EXTRATERRITORIAL OPERATION OF LAWS

Questions and Answers

Question - Peter Short:

Barry Metzger referred to the "laundry list" of Regulation K, that restricts American banks' activities here. I would like to ask him if he has any experience of the Federal Reserve Board Policy; what is their policy on allowing American subsidiaries to undertake activities in this country, such as Travel Agencies; what is their policy on applications to vary that laundry list?

Answer - Barry Metzger:

Well there is a very specific and recent example in November or December of last year. The Federal Reserve Board turned down an application, for a specific consent under Regulation K, by the Citicorp organization, to engage in certain limited underwriting activities with respect to property in casualty insurance, and a part of the application was based upon the fact that comparable financial institutions in Australia provided these services as a matter of course.

The Federal Reserve Board, in turning down that application, said that it had given consideration to that, but basically felt the types of risks involved were not the types of risks that an American commercial bank had experience in effectively managing, unlike life insurance activity which on a limited basis is permitted to American banks in some cases on-shore and to a broader extent off-shore of the United States, where there is an actuarial certainty of ability to manage life insurance risk.

But there was not a comparable degree of ability to manage property and casualty insurance. That is a recent, very specific example. And in Citicorp's application they made the point that it would be at a severe competitive disadvantage in not being able to provide the service that others in the Australian markets - that the competitors could provide. And the Federal Reserve Board basically said, tough luck.

Comment - Philip Wood:

This is an area which does remind me a little bit of Sam Goldwyn's remark that he wanted a movie which started with an earthquake and built up to a climax. The problem really with the multilateral convention is that really you can't cover all of the situations in a fair manner.

A classic example of that occurred in the 1930s. Monetary warfare was carried out by exchange control. That is how it was done. The sort of warfare which we are getting now in anti-trust and so on was done by exchange control. A slightly different method. After the wars, as I mentioned in one of my talks, White and Cain got together and said, if you have an exchange control, which is approved by the IMF, then all of the courts of all of the IMF members will recognize that exchange control, because it is bound to be fair.

So what happens? Along comes Mr Terruzzi, he deals on the London metal exchange. He buys and sells, he runs up an absolutely enormous loss, and then, when he is sued by the London metal dealers, he says "I'm not allowed to do it because there is an Italian exchange control, I wasn't allowed to deal at all". And Article 8 of the IMF agreement says that all of the courts of the IMF members must recognize this Italian exchange control. So you see, it is grossly unfair that this private individual should be able to come and dig up, dredge up, this multinational treaty, and use it to get out of an obligation.

The multinational solution, the treaties, don't always work, they don't always give a fair solution. I must say that I very much question whether Effects Doctrines, which you discussed John, are themselves a fair way of doing things, because all this balancing of interests and weighing up policies is very interesting, but it is not law. People don't know where they are. It is not law. And that is of course a criticism.

Comment - Jeffrey Browne:

Mr Chairman, let me take up Jim Armstrong's invitation to comment very briefly on the litigation about two years ago in the US courts involving Reynolds Aluminium Company of America v The Conservation Council of Western Australia, but before I do that, because of our firm's involvement in I think all of these matters that have been mentioned, let me just reinforce a couple of other of Jim Armstrong's remarks, because of the confusion, particularly in the Australian Financial Review, over recent days.

In the MIM Asarco Weeks litigation, as Jim mentioned, the comment about Mr Holmes A'Court's visitations to the US now, is for very different reasons than the CRA officers considerations during the Westinghouse litigation. It relates purely and solely to availability of depositions rather than any question of jurisdictional problems, because clearly what is being done in that case, is the purchase of substantial shareholdings in Asarco in the United States, clearly subject to the US Takeover laws in the US.

There was also a reference to BHP Esso and Weeks litigation and that again is not a question of extraterritorial application of laws, it is a question of interpretation of contracts, royalty agreement, and interpretation of governing law clauses etc, and questions of personal jurisdiction.

In the Alcoa Reynolds Conservation Council case though, as Jim pointed out, it was an attempt to attack activities, in Australia, of joint ventures principally, and in Alcoa's case, Aluminium Company of America had 51% in that substantial Australian enterprise as well as attacking their activities in Australia through the parents in the US, who clearly were subject to personal jurisdiction in the US.

And unfortunately we didn't get a determination on that matter as to how far you could go and how much Australian entities really need to worry about the US parent involvement, because we got the case thrown out on questions of lack of evidence really, establishing possible US violations and US jurisdiction, with respect to what were essentially environmental activities in Western Australia. And the Australian government put in a Brief addressing that, as well questions of sovereignty etc.

Comment - Mr Hughes:

Perhaps just to follow up on Jeff's remarks, we have in the Foreign Proceedings Excessive Jurisdiction Act what I call the Alcoa provision, which enabled the Attorney General to prevent the enforcement within Australia of any judgment or decree or injunction made by a foreign court. But it doesn't deal with the problem that emerged earlier and which I think in the banking field will be important. That is, that the United States, if you take the company in question, could still take enforcement action against the parent or subsidiary in the United States. I think the problem was mentioned by Barry. Nor could we contest it with international law. If it is within their territory, then clearly enough, they have authority to deal with it, and there you have then essentially your conflict of national interest.

Question - Mr Greenwood:

I won't defend my multilateral treaties, I'll go on to something different. Mr Armstrong mentioned the question of the Bhopal litigation in India, and I think he raised in that an interesting question of forum shopping. One of the side effects of extraterritoriality or transactions with an extraterritorial impact, is that you try to find a jurisdiction where you might be able to get better relief than you might in your home country or some other jurisdiction, and I think an interesting development in England is the Mareva Injunction which has now got friends all round the world. It has come to Australia and been embraced in all jurisdictions, bar perhaps one or two and has been used recently in one state here to protect assets awaiting the result of arbitration proceedings.

Perhaps Mr Wood would like to comment on the use of the Mareva Injunction by the courts.

Answer - Philip Wood:

Well the Mareva finds its model in any jurisdiction, it is just stopping somebody from removing his assets before you get the judgment of it in fact. It is the same as the c'est moi conservatoire in France and pre-judgment attachments of the US.

Perhaps more interesting from the extraterritorial point of view, are the injunctions which prevent somebody from proceeding with the case like the injunctions against Laker, the liquidator of Laker, to go ahead with his suit in the US. Now that gives rise to much more interesting problems of extraterritorial collision, which in the Laker case have now been resolved.