des „internationalen Rechtsraums“
- *Giesela Rühl:* Rechtswahlfreiheit im europäischen Kollisionsrecht
- *Kurt Siehr:* Kollisionen des Kollisionsrechts
- *Hans Jürgen Sonnenberger:* Randbemerkungen zum Allgemeinen Teil eines europäisierten IPR
- *Hans Stoll:* Ausländische Vermögensstatute im deutschen internationalen Privatrecht
- *Andreas Bucher:* Das Kindeswohl im Haager Entführungsabkommen
- *Anatol Dutta:* Europäische Zuständigkeiten mit Kindeswohlvorbehalt
- *Dieter Henrich:* Ansprüche bei Auflösung einer nichtehelichen Lebensgemeinschaft in Fällen mit Auslandsberührung
- *Erik Jayme:* Zur Anerkennung einer deutschen Volljährigenadoption in Brasilien
- *Dirk Looschelders:* Scheidungsfreiheit und Schutz des Antragsgegners im internationalen Privat- und Prozessrecht
- *Heinz-Peter Mansel:* Zum Verhältnis von Vorfrage und Substitution. Am Beispiel einer unterhaltsrechtlichen Vorfrage des iranischen Scheidungsrechts
- *Dieter Martiny:* Auf dem Weg zu einem europäischen Internationalen Ehegüterrecht
- *Jörg Pirrung:* Auslegung der Brüssel IIa-Verordnung in Sorgerechtssachen – zum Urteil des EuGH in der Rechtssache *C* vom 27. 11. 2007
- *Jürgen Samtleben:* Ehetrennung als Ehescheidung – ein Fall der Substitution?
- *Anton K. Schnyder und Pascal Grolimund:* Erbschaft in der Schweiz – Grundstück im Ausland. Gedanken zu Art. 86 Abs. 2 IPRG
- *Andrea Schulz:* Das Haager Kindesentführungsübereinkommen und die Brüssel IIa-Verordnung. Notizen aus der Praxis
- *Helmut Heiss:* Versicherungsverträge in „Rom I“: Neuerliches Versagen des europäischen Gesetzgebers
- *Abbo Junker:* Internationalprivat- und -prozessrechtliche Fragen von Rumpfarbeitsverhältnissen
- *Eva-Maria Kieninger:* Der grenzüberschreitende Verbrauchervertrag zwischen Richtlinienkollisionsrecht und Rom I-Verordnung. Nach der

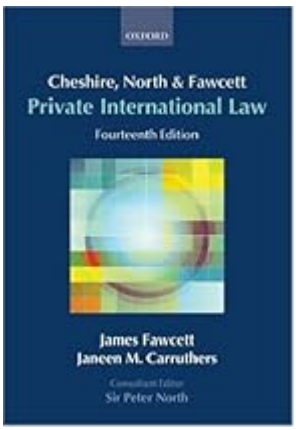
Reform ist vor der Reform

- *Lajos Vékás:* Vertragsfreiheit versus Verbrauchervertragsrecht und Gleichbehandlungsgrundsatz. Aus der Sicht einer nationalen Privatrechtskodifikation
- *Ulrich Drobnig:* Die Kollisionsnormen des Legislative Guide for Secured Transactions von UNCITRAL (2007)
- *Jan von Hein:* Die Ausweichklausel im europäischen Internationalen Deliktsrecht
- *Michael von Hinden:* Ein europäisches Kollisionsrecht für die Medien. Gedanken zur Fortentwicklung der Rom II-Verordnung
- *Ulrich Magnus:* Probleme des internationalen Atomhaftungsrechts
- *Yasuhiro Okuda:* Arbeitnehmererfindungen im japanischen IPR
- *Wulf-Henning Roth:* Internationales Kartelldeliktsrecht in der Rom II-Verordnung
- *Haimo Schack:* Das auf (formlose) Immaterialgüterrechte anwendbare Recht nach Rom II
- *Andreas Spickhoff:* Die Produkthaftung im Europäischen Kollisions- und Zivilverfahrensrecht
- *Ansgar Staudinger:* Das Konkurrenzverhältnis zwischen dem Haager Straßenverkehrsübereinkommen und der Rom II-VO
- *Rolf Wagner:* Das Vermittlungsverfahren zur Rom II-VO
- *Christa Jessel-Holst:* Die grenzüberschreitende Herausverschmelzung von Aktiengesellschaften. Aktuelle Umsetzungsprobleme bei der Implementierung des acquis communautaire in Bulgarien und Rumänien.
- *Dagmar Coester-Waltjen:* Konnexität und Rechtsmissbrauch – zu Art. 6 Nr. 1 EuGVVO
- *Robert Freitag:* Anerkennung und Rechtskraft europäischer Titel nach EuVTVO, EuMahnVO und EuBagatellVO
- *Reinhold Geimer:* Forum Condefensoris
- *Burkhard Hess:* Die Europäische Kontenpfändung aus der Perspektive eines Europäischen Vollstreckungsrechts
- *Gerhard Hohloch:* Zur Bedeutung des Ordre public-Arguments im Vollstreckbarerklärungsverfahren
- *Florian Jacoby:* Öffentliche Zustellung statt Auslandszustellung? Kritische Anmerkungen zum Entwurf des § 185 Nr. 2 ZPO durch das MoMiG
- *Peter Mankowski:* Wie viel Bedeutung verliert die EuGVVO durch den Europäischen Vollstreckungstitel?

- *Thomas Rauscher:* Der Wandel von Zustellungsstandards zu Zustellungsvorschriften im Europäischen Zivilprozessrecht
- *Oliver Remien:* Europäisches Kartellrecht (Artt. 81 f. EG-Vertrag) als Eingriffsnorm oder ordre public in neueren internationalen Schiedsrechtsfällen
- *Herbert Roth:* Das Konnexitätserfordernis im Mehrparteiengerichtsstand des Art. 6 Nr. 1 EuGVO
- *Rolf A. Schütze:* Forum non conveniens und Verbürgung der Gegenseitigkeit im deutsch-amerikanischen Verhältnis
- *Gerhard Wagner und Christoph Thole:* Die europäische Mediations-Richtlinie. Inhalt, Probleme und Umsetzungsperspektiven

More information can be found at the publisher's website.

Publication: Cheshire, North & Fawcett on Private International Law



The fourteenth edition of one of the world's leading texts on private international law has just been published. Professor James Fawcett has been elevated to the status of co-author, after twenty-one years at the editorial helm. Sir Peter North, who has been involved with the text since 1970, has handed over his responsibilities to Dr Janeen Carruthers for this edition (though North remains a Consultant Editor).

The publishers describe the new edition thus:

> *The new edition of this well-established and highly regarded work has been fully updated to encompass the major changes and developments in the law, including the newly finalised Rome II Regulation. The book is invaluable for the*

practitioner as well as being one of the leading students' textbooks in the field, giving comprehensive and accessible coverage of the basic principles of private international law, a popular law school option.

It offers students, teachers and practitioners not only a rigorous academic examination of the subject, but also a practical guide to the complex subject of private international law. Written by academics who both previously worked as solicitors, there is extensive coverage of commercial topics such as the jurisdiction of various courts and their limitations, stays of proceedings and restraining foreign proceedings, the recognition and enforcement of judgments, the law of obligations with respect to contractual and non-contractual obligations. There are also sections on the various aspects of family law in private international law, and the law of property, including the transfer of property, administration of estates, succession and trusts.

ISBN: 978-0-19-928438-2. Price: £39.95 (paperback) or £95.00 (hardback). You can purchase the book from our secure, Amazon-powered bookstore in **paperback** or **hardback**, or from the OUP website. Stay tuned – a review of the book will follow here in the coming weeks.

ECJ: New Reference on Art. 11 (2) Brussels I

Another new reference on the interpretation of the Brussels I Regulation has been referred to the ECJ for a preliminary ruling: The *Landesgericht Feldkirch* (Austria) has asked the following questions:

Is the reference in Article 11(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to Article 9(1)(b) of that regulation to be interpreted as meaning that a social security institution, to which the claims of the directly injured party have passed by operation of law (Paragraph 332 of the Allgemeines Sozialversicherungsgesetz (General Social Insurance

> *Law, ASVG)), may bring an action directly against the insurer in the courts for the place in a Member State where the social security institution is established, provided that such a direct action is permitted and the insurer is domiciled in a Member State?*
> *If the answer to Question 1 is in the affirmative: Does that jurisdiction exist even if at the time of bringing the action the directly injured party is not permanently or ordinarily resident in the Member State in which the social security institution is established?*

Recently, the ECJ had already to deal with the interpretation of Art. 11(2) Brussels I in a different case: In C-463/06 (*FBTO Schadeverzekeringen N.V. v. Jack Odenbreit*) the ECJ held that

> *[t] he reference in Article 11(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to Article 9(1)(b) of that regulation is to be interpreted as meaning that the injured party may bring an action directly against the insurer before the courts for the place in a Member State where that injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State.*

The difference with regard to the present case is that here the action is not brought by the directly injured party but rather by a social security institution, to which the claims of the directly injured party have passed by operation of law. Consequently the question arises whether the ECJ's reasoning in case C-463/06 can be transferred to this situation.

This has been argued by the claimant in the main proceedings on the grounds that a social security institution to which the claims of the injured party have passed has to be qualified as "injured party" in terms of Art. 11 (2) Brussels I since "injured party" is everybody sustaining any disadvantages of rights, assets or physical integrity. This is – according to the claimant – the case since the claimant paid medical expenses and sickness benefits to the directly injured person. According to this point of view, the fact that two economically comparable insurance institutions are opposing each other does not preclude the application of Art. 11 (2) Brussels I.

This line of argument is disputed by the respondent party arguing that Artt. 11 (2), 9 Brussels I reflect the need to protect the economically weaker party. This, however, is – according to the defendant – in view of its economic situation not the case with regard to a social security institution, to which the claims of the directly injured party have passed by operation of law. Consequently, with regard to the question of international jurisdiction it is decisive where the directly injured party is domiciled.

According to the *Landesgericht Feldkirch*, the more persuasive arguments suggest that a social security institution, to which the claims of the directly injured party have passed by operation of law **cannot** bring an action directly against the insurer in the courts for the place in a Member State where the social security institution is established. However, since this particular question has not been answered by the ECJ so far, it referred the above cited questions for a preliminary ruling.

The case is pending as C-347/08 (Vorarlberger Gebietskrankenkasse v. WGV-Schwäbische Allgemeine Versicherungs AG).
See with regard to the ECJ's decision in case C-463/06 also our previous posts on the judgment itself, the referring decision and annotations to this case which can be found here, here and here.

Ruling Dutch Supreme Court on Article 4 Rome Convention

On 17 October 2008, the Dutch Supreme Court delivered a judgment in the case Baros A.G. (Switzerland) v. Embrica Maritim Hotelschiffe GmbH (Germany), concerning the application of Article 4 of the Rome Convention (*Hoge Raad*, 17 October 2008, No C07/084HR; LJN: BE7628). In 1998 Baros and Embrica concluded a "Bareboat-Chartervertrag" (rental agreement) concerning a hotel ship; the ship was located in Bremem (Germany) at that time, but was to be used for housing persons seeking asylum in the Netherlands. After termination of the contract in 2002, Embrica claimed damages in the amount of € 742.416,–,

because the ship was not returned in the state it was when it was made available.

The Dutch Court of first instance dismissed the claim, but the Court of Appeal awarded a part of the claim. The applicable law was Dutch law, according to the Court. To this end the Court of Appeal stated that according to Article 4(2) of the Rome Convention the contract is presumed to be most closely connected to Germany, since the characteristic performer (Embrica) has its principal place of business in Germany. In line with the Dutch Supreme Court (*Hoge Raad*, 25 September 1992, No. 14556, *NJ* 1992, No. 750), the Court of Appeal further stated that article 4(2) of the Rome Convention constitutes the general rule, while Article 4(5) is the exception and should only be applied in exceptional circumstances, where the country where the party effecting the characteristic performance is situated has no real connecting value. The Court of Appeal decided that in this case the rental agreement did not have a real significant connection to Germany, since (a) the hotel ship was rented with the intention to use it as housing in a permanent location in the Netherlands, (b) the hotel ship had been connected to the shore with a jetty and a footbridge on a permanent basis, (c) the hotel ship was not intended or suited as a means of transport and cannot be moved without the assistance of a tugboat, (d) this was a continuing performance contract where Embrica had agreed to make the ship available in the Netherlands for rent, (e) Embrica was aware that Baros would not use the hotel ship himself, but would sublet it to a party situated in the Netherlands (National centre for support of persons seeking asylum), (f) the agreement stipulated that the return of the ship was to take place in the Netherlands. Therefore, the Court of Appeal concluded that Dutch law was applicable as the most closely connected law.

The Supreme Court, however, disagreed. It ruled that none of the grounds set out by the Court of Appeal could lead to the conclusion that Germany, as the principal place of business of the lessor (Embrica), has such an insignificant connection that it justifies departing from the general rule of Article 4(2) Rome Convention.

This ruling reaffirms the strict interpretation of Article 4(5) Rome Convention in the Netherlands. Further, it is in line with Article 4 of its successor, the Rome I Regulation, where the law of the habitual residence of the characteristic performer explicitly is the main rule, and may only be set aside where the contract is manifestly more closely connected to another country.

Reference for preliminary ruling on relationship Insolvency Regulation and Brussels I

It has been a while, but this reference for a preliminary ruling is nevertheless worth mentioning. In its judgment of 20 June 2008, the Dutch Supreme Court, in a case between the German company Graphics Graphische Maschinen GmbH and A. van der Schee, acting as liquidator of Holland Binding BV, referred questions to the ECJ concerning the relationship between the Insolvency Regulation and the Brussels I Regulation (*Hoge Raad*, 20 June 2008, R07/124HR; LJN: BD0138). The questions arose in the context of the application by German Graphics of a declaration of enforceability of a German order (*Beschluss*) against the Dutch liquidator of Holland Binding to relinquish assets which are subject to retention of title. The Dutch Supreme Court referred the following questions to the ECJ in this case, pending as Case C-292/08:

"*1) Must Article 25(2) of the Insolvency Regulation be interpreted as meaning that the words 'provided that that Convention [that is to say, the Brussels I Regulation] is applicable' featuring in that provision imply that, before it can be concluded that the recognition and enforcement provisions of the Brussels I Regulation are applicable to judgments other than those referred to in Article 25(1) of the Insolvency Regulation, it is first necessary to examine whether, pursuant to Article 1(2)(b) of the Brussels I Regulation, such judgments fall outside the material scope of that regulation?*

2) Must Article 1(2)(b) of the Brussels I Regulation, in conjunction with Article 7(1) of the Insolvency Regulation, be interpreted as meaning that it follows from the fact that an asset to which a reservation of title applies is situated, at the time of the opening of insolvency proceedings against the purchaser, in the Member State in which those insolvency proceedings are opened, that a claim of the seller based on that reservation of title, such as that of German Graphics, must be regarded as a claim which relates to bankruptcy or the winding-up of an insolvent

company, within the meaning of Article 1(2)(b) of the Brussels I Regulation, and which therefore falls outside the material scope of that regulation?

3) Is it relevant in the context of Question 2 that, pursuant to Article 4(2)(b) of the Insolvency Regulation, the law of the Member State in which the insolvency proceedings are opened is to determine the assets which form part of the estate?"

French Doctorate on the Use of the Lex Fori

Ms Peggy Carlier has recently completed her doctorate at the Universiy of Lille on "How to use the Lex Fori in the Conflict of Laws Process" ("*L'utilisation de la lex fori dans la résolution des conflits de lois*").

The English abstract reads:

> *By overemphasising the benefits of foreign law as the mean of the resolution of conflicts of laws, the literature on private international law presents a manichean vision of the discipline in which the lex fori (the law of the court to which the international dispute is referred) is demonised. However, such a presentation fails to recognise that the lex fori is more commonly used in international litigation, either directly or through a large number of derogations.*
>
> *Given this observation, which can be explained by sociological (ethnocentrism) and pragmatic (the reasonable administration of justice) reasons, the present author seeks to restore the lex fori to favour. At the same time, the present author rejects the extreme of legeforismo, which in practice would mean a systematic application of the lex fori, preferring instead a more realistic and balanced approach based on bringing together the factors indicating the applicable law and the criteria founding the jurisdiction. The resulting vade-mecum offers the key to the complementarity which ought to exist between the lex fori and the foreign law.*

The doctorate is not (yet?) published, but, remarkably, the manuscript is entirely available online for no fee. The abstracts (in French and English) are available here, and the manuscript (637 p., in French) here.

Recent Second Circuit Decision: The Courthouse Door is Temporarily Shut, Though Still Left Ajar, for Foreign Securities Plaintiffs

National Bank of Australia purchased U.S. mortgage service provider HomeSide Lending Inc. in 1998. Three years later, the bank was forced to admit that its calculations on the amount of fees HomeSide was generating from servicing mortgages were overstated. This led to the bank announcing two write-downs in 2001 totaling $2.2 billion. As a result, both the bank's shares, which do not trade on U.S. exchanges, and its American Depository Receipts, which trade on the NYSE and make up only a small fraction of the bank's securities, dropped in value. Three plaintiffs who purchased shares abroad and a fourth who purchased the ADR's sought to represent two classes in the Southern District of New York.

The case presents the "vexing question of [the] extraterritorial application of the securities laws." This vexing question, however, is not new. Though there is conflict in the nuances of the proper test to be applied, U.S. federal courts will sustain subject-matter jurisdiction over a foreign-based lawsuit "if activities in this country were more than merely preparatory to a fraud and culpable acts or omissions occurring here directly caused losses to investors abroad." The plaintiffs had argued below that the fraud primarily occurred in the United States because HomeSide was based in Florida, even though the statements which investors relied upon were made and disseminated in Australia.

What is at the heart of the scheme as opposed to what is merely "preparatory" or "ancillary" can certainly be "an involved undertaking." The defendant and some amici argued for a "bright-line rule" dismissing these sorts of securities cases, because U.S. markets are substantially not at issue. Their biggest objection was the conflict between U.S. securities laws and those in other countries, such as Canada, which does not recognize the fraud on the market doctrine, or other countries where class actions are not allowed or difficult to bring. The United States, under their "parade of horribles," could become the clearing-house for the world's securities fraud litigation if these sorts of actions were countenanced by the courts. On the other hand, plaintiffs argued that closing U.S. courts to these sorts of actions could actually harm U.S. competitiveness by increasing the migration of capital overseas.

The Second Circuit refused the "bright line rule," but nonetheless dismissed this suit. It held that the potential conflict noted by Defendants does not require the "jettisoning" of our prior precedent because conflict of laws "is much less of a concern when the issue is the enforcement of the anti-fraud sections of the securities laws than with such provisions as those requiring registration of persons or securities." On the former, he said, the "anti-fraud enforcement objectives" in different countries are "broadly similar." A categorical rejection of these sorts of actions, he said, "would conflict with the goal of preventing the export of fraud from America." Applying what has become known as the "conduct test," the court found that the heart of the fraud alleged here occurred outside the United States, and dismissed the suit for lack of subject matter jurisdiction.

This is a short-term victory for foreign companies, though not as large a victory as they had liked. As the lead counsel for the defendants noted, "[t]he court's decision makes clear that a paramount consideration in determining whether a U.S. court can hear [this sort of case] is whether the statements were made by the foreign issuer itself in the foreign country, and if that's the case, it is going to be very difficult for the plaintiffs to sustain the case." While this decision may have made some progress towards lessening the threat against foreign companies—for example, by shortening the chain of causation—the larger problem remains, because the Second Circuit clearly contemplates that there will be occasions where [foreign] transactions can be litigated here. According to one legal commentator, "[t]hat leaves considerable residual fear in the hearts of a foreign issuer who does not have to face the prospect of class litigation in their

home country and thus only encounters it by entering the United States." While people like to blame the "already significant migration" of capital off shore on Sarbanes-Oxley, he said, "that doesn't do much compared with the threat of a billion dollar class action."

The Second Circuit Decision is *Morrison v. National Australia Bank Ltd.*, 07-0583-cv