EXTRATERRITORIAL OPERATION OF LAWS
AN ENGLISH VIEW

PHILIP WOOD

Allen & Overy
Solicitors, London

I INTRODUCTION

(1) Scope

This paper deals with the impact on banking aspects of:

(a) The extraterritorial application of regulatory crimes in the economic field, eg violations of exchange controls, usury laws, taxation laws, blocking orders, trade embargos, prospectus requirements, licensing requirements for securities and banking businesses, and competition laws. These crimes are quite unlike the traditional crimes. Murder is murder everywhere but a bad prospectus here is not necessarily a bad prospectus there.

(b) The extraterritorial application of laws generally, especially moratoriums, expropriations and the like and the degree of recognition or otherwise which other states will confer on a foreign state's laws.

Two central points need to be made:

(i) There is nothing new about the extraterritorial operation of laws in the legal field. Much play is made of internationalisation as if international disputes started only yesterday. All that has happened is that the pace is hotting up - largely I think because of the rapidity of communications and thicker density of transactions.

(ii) I do not think it is always right to confront an extraterritorial law by invoking sovereignty. The major nations of the world have for reasons no doubt of comity, reciprocity and preservation of international trade, long accepted that the recognition of a foreign system of law by the domestic courts is not necessarily an infringement of sovereignty. Only very few countries still persist in non-recognition of foreign laws of any sort even in private transactions.

(2) Examples of impact on banks

As it has turned out, banks have been amongst the prime victims of extraterritoriality in one form or another and the area is of fundamental concern to them.

For example:

(a) The credit of a borrower from the bank may be devastated by a treble damages anti-trust suit or an action for product liability visited with punitive damages.

(b) Banks are the main targets for discovery orders at the behest of grand juries, taxation authorities or courts demanding, upon pain of penalties for contempt, disclosure of information whose disclosure would be a breach of a secrecy or other disclosure rule in the jurisdiction where the information is located.

(c) A similar conflict arises where a blockade enacted in the country of the bank's head office purports to cancel a contract through a foreign branch and governed by a different system of law.

(d) Banks and their capital market affiliates are amongst the main participants in securities transactions and hence exposed to potential violations of foreign securities laws, particularly in the area of prospectuses and insider trading. If a borrower becomes insolvent, the disappointed creditors may attack the managers of the loan or bond issue as the only pocket left to pay - attractive because the pocket is a big pocket. When will foreign negligence and fraud standards apply?

(e) Banks which have made an international loan may find the loan subject to a foreign exchange control, usury law or moratorium order.

(f) A bank whose foreign branch is expropriated or payment of its deposits blocked may be subjected to claims against head office by unpaid depositors.

(g) A bank which receives money flowing from a criminal transaction perpetrated by the customer may be held to be constructive trustees of the money and accountable accordingly, if they knew or should have known of the violation. The violation may be highly techn'cal, eg a company giving financial assistance in connection with the purchase of its own shares.

II INTERNATIONAL LAW: PRESCRIPTIVE JURISDICTION

(1) Principles of criminal jurisdiction

It is useful at the outset to have in mind the generally accepted international rules defining the ambit of a state's ability to control criminal conduct - its prescriptive jurisdiction. The jurisdictional bases upon which states can prescribe their laws

has attracted much writing and I need to go no further than to summarise the main principles:

(a) Objective territorial principle A rogue manufactures poison in an anti-poison state and poisons Z there. The anti-poison state can punish the rogue. The offence and its impact took place entirely within the territory of the anti-poison state.

(b) Subjective territorial principal A rogue manufactures poison in an anti-poison state and sends it into a neutral state where it poisons a victim. The anti-poison state can punish the rogue. The territory of the anti-poison state should not be used as a base for peddling poison to foreigners.

(c) Protective principle A rogue manufactures poison in a neutral state and sends it into an anti-poison state intending his victim will drink it. The anti-poison state can punish the rogue if it can get hold of him. The same principle might apply if the rogue does not send the poison into the anti-poison state but some fumes escape into the anti-poison state and debilitate the victim so that he cannot support his family. This is known as the "effects" doctrine. The "effects" doctrine becomes increasingly controversial where, for example, the only effect of the poison in the anti-poison state is temporary weeping eyes.

(d) Nationality principle A rogue manufactures poison in a neutral state and poisons a victim. The rogue is a national of an anti-poison state. The anti-poison state can in some circumstances punish the rogue.

(e) Universality principle A rogue manufactures poison in a neutral state and poisons a victim in the neutral state. Nobody in an anti-poison state is affected. The anti-poison state can punish the rogue where the crime is so dangerous to the international order that it does not matter who punishes the rogue so long as he is punished. Examples are international terrorism, hijacking and piracy.

In some of these cases, two or more states have parallel jurisdiction, thereby giving rise to double jeopardy. Further there is clearly a distinction between jurisdiction to prescribe and jurisdiction to enforce.

If one substitutes, say, whiskey for poison where the only effect on the victim is a pleasurable sensation, it will be seen that an anti-whiskey state (and some states are anti-whiskey) should not be able to impose its own views on the rest of the world. For "poison" one may very well substitute, for example:

- interest (fundamentalist Islamic states)

- underwriting of securities by banks (US Glass-Steagall Act; Canadian Bank Act)

- bearer bond issues not constituted by a trust deed (US; Singapore)

- prospectus not containing sources and application of funds statement (US; UK)

All of these are considered poison somewhere or another, but by no means universally.

(2) Restatement principles

A useful primer on the issues involved in the summary of influencing factors in the Draft Restatement, Foreign Relations Laws of the United States, ss 402, 403, 415, 418, 419 and 420. The draft of course reflects US law and hence an extraterritorial expansiveness but nevertheless indicates some of the legal and policy factors which need to be weighed in resolving this matter.

The procedures include:

(a) Balancing of interests The court should balance the interests of the states whose law is involved. The main objections include:

 (i) where the forum state deems conduct sufficiently serious to be criminal, the court is likely to reflect that policy and give great weight to local interests. Judicial restraint may be required.

 (ii) Judges are not always in a position to weigh up political issues, eg conflicting foreign policies.

 (iii) The discretion robs the law of the predictability which is important for the integrity of business transactions.

(b) Shared policies A court can more reasonably punish conduct which is also unlawful in the other state involved. US courts did the world a signal service in bringing the IOS frauds to book, even though the actions were sometimes based on tenuous jurisdictional links.

(c) Jurisdictional links The exercise of the prescriptive jurisdictions becomes increasingly reasonable where the accused or the transaction has substantial links with the prescribing state, eg carrying on business locally or nationality.

III PRIVATE INTERNATIONAL LAW AND ADJUDICATORY JURISDICTION

Numerous extraterritorial conflicts have been taken out of the realm of the criminal law and relegated to private disputes determined in accordance with private international law. Although the sanctions usually (but not always) are less alarming, confrontations still remain and choice of law extraterritoriality is not dissimilar from regulatory extraterritoriality.

For example, most states have enacted long-arm jurisdictional rules which give their courts the right to exercise adjudicatory jurisdiction over persons and transactions having but slight connections with the forum. The hapless foreigner who is thus snatched into a forum by his toe-nail on the basis of some exorbitant jurisdictional rule will find himself subject to the conflicts, rules and mandatory policies of the forum state. To this extent, the forum state is imposing its law extraterritorially upon foreigners and foreign transactions.

In practice the distinction between regulatory and civil matters is blurred. For example a violation of a criminal statute may also give rise to a parallel tort of breach of statutory duty or parallel civil claim conferred by the same statute. In the US in particular, Congress and the courts have promoted law enforcement by placing a private remedy in the hands of the injured party. Thus in anti-trust suits, the great majority of actions have been brought by private plaintiffs.

These plaintiffs are encouraged because they can claim penalties in the form of treble damages. Private vigilantes are not minded to take into account the diplomatic consequences of their litigation. Indeed, the constitution of "private attorneys-general" fulfilled a deliberate executive objective to enhance the rooting out from US commerce of restrictive practices, whether they emanated at home or from abroad.

In the UK, the judiciary are perhaps slower to develop the tort of breach of statutory duty for violation of a criminal statute. Thus it is doubtful whether the anti-fraud provisions in the Prevention of Fraud (Investments) Act 1958 or the insider dealing prohibitions in the Companies Act 1980 also give rise to civil actions for damages. In contrast, the corresponding anti-fraud provisions of Rule 10b-5 under the Federal securities laws do not permit private civil action for both fraud and insider dealing constituting a manipulative practice.

IV RECENT EXAMPLES OF EXTRATERRITORIALITY

(1) Introduction

It will be helpful for the more legal review which follows to have in mind a broad outline of some of the recent extraterritorial statutes which seem to have caused the most trouble. Most of the examples emanate from the US because the US is presently the most assertive state in this respect. This is not to say that other states have not themselves on occasion sought to give their statutes extraterritorial force.

(2) Anti-trust

International confrontations on anti-trust matters began in earnest following the Alcoa decision in 1945. In the US The Aluminium Co of America [1945], Judge Learned Hand decided that combinations organised by non-US companies outside the US which had a substantial and intended effect on US commerce were subject to US anti-trust laws. Plainly if external monopolists agree to

fix the price of imports into a particular state, the consumers in that state are harmed.

High points in subsequent bouts of litigation included cases concerning the Canadian paper industry, international oil companies, the Canadian patent pool, Swiss watchmakers, shipping, uranium and the Laker litigation which is still going on, basically hinging upon alleged conspiracies by airlines to put Laker out of business.

Many of these cases involved:

(a) allegations that foreign cartels had an effect on US commerce even though maintained abroad ;

(b) potential liability for punitive damages imposed on foreign operations;

(c) orders for discovery of evidence located abroad; and

(d) initiation of the action by private parties.

Each new attack provoked blocking statutes and orders to local companies not to comply by the foreign states concerned, including Canada, Australia, France, the Philippines, South Africa, United Kingdom, Italy, Netherlands, Finland, Denmark, Belgium, Norway and Sweden. The UK blocking statute is reviewed below.

This reaction against "extraterritoriality" has led to an increasing tendency of the US courts in matters of this class to balance the interests of the United States against the interests of the foreign states involved on the basis of comity. The seminal cases are Timberlane Lumber Co v Bank of America, 549 F 2d 597 (9th Cir 1976) and Mannington Mills Inc v Congoleum Corp, 595 F 2d 1287 (3rd Cir 1979). This unilateral approach requires the judiciary in the regulating state not to over-emphasise the importance of local policies.

The EEC Commission has expressly embraced the "effects" doctrine, but the European Court has not yet endorsed this. The effects doctrine is espoused by the German but not the UK competition authorities.

Of course, there are effects and effects. One state may regulate only activities of local branches and subsidiaries even though the poisonous decision is made abroad (the German position). Another may control external conduct having a local effect despite the absence of a local business operation.

Commentators have complained that state trading cartels escape scot-free under competition laws and that the anti-competitive practices of state monoliths are designed to further national interests and lead in turn to protectionism by other states.

The other resolving factor has been the development of the diplomatic response.

There are three bilateral agreements concerning anti-trust matters between the US on the one side and Australia, Canada and Germany on the other providing for notification and consultation (but not the abandonment of jurisdictional claims).

Comparable provisions appear in the US treaties of Friendship, Navigation and Commerce.

The shipping dispute has been mitigated by the 1964 Agreed Minutes on Exchange of Shipping Information involving the United States and 14 other governments.

The OECD and the United Nations have produced recommendatory guidelines which, though not binding, indicate a governmental willingness to consult instead of confront.

(3) Trade sanctions

The past 25 years have seen the frequent use of trade embargos as an instrument of foreign policy. While there are important differences in the detail of the embargos and while the US sanctions have been imposed under a variety of statutes ranging from trading with the enemy legislation to export and emergency power statutes, a common characteristic of the US approach has been the application of the embargo prohibitions to foreign branches and subsidiaries of US corporations to a greater or lesser degree. A brief chronology is as follows:

(a) US embargo of China and Korea in the 1950s - hot war. The regulations gave rise to the celebrated Fruehauf case - see below;

(b) US embargo of Cuba in the mid-1960s - cold war;

(c) multilateral embargo on Rhodesia in the mid-1960s as part of international sanctions against UDI. Both Great Britain and the US brought pressure to bear upon the national companies with subsidiaries abroad with Great Britain applying pressure on UK oil companies with South African subsidiaries not to supply oil to Rhodesia;

(d) 1977 US anti-boycott legislation prohibited compliance by US companies with the Arab ban on trade with Israel and was extended to foreign subsidiaries of US companies, though in modified form. This legislation was strictly a blocking statute akin to the anti-US blocking statutes enacted by other Western states;

(e) 1977 US Foreign Corrupt Practices Act was directed against bribery of foreign government officials to obtain or retain business and strengthened the US accounting disclosure requirements in this regard. The Act did not apply directly to foreign subsidiaries but indirectly obliged conformity by foreign subsidiaries in certain respects.

(f) US embargo in 1978 on Uganda as part of President Carter's human rights policy;

(g) US embargo on Iran in 1979-80 in response to the seizure of diplomatic hostages and Iranian threats to the US banking system. The embargo involved a freeze on Iranian assets;

(h) a variety of US embargos imposed after the Soviet Union's invasion of Afghanistan in 1979 especially limitations of transactions involving grain, phosphates and high technology and the 1980 Moscow Olympics - cold war;

(i) US embargo imposed in response to the Soviet - supported crackdown on the Polish trade union. Solidarity, limiting transactions with Poland and participation in the Siberian pipeline. This embargo appeared to touch a raw nerve of European governments: some directed companies within their territories, including subsidiaries of US parents, to produce and ship pipeline components to fulfil existing contracts. The US imposed retaliatary sanctions on the corporate offenders. The sanctions were lifted in November 1982.

(j) British embargo on Argentina during the Falklands War. Unlike the US Iranian freeze, the embargo did not, in light of the UK stand on extraterritoriality and its wish to preserve the impartiality of the London financial market, have extraterritorial effect on foreign subsidiaries of UK companies nor on foreign financial transfers.

(k) The recent US embargo on Libya.

Some of the principal legal issues raised have been:

(a) the impact of foreign freezes on existing contracts; and

(b) the piercing of the veil of incorporation.

(4) <u>Securities regulation</u>

The US Federal securities laws have had a major impact upon the eurobond market in four main respects:

(a) elaborate selling restrictions and "lock-up" procedures are required in order to prevent the bonds from coming to rest in the United States because of the unavailability of a practicable "sophisticated investors" exemption from the registration requirements of the <u>Securities Act</u> of 1933, an exemption which is widely available in Europe;

(b) controls on frauds in relation to securities and the exercise of a US long-arm jurisdiction especially in relation to insider dealing and misrepresentation;

(c) "waiver by conduct" proposal - see below;

(d) attempts to counter US tax evasion, notably by requirements that bearer bonds be issued in registered form and efforts to require bank paying agents to provide a certificate of non-US beneficial ownership of bonds.

(5) Taxation

Points of abrasion have been:

(a) attempts by tax authorities to tax worldwide income of a corporation (unitary taxation) regardless of the fact that some of the income was not earned within the jurisdiction;

(b) taxation of the property of persons outside the jurisdiction and not belonging to nationals, domiciles or residents; and

(c) double taxation.

In the main, taxation treaties have played a major part in harmonising international tax regimes. The US attitudes are helpfully codified in the Foreign Relations Restatement - see the Draft, ss 411 - 413. Tax treaties however have not resolved the problem of US discovery orders at the behest of the IRS requiring the production of evidence located abroad in violation of foreign bank secrecy and non-disclosure laws.

(6) Banking supervision

States vary widely in their methods of banking supervision. Banking supervision in the United States is based upon black letter rules, while in Germany and the United Kingdom, the standards are said to be both flexible and discreet. The possibility of serious conflict has been largely disarmed by the Basle Concordat which divides the responsibility of central banks for supervision purposes (eg supervisory authority for the London branch of an Australian bank is primarily the Australian authority, while the primary responsibility for a UK banking subsidiary of an Australian bank is primarily the Bank of England).

(7) Others

The extraterritoriality problems arising with exchange controls, expropriations and discovery orders are reviewed briefly below.

V BLOCKING TECHNIQUES

(1) Generally

Where a foreign state's laws apply extraterritorially, other states have to decide how to deal with the situation. They can let it in or they can block it. The English courts and the UK Parliament (along with many other courts and legislatures) have adopted a number of techniques to block the application of foreign laws, notably:

(a) non-recognition of foreign laws;

(b) non-recognition of foreign judgments;

(c) prohibitions on the giving of effect to a foreign measure and aggressive defence, eg clawback of the non-compensatory element of damages.

One may now examine these in more detail.

(2) Blocking statutes

At least 17 states have adopted blocking statutes, mainly directed against the extraterritorial application of US anti-trust laws. These blocking statutes are of two types:

(a) those which prohibit the production of evidence before a foreign tribunal; and

(b) those which prohibit compliance with foreign court orders or laws.

The UK Protection of Trading Interests Act 1980 provides (amongst other things) that:

(a) The Secretary of State can prohibit a United Kingdom business from complying with a foreign measure for regulating or controlling international trade which appears to be extraterritorial and to be damaging or threatening to damage the trading interests of the United Kingdom.

(b) The Secretary of State can prohibit compliance with a foreign requirement for the production to a foreign tribunal of a commercial document outside the relevant country's territorial jurisdiction.

(c) The English courts are not to recognise foreign judgments for multiple damages in relation to certain anti-trust matters.

(d) A UK citizen, a UK corporation or a person carrying on business in the United Kingdom against whom the multiple damages award has been given in a foreign country can recover the non-compensatory portion; ie can claw-back.

(3) Insulation by governing law: exchange controls

Prior to World War II monetary warfare was conducted by means of exchange controls, in which term I include freeze orders, moratoria, certain forms of withholding tax and the like. The judicial reaction was complex but most Western courts took the view that it was useless to outlaw controls as expropriations in breach of international law because all states used exchange controls. After the War, Messrs White & Keynes, in drafting the Bretton Woods Agreement, endeavoured to outlaw these damaging monetary engagements by establishing IMF guidelines for acceptable exchange controls and then requiring that the courts of IMF members give effect to other countries' exchange controls enacted within these guidelines. For reasons explained below, this initiative has largely failed.

Instead the matter has been left to the rules of private international law. In this respect, the English courts have been quite ruthless in insisting that the parties take the risk of their choice of law. The German courts, on the other hand, have tended to treat exchange controls as matters of foreign public law which are not entitled to recognition in Germany. The US courts have found favour with the comity doctrine originally espoused by the Bretton Woods Agreement and recognised a foreign moratorium expressly on the grounds that this accorded with the wishes of the executive - see the Allied Bank case. Essentially this looks like the "balancing of interests" approach in action. Many American lawyers criticised the decision, not because it was unreasonable, but because they say it creates business unpredictability.

Unlike the 1980 Act with its direct government intervention to protect UK business from foreign extraterritorial law is achieved by private contract with the government expressing no interest in the matter. The technique rests on the fundamental English conflicts rule that the express or implied choice of English or other external law to govern a contract, eg a loan agreement, with a foreign obligor is effective to insulate the contract against certain decrees in the foreign country concerned purporting to modify or annul the contract. The result is that foreign attacking measures impacting on the contract are shut out so far as the English courts are concerned. On the other hand, if the contract is expressly or impliedly governed by the law of the country which enacts the interfering legislation then the blocking is ineffective - unless, perhaps, it is grossly abusive or discriminatory.

The following are some banking examples where the application of external law shut out the obligor state's interfering legislation:

(a) Usury laws - see Montreal Trust Co v Stanrock Uranium Mines Limited [1965] 53 DLR (2d) 594 (case on compound interest).

(b) A foreign moratorium, eg a bankruptcy moratorium: Gibbs & Sons v Societe Industrielle et Commerciale des Metaux (1980) 25 QBD 399.

(c) A foreign exchange control: Kleinwort Sons & Co v Ungarische Baumwolle Industrie A/G [1939] 2 KB 678; Toprak v Finagrian [1979] 2 Lloyds Rep 98, affirmed 112, CA.

(d) A foreign withholding tax on interest: see Indian and General Investments Trust Co Limited v Baurax Consolidated Limited [1920] 1 KB 539.

As mentioned above, if the contract is governed by the law of the obligor state, the English courts will recognise the foreign state's legislation modifying the contract even if this leads to an anniliation of the claim and thus an effective expropriation of a UK national's assets.

Thus in Re Helbert Wagg & Co Limited [1956] Ch 323, a loan agreement was governed by German law and a German decree required

the loan to be paid to a local German custodian in German currency: the English creditor was held to have lost his claim.

Similarly, annulling local legislation will be recognised by the English courts if the contract is governed by the local law: see, for example, Perry v The Equitable Life Assurance Society [1929] 45 TLR 468 where a Russian insurance policy held by UK national was successfully annulled by Soviet legislation.

English law therefore places in the hands of the parties themselves whether or not they can block certain of the laws of their respective jurisdictions. Hence, on the one hand, the English courts will not permit comity or "balancing" to let in exchange controls blocked by external law so that essential foreign state's interests can be excluded by private act of the parties. On the other hand, the English courts will not intervene to protect a party who has effectively been expropriated by an exchange control which is absorbed into his foreign law contract, eg on the ground that the foreign law is a "public" law. The solution is neat and predictable. No balancing of interests is involved.

The interesting point here is the ejecting of exchange controls (which are, after all, economic regulations attracting criminal sanctions) from the governmental realm into the private arena. The problem is distanced from governmental confrontation and foreign relations. In concept, the same "hands off" policy is exhibited by the US transfer of sovereign immunity issues from executive discretion to the rule of law monitored by the judiciary.

The exceptions to the doctrine of the controlling effect of the governing law can be important. In brief the qualifications are:

(i) illegality at place of performance;

(ii) conspiracies to break the laws of friendly powers; and

(iii) Article VIII 2b of the Bretton Woods Agreement.

(a) Illegality at place of performance The English courts will not enforce a contract, even if valid by a proper law, in so far as performance of the contract is unlawful by the law of the country where the contract might by its terms be performed, eg where payments must be made: see Ralli Bros v Compania Naviera Sota y Aznar [1921] 2 KB 287. It follows that if there is a maximum limit on interest, a freeze order, a prohibition under trading with the enemy legislation or other blocking decree which prohibits performance of the contract, eg payment of a loan the place where payments have to be made, then the English courts will not enforce the contract. The rule finds its origins in the doctrine of frustration of contracts. It is not a "balancing" doctrine.

It is to be noted that the mere fact that the contract is illegal under the laws of one of the parties to the contract, eg because of an exchange control, is immaterial

provided it is not illegal where the contract has to be performed: see Kahler v Midland Bank Limited [1950] AC 24.

The application of this rule was at the centre of the Iranian litigation in London in 1980. Bank Markazi claimed deposits from London branches of US banks which the US banks claimed were frozen by the Carter freeze on Iranian assets. Plainly, the US freeze order could not apply in England. The main question, therefore, was whether, since the repayment of the US dollar deposits ultimately involved a transfer transaction in New York City, the bank was being required to perform an act which was illegal where it had to be performed. Bank Markazi would have argued that the contract was to be performed in London and not New York. The release of the hostages put this not uninteresting issue on the back-burner.

See also the Sensor case [1982] in Holland concerning the US pipelines embargo catching a Dutch subsidiary: the court held that an existing sale contract was governed by Dutch law and the US embargo did not extend to it.

(b) Contracts to break foreign laws The English courts will not enforce a contract governed by a foreign law if that contract is apt to jeopardise the friendly relations between the British government and any other governments with which Britain is at peace. This is a straight comity rule.

The swash-buckling cases involving smuggling and the fomenting of rebellions are obvious examples. Less obvious and more significant in this context are those cases where the English courts have refused to enforce:

(i) contracts contrary to export prohibitions of a foreign state, as in Regazzoni v KC Sethia Limited [1958] AC 301 - Indian legislation directed against the shipment of goods from India to South Africa, and

(ii) contracts to breach foreign revenue or penal laws (Re Emery's Investment Trust [1959] Ch 410).

Whether or not these cases could be extended to apply to contracts to break, for example, US anti-trust laws or export controls remains to be decided.

It should be noted that this good neighbour principle does not permit the direct enforcement of the foreign law but merely entitles it to recognition. Further an external law contract will be shielded from a subsequent foreign prohibition: the rule applies only where the parties conspire to violate an existing prohibition. The English courts will hence not use the doctrine to retrospectively invalidate a contract with the result that the various embargo and anti-boycott sanctions initiated by Congress would not affect contracts already entered into.

(c) Bretton Woods Agreement I mentioned above that attempts were made in the Bretton Woods Agreement to resolve the

exchange control problem by treaty. The idea was that if the exchange controls were imposed consistently with the IMF agreement and with IMF approval then the legislation should not be blocked by foreign courts. In effect the legislation should be given extraterritorial effect.

The text of the relevant Article VIII 2b is set out in my paper on government loans. In broad terms, the objectives sought to be achieved by the negotiators of a Bretton Woods Agreement have not worked to any great degree. English and US decisions lead to the conclusion that in those jurisdictions an ordinary international loan contract is not a contract of the sort covered by Article VIII 2b requiring reciprocal recognition of another IMF member's exchange controls and thereby stripping the insulation achieved by the external governing law - see in the US the Libra Bank/Costa Rica case [1983].

The reason is that English courts have taken the view that generally the Article VIII 2b defence involves an unmeritorious attempt by a party to get out of an inconvenient obligation. The courts have justified their view by emphasising that one of the primary stated objectives of the Bretton Woods Agreement is to promote international trade and this would be hampered by exchange controls: according to the court it would be quite impossible for parties in trading transactions always to check whether the necessary foreign permission has been obtained. See Wilson Smithett & Cope Limited v Terruzzi [1976] 1 All ER 817, CA where an Italian resident unsuccessfully endeavoured to avoid an obligation to pay for dealings on the London Metal Exchange on the basis they were forbidden by Italian exchange control.

On the other hand, the French courts are likely to regard loan contracts as within Article VIII 2b (see the de Boer case [1962]) as are the German courts (see the Lessinger case [1955]) and the Luxembourg courts (see the Filature & Tissage case [1955]). But the English courts have applied the Article to frauds such as compensation deals - see, for example, United City Merchants Limited v Royal Bank of Canada [1982] 1 All ER 720.

(4) Insulation by external situs

An important problem for banks is the impact of expropriation laws in foreign countries. A bank may be affected in a variety of ways:

(a) the expropriation of a foreign subsidiary of a borrower may damage the credit of the borrowing parent;

(b) the expropriation of assets forming security for a loan could be prejudicial, especially in the project finance area;

(c) the expropriation of a foreign branch may lead to claims by depositors for their money at head office.

The English courts adopt the almost universal doctrine that takings of property, eg by nationalisation, where the property is located in the legislating state cannot generally be challenged by the English courts, although no doubt diplomatic protests may be made.

Thus if a debt is found to be situate in the expropriating state, then, subject perhaps to grossly abusive, penal or discriminatory legislation, the English courts will recognise the transfer. If the debt is found to be located outside the expropriation state, the expropriation will not be recognised by the English courts. The principles follow a line of cases concerning such items as logs in the Baltic and paintings in Moscow.

Note that in the case of expropriations, unlike exchange controls, the foreign interference does not merely modify the obligation itself but transfers the proprietary rights in a loan or deposit to a third party.

The English courts fix the situs of debts for the purpose of this rule at the place where the debt is property recoverable or can be enforced. This is usually deemed to be the place where the debtor resides (or, in the case of a company, where it has its centre of operations) for it is only in that place that a creditor can normally enforce payment.

A deposit debt will generally be situate at the branch of the bank where it is primarily payable. Hence, if the governing authority of the territory where the branch is situate passes an expropriation decree then the English courts will recognise it, but not otherwise: see Jabbour v Custodian of Israeli Absentee Property [1954] 1 All ER 154; New York Life Insurance Company v Public Trustee [1924] 2 Ch 101, CA; Arab Bank Limited v Barclays Bank DCO [1954] 2 All ER 226.

As mentioned above, this rule, ie that expropriation decrees do not have extraterritorial effect, appears to be adopted by most western states. The two main differences are that:

(a) states have distinctive methods of determining the situs of debts, and

(b) some states enlarge the grounds on which an intraterritorial taking can be challenged.

Thus the US and the Netherlands have declined to give effect to an intraterritorial taking where it is in breach of their view of international law, eg because it is not accompanied by prompt, adequate and effective compensation.

Apart from one case of doubtful authority (The Rose Mary) involving the Iranian expropriation of oilfields in the 1950s, the English courts have rigidly refused to interfere with foreign expropriation statutes even if no compensation is paid. It seems that they will only refuse to recognise such an expropriation in cases of gross discrimination as in the Nazi/Jewish expropriation cases.

One may add that roughly similar rules apply to foreign attachments and garnishments. If the asset or debt is located within the territory of the foreign court which makes the attachment order, then the English courts will recognise it. If not, they will not but will take into account the possibility that a party may have to pay twice. They will not, in any event, recognise a foreign attachment in support of taxes or a penalty. Of course, it is usually banks which are the targets of attachment orders.

(5) Insulation by exclusive external jurisdiction

If a contracting party can ensure that the contract is subject to an exclusive external jurisdiction, he will be shielded against proceedings in other jurisdiction by the other party which may be subject to the laws of that other country. Along with many other states, the English courts tend to uphold exclusive jurisdiction clauses in the absence of special reasons. The Bremen [1972] and Scherk [1974] cases are landmark US decisions in affirming this policy.

(6) Non-recognition of foreign judgments

Probably one of the main blocking techniques is based on the rules inhibiting the recognition by the English courts of foreign judgments. Along with many other countries, the English courts will refuse to recognise a foreign judgment in the following cases (amongst others):

(a) The court of origin did not have jurisdiction. The foreign court will be deemed to have jurisdiction if (generally speaking) the defendant corporation was carrying on business locally (or, sometimes, the defendant had its principal place of business there) or alternatively the defendant expressly agreed to submit to the jurisdiction of the foreign court or actually appeared in the action otherwise than to contest jurisdiction.

It follows that a plaintiff cannot have his judgment recognised in England if his original judgment was based on a long-arm jurisdictional rule, such as fleeting presence, location of assets, governing law of contract, residence, nationality or plaintiff, or slight activities not amounting to a continued course of doing business locally from a fixed abode.

This is so notwithstanding that the English courts will themselves exercise original jurisdiction on a long-arm rule. Here then is the first of a number of examples I will mention of the courts claiming a right themselves which they will not allow a foreign court. A foreign court's judgment is treated as second-class. No doubt the English lawyer would argue that the English original long-arm jurisdiction is balanced by the court's application of forum non conveniens principles which adequately protect the foreign defendant and prevents unfair primacy being given to local interests. Essentially however the rule insists on closer territoriality for the foreign action.

This bar has in practice been a most important method of blocking foreign judgments founded on foreign long-arm statutes. The US corresponding rule is very similar.

(b) The English courts will not recognise a foreign judgment in respect of taxes, fines or penalties or if it is against public policy. Practically everybody seems to take this position. In addition, in England, s 5 of the Protection of Trading Interests Acts 1980 prohibits the enforcement of foreign judgments for multiple damages, eg treble damages in private US anti-trust suits. One imagines that many foreign courts would in any event treat these as penal and therefore barred.

Apart from the above, the English courts are liberal in their attitude to foreign judgments. Judgments are not territorial: they can leap from one country to another. Indeed in this respect there is great consistency between US and UK recognition ideas. Provided various obvious criteria are satisfied, eg due process and natural justice, the English courts will not reopen the merits even if the award is obviously wrong - as in Goddard v Grey [1870] LR 6 QB 139. However, the English courts do not require reciprocity - a frequent requirement of Continental courts but irrelevant to the private parties in dispute. Some states, especially the Nordic countries and the Netherlands, are unreceptive to foreign judgments in the absence of a treaty.

A major step in the expansion of the extraterritoriality of judgments is the EEC Judgments Convention which provides for the free movement of judgments within the Community. The Convention is in the process of being brought into force between the 10. The basic principle is that, subject to exceptions, suits must be brought against the defendant at his place of domicile. This is good for the territorialists. Then the judgment is entitled to full faith and credit throughout the Community.

But the Convention has great dangers for non-Community domiciliaries, eg those located in the US, Switzerland or Japan. A non-Community domiciliary can be sued on the basis of the exorbitant jurisdictional rules of any of the Convention countries and a judgment so obtained will be entitled to full faith and credit throughout the Community. These exorbitant jurisdictional rules include:

(a) contract made in England or Ireland or expressly or impliedly governed by English or Irish law (but subject to forum non conveniens restraints);

(b) fleeting presence;

(c) "tooth-brush" jurisdiction in Germany and Scotland;

(d) nationality of plaintiff in France and Luxembourg;

(e) residence of plaintiff (sometimes) in the Netherlands and Italy.

The result is that a foreign defendant may be spirited into a European court and then subjected to the conflicts rules and policies of the particular European forum. This done, his entire European assets are subject to attachment.

(7) Veil of incorporation

I have noted above that many of the recent US trade embargos have restricted transactions by foreign subsidiaries of US corporations. Further, US discovery orders have required the delivery of information by foreign subsidiaries. This claim to extraterritoriality has been resisted by the UK on the grounds that (they say) a UK company is a UK national and not subject to US jurisdiction. Barcelona Traction (Belgium v Spain) [1970] ICJ 4 and Sumitomo have been called in aid.

The US response has been that the technical veil of incorporation is merely a mechanistic legal fiction and should not be used to obscure the realities of the situation and the genuine conflict between policy interests, ie this is another instance where the veil of incorporation should be pierced.

Many jurisdictions recognise that the veil of incorporation is not absolute and can be pierced in a number of well-defined situations including:

(a) the company is agent of its parent ("alter ego" doctrine),

(b) abuse of corporate privileges as in the case of fraudulent trading,

(c) the use of the corporate form to evade legal obligations, and

(d) "see through" to alien enemy ownership in time of war (a typical "hot war" exception to normal doctrines).

The Draft of the Foreign Relations Restatement, s 418, proposes that the US has jurisdiction over foreign branches or subsidiaries of US corporations if the exercise of the jurisdiction is reasonable. The now familiar "balancing of interests" approach is adopted, including whether or not a subsidiary will be required to do something which is prohibited by local law.

In practice, the US has been able to secure conforming conduct by overseas subsidiaries in many cases, notably, by prohibiting "participation" or "involvement" by the parent and its officers in the subsidiary's actions (eg decision-making) and by the threat of US economic sanctions against the subsidiaries such as the threat of the loss of unrelated privileges. These methods are informal and indirect but are no less effective.

Again, there is a clear conflict of jurisdictional reach. At the policy level, the US has claimed that:

(a) the widespread US foreign policy interests are protective of the free world,

(b) the US has substantial economic and beneficial interests in foreign countries through US multinationals in whom they have a direct interest, and

(c) that these embargos have been necessary to symbolise the moral importance attached by the US to international order, as in the Rhodesian and Ugandan embargos and the Iranian and Afghanistan crises.

The objections of the European states have included:

(a) money and jobs are affected, and

(b) being told what to do by the US.

In the end, if the "balancing of interests" approach is followed, it is extremely difficult to weigh the importance to one state of combating Communist aggression against the wishes of another state in maintaining scarce jobs. Even if these issues can be evaluated, one state is unlikely to trust the agencies and courts of another to weigh up the interests fairly, even if it is an ally.

One method is to give absolute preference to the territorial state of incorporation. But there clearly are cases where the piercing of the veil extraterritorially is admitted, eg in the cases of hot wars.

With this background in mind, one may examine some of the legal blocking methods which are available under general law, apart from direct foreign governmental action under blocking statutes.

In the Fruehauf case (5 ILM 476 (1966)) a French company which was a subsidiary of a US corporation but which had minority French shareholders contracted to supply trucks to another French company which in turn was to supply them to the Peoples Republic of China. The US government, under trading with the enemy legislation, ordered the US corporation not to perform the contract and the French subsidiary was directed accordingly. The independent directors of the French company then successfully sought an order from the French courts for the installation of a judicial administrator, who took over the administration of the company and performed the contract. Under French law, such an administrator could be appointed where the controllers of a French company conducted the company's business in a manner contrary to its interests. This was clearly the case here since the French purchaser was threatening to sue the seller for a large sum if the contract was not fulfilled.

The case identifies a significant blocking technique derived from company law doctrines. These doctrines include:

(a) abuse of minority shareholders,

(b) duties of directors to act in the best interests of the company as a whole and not of its shareholders,

(c) inability of shareholders to fetter a director's discretion except by special resolution or under the constitutional documents,

(d) risks of the parent directing business locally through the agency of its subsidiary, thereby lifting the veil of incorporation and leading to potential local tax liability and registration requirements.

In practical terms, implementation of these doctrines is often limited by:

(a) their vagueness in the context,

(b) the absence of a plaintiff with the necessary locus standi to challenge a wholly-owned subsidiary's action, and

(c) the fact that, although directors may feel disquiet at the risk of misfeasance proceedings on liquidation, they do not expect the company to go into liquidation.

(8) Discovery and evidence

(a) Background Many of the recent collisions have arisen in connection with foreign subpoenas ordering the discovery of documents which are located in foreign parts. The Hague Convention on the Taking of Evidence abroad in Civil or Commercial Matters has been ratified by only 12 states (although with significant UK and French reservations) and does not apply to administrative matters. Some bilateral consultative procedures are in force between administrative authorities. I ignore for the moment the importance distinction between direct requests by the court to a litigant and indirect requests which take the form of letters rogatory emanating from one court to another and subject to judicial moderation. I also ignore the different treatment of documents and testimony.

The rationale for discovery is that civil courts should proceed on the basis that each party's position is fully disclosed so that litigation is not a game of blindman's buff or conducted on ambush principles. Extraterritorial discovery threatens other states if:

(a) it offends overriding policies, eg bank and professional secrecy, national security, commercial confidentiality and the like,

(b) the pre-trial discovery is unfairly burdensome,

(c) discovery might incriminate a party under criminal law, or

(d) discovery is used as a harrassing tactic or a fishing expedition.

Some courts appear to allow a wider right of discovery in home litigation than they would allow in relation to foreign

litigation. Here is another case of the second-class foreign court. Of course, relegation to second-class status may well be based on the above policies. But the objection is partly that extraterritorial discovery is seen as a potential infringement of sovereignty. Whether this is legitimate or is mere touchiness is a point on which many views may be held.

A leading US case is Societe Internationale pour Participations Industrielles et Commerciales SA v Roger, 357, US 197 (1958) where a Swiss national was absolved from discovery because this would violate Swiss secrecy laws. Since then, apart from a handful of cases (such as the somewhat special case of In Re Westinghouse Electric Corporation, 563, F 2d 992 (10th Cir 1977)) the US courts have almost invariably supported US policy interests in insisting on extraterritorial discovery notwithstanding in many cases that the order would infringe local law. Examples are:

- In Re Uranium Anti-Trust Litigation, 480 F Supp 1138, (ND 111, 1929). The court upheld Canadian discovery on the reasoning that (inter alia) the US anti-trust statute was of overriding importance, the documents located in Canada were crucial to the resolution of the issue, that other nations were generally flexible in applying their blocking statutes, ie no foreign compulsion, and that there was a lack of "good faith" - see below.

- US v First National Citibank, 396, F 2d 897 (2d 1968). Another anti-trust case involving a grand jury investigation and a subpoena for documents with the bank's branch in West Germany. The court upheld the order on the ground that (inter alia) US anti-trust laws were paramount and bank's secrecy restraint in West Germany was not a criminal matter.

- US v Field, 532, F 2d 404 (5th Cir) cert denied 429 US 940 (1976). A grand jury investigation alleging tax violations ordered testimony by a foreign branch manager in the Cayman Islands branch of the bank. Field refused on grounds of Cayman Islands bank secrecy rules and was duly jailed in the US.

Other cases are US v Vetco Inc, 644 F 2d 1324 (9th Cir) cert denied 454 US 1089 (1981) (IRS summons involving bank records in Swiss bank), SEC v Banca della Svizzera Italiana, 92 FRD 111 (SDNY 1981) (SEC action for alleged violation of insider trading laws and attempts to obtain identity of parties from BSI) and Arthur Andersen & Co v Finesilver, 546 F 2d 338 (10th Cir 1976), cert denied, 429 US 1096 (1976) (Swiss secrecy laws again).

The tale continues with the 1984 contempt fines imposed upon the Bank of Nova Scotia in relation to its Cayman Islands branch (grand jury subpoena) and the continuing litigation between Chase and Garpeg where the Hong Kong office of Chase

is required by a US court order to deliver certain business records relating to its customers in response to an IRS summons.

Section 40 of the Restatement on Foreign Relations Law sets out a number of factors to be taken into account in balancing the interests of the states involved, including their vital national interests. This balancing has, as noted above, most often come down in favour of US interest. The general grounds for upholding extraterritorial discovery orders have been:

(a) the party in contempt had shown bad faith, eg he concealed or transported the documents abroad, he tried to delay the matter, he did not make really positive efforts to comply, he courted the foreign impediment, eg by inducing a foreign government to block the order, or he did not exhaustively study the scope of the local non-disclosure law;

(b) US interest in preventing cartels, tax evasion and insider non-disclosure law;

(c) the foreign prohibition was not a criminal prohibition, or was not statutory and therefore could be changed by judge-made law.

The conflicts present great difficulties for the businessman trying to keep out of trouble. Thus a UK subsidiary, which reports a US order for production of documents to the UK government on the grounds that questions of national security are involved, may nevertheless be deemed to have shown an absence of good faith because it induced an order under the Protection of Trading Interests Act 1980.

Similar problems have arisen, albeit somewhat inconclusively, in EEC commission requests for information in relation to alleged restrictive practices, notably in the Vitamins case [1976] (involving Hoffman - La Roche), the CSV case [1976] (involving Swiss secrecy) and finally in the United Brands "Chiquita Banana" case [1978].

(b) English discovery at foreign request In England the courts have power under the Evidence (Proceedings in other Jurisdictions) Act 1975 to grant applications for English discovery. However, there are major blocks against the ability of foreign litigants or authorities to obtain English discovery. The main limitations are as follows:

(i) No order for "evidence" for pre-trial purposes: the danger of the fishing expedition is considered too great. There are tighter rules for foreign criminal proceedings.

(ii) No order for general discovery of documents - again it is said that these are likely to be fishing expeditions. The request must be for specific

documents, a rule which is strictly interpreted: see In Re Asbestos Insurance Coverage Cases FT Com LR, March 6, 1985, House of Lords.

(iii) Prejudice to UK sovereignty, eg where the letters rogatory are a request for evidence in a penal or US grand jury investigation.

(iv) No order for evidence which might incriminate the person who is thereby exposed to penal action in any jurisdiction: Re Westinghouse Electric Corporation [1978] AC 547.

(v) Prejudice to the security of the UK as conclusively certified by the Secretary of State.

[See Rules of the Supreme Court, Order 70 for a discussion of the authorities.]

(c) Bank secrecy

The principal victims of foreign authority requests for information have been banks maintaining accounts for the accused or defendant. In such situations banks may be under a threat of contempt of court if they fail to disclose in the demanding jurisdiction but in the other jurisdiction they may be liable for damages or contempt if they do disclose.

As with almost all countries, banks in England owe a duty of secrecy or confidence to their customers subject to qualifications. These are classified under four main heads, namely:

(a) the disclosure is under compulsion by law (this does not include foreign law),

(b) where there is a duty to the public to disclose,

(c) where the interests of the bank require disclosure (eg where the bank is suing the customer), and

(d) where the disclosure is made by the express or implied consent of the customer: see Tournier v National Provincial and Union Bank of England [1924] 1 KB 461.

The recent case of X AG v A Bank [1983] 2 All ER 4464 demonstrates that the English courts are most reluctant to permit the bank secrecy rule to be overridden at the behest of a foreign authority carrying out an investigation into alleged breaches of its laws. The case concerned a US grand jury investigation leading to an order for production of documents by the London branch of a US bank. The court drew attention to the serious prejudice which might be caused to the customer's business if its commercial affairs became public knowledge. It noted that US grand juries do not respect confidentiality.

A Hong Kong court followed the X AG decision in the Chase/Garpeg litigation involving an IRS summons on Chase New York to produce information as to the identity of its customer in its Hong Kong branch. The court expressed its displeasure at the pressure being brought to bear upon it by the threat of US contempt proceedings against the unhappy US bank, and indicated that it was for the US court to relieve from the dilemma.

Is there here another example of the second-class foreign authority? After all, English tax and company delinquency statutes give the authorities wide powers of inspection. The comparative degree of infringement of the secrecy principle is difficult for me to judge. However, in a line of cases the English courts have strictly limited the scope of domestic official discovery to the matters in hand: see, for example, Clinch v IRC [1973] 1 All ER 977 (tax); Bankers Trust Co v Shapira [1980] 3 All ER 353, CA (private claim for alleged wrongful or fraudulent deprivation of property).

One should not forget the arrangements between bank supervisory authorities for exchanges of information: a significant and necessary inroad on territoriality.

(9) Bankruptcy

Another fertile area of collision between jurisdictions occurs in relation to bankruptcies. The universal theory holds that, where a company becomes a bankrupt in the jurisdiction of its principal place of business and incorporation, then other states should recognise the home forum's bankruptcy rules, notably its freeze of creditors' suits, the liquidator's right to collect foreign assets of the bankrupt, and the home forum's bankruptcy rules in relation to such matters as set-off, fraudulent preference, proof of debts and assets available for distribution. The territorial theory on the other hand would not recognise any of the above rules of the home forum.

In practice, notwithstanding occasional protestations of purity, most states are neither universal nor territorial. For example, the English courts will probably recognise a foreign liquidator as having the right to collect assets on behalf of an insolvent foreign company (since he is an officer representing the company) but will not recognise a foreign freeze on creditor suits. If a contract is governed by an external system of law, the English courts will not recognise a moratorium imposed by a foreign moratorium rule flowing from the insolvency.

Many insolvency practitioners would agree that the international aspects of UK bankruptcy law are long overdue for review. An EEC convention on bankruptcy is in draft but it will be many years before it can be implemented. Probably the main defect of the present regime is the ability of creditors to disturb the pari passu principle by ignoring the foreign freeze and attaching English assets of the insolvent. The US Bankruptcy Code takes some steps in the right direction on the comity point.

VI EXTRA-LEGAL SANCTIONS

Perhaps one of the most effective ways in which a state can achieve recognition of its regulations is be extra-legal methods.

Extra-legal enforcement is achieved in a number of ways, among them:

(1) The regulating state brings commercial pressures to bear, ultimately backed by legal sanctions, upon the major players in the financial markets, eg those who have a local presence, to oblige them to procure the observance of the required standards.

(2) The regulatory state induces banks and others to introduce contractual provisions into their contracts reflecting the dangers of extraterritorial regulations.

The following are some examples:

(a) Illegality clause Perhaps the contractual clause of the most respectable ancestry in loan documentation in this context is the illegality clause. This provides that if it becomes illegal for the bank to fund, make or maintain the loan, then the bank's obligations are cancelled and the borrower must prepay forthwith. The object is to allow the bank to call for a prepayment and to cancel its commitment if the loan should be prohibited under one jurisdiction but not under the governing law of the agreement itself. The clause also contemplates retrospective legislation banning the continuance of the loan.

Blocking orders under a blocking statute could override such a clause.

(b) Deposit contracts Recent instances, such as the US case involving the expropriation of Chase's Saigon branch and the Philippines block on deposits located with the Manila branch of Citibank, have focused attention upon the risk that a bank's head office may have to pay depositors at a foreign branch notwithstanding that the foreign branch's assets may not be available to head office. Recently, there has been a move in the London market to include clauses in certificates of deposit whereby the risk of local branch deposit is thrown upon the depositor. Broadly, the techniques involve:

(a) local governing law,
(b) local exclusive jurisdiction,
(c) local place of performance, and
(d) local situation of claims for expropriation purposes.

This localisation of issues (to make the depositor take the local political risk) is not foolproof but doubtless it will assist. A depositor wishing to limit the local risk must externalise all of the above items.

(c) Secrecy waivers If the operation of foreign discovery orders continues to expose banks to contempt of court in one jurisdiction and damages in the other for breach of secrecy, then it is to be expected that banks will seek to introduce clauses into their bank/customer contracts whereby the customer waives his right to confidentiality in the event that the bank of its holding company is obliged to produce information in any applicable jurisdiction. Such clauses would no doubt meet market resistance and might harm the banks competitively. Certainly they have already been introduced into the agency clauses in syndicated loan agreements.

(d) US selling restrictions Unlike other commercial states, the Federal securities laws do not allow a "sophisticated investors" exception from the prospectus registration requirements which is of any practical value in the eurobond market. In the UK for example a foreign issuer of bonds can distribute offering material amongst professional dealers in securities without involving the prospectus requirements of the Companies Acts.

In order to allow US access to the eurobond market but yet to seal off the US market, the 1964 SEC Release relaxed the strict operation of the Federal securities laws and, by administrative action, permitted non-registration provided that procedures were followed reasonably designed to ensure that the securities did not come to rest within the United States. The observance of these various procedures is effectively enforced by virtue of the legal sanctions which could be exercised against managers of bond issues and issuers themselves by reason of their frequent connections with or presence within the United States.

VII WAIVER BY CONDUCT

(1) SEC Release

SEC Release No. 21186 proposes that the purchase or sale of securities in the United States, whether directly or indirectly, would be considered:

(a) a waiver by conduct by the investor of his right to secrecy, especially his right to insist that his bank keep his affairs confidential;

(b) the appointment of the US broker which executed the transaction as an agent for service of process or subpoenas and a consent to the exercise of *in personam* jurisdiction by the US courts and the SEC.

The stated object is to enable the SEC to protect the US securities markets from fraud by foreign investors.

There is of course nothing new about jurisdictional rules which provide that service upon some local official is good service. Such rules in civil code countries are on the way out but vestiges still remain.

(2) Implied consent

The implied consent to the waiver of secrecy and the jurisdictional submission is based on the proposition that the foreign bank which instructs the US broker-dealer on behalf of the foreign customer of the bank is the agent of the customer. Since the bank is likely to have notice of the waiver, the knowledge is, it is argued, imputed to the customer principal in accordance with normal agency rules.

If the matter ever came for decision one could expect a customer in England to raise the following arguments (of varying cogency):

(a) Notice to an agent is not notice to the principal unless the agent receives the notice within the scope of his authority.

(b) The agent did not have authority to bind the principal to a waiver of confidentiality or to a submission to US jurisdiction.

(c) Notice to the agent is insufficient where it is general knowledge of the agent but not particular to that transaction: see Tate v Hyslop (1885) 15 QBD 368.

(d) Knowledge is not the same as consent.

(e) The bank-customer contract is governed by English law and is therefore insulated against foreign legislation; see X AG v A Bank [1983] 2 All ER 464.

(f) Foreign "public laws" do not have extraterritorial force in English eyes and therefore do not qualify for recognition by the English courts.

(g) The waiver by conduct is against public policy.

(3) Discovery order

A US order for discovery of evidence may be blocked on the basis of the rules mentioned above.

(4) Enforcement of US judgment

Any US judgment obtained on the basis of the "waiver by conduct" and the implied submission would not be likely to qualify for enforcement in the English courts on the ground that:

(a) a submission to a foreign jurisdiction must be express and not implied (see Sirdar Gurdyal Singh v Rajah of Faridkote [1884] AC 70, PC; Emanuel v Syman [1908] 1 KB 302, CA); and

(b) it is against English public policy to enforce a foreign "public" law or a judgment for a penalty or a fine.

(5) Conclusion

Notwithstanding the above bars, it is conceivable that the SEC might achieve its objective by extra-legal means. If foreign

banks with a presence in the United States are threatened with double jeopardy by reason of the proposed legislation, then it may well be that these banks would not accept instructions from a foreign investor unless the foreign investor agrees to the terms of the "waiver by conduct" principle and in particular agrees to waive his confidentiality rights to the extent required by the proposed legislation. The SEC could perhaps thus achieve by commercial pressures what it might not be able to achieve by direct legislation.

VIII AMBIT OF UK BANKING AND SECURITIES REGULATION

(1) Background

For almost two centuries the UK financial and securities markets have been international. Foreign bonds have been issued and traded in London since 1790 and the UK has historically had one of the largest and most developed securities markets in the world attracting a large number of foreign investors. Accompanying this international market has been the development of reasonably high standards of investor protection, standards which have historically been in advance of that of many other states. For example, an offer of securities has effectively been a contract *uberrimae fidei* since the latter part of the 19th century when a number of cases elaborated the requirement that, once something is said in a prospectus, then a material omission is a misrepresentation: a half-truth is as good as a lie. The result is that the whole truth must be told. Whether there have been any complaints that the UK has sought to impose its own standards as regards securities matters on other countries extraterritorially is a question for legal historians. All I propose to do is to examine the territorial ambit of some typical statutes.

(2) Unlicensed financial business

As with most industrialised states, the UK regulates businesses engaged in banking, securities and insurance. Typically the statutes provide that no person shall "carry on the [regulated] business" without a licence or an exemption. Not uncommonly the statutes do not state their territorial ambit.

Where the territorial ambit of a UK statute is not stated, numerous decisions of the courts have upheld the principle that statutes will not apply to extraterritorial conduct unless this is clearly intended. A prohibition on "the carrying on of business" is therefore likely to be a prohibition against carrying on the regulated business in the United Kingdom.

The meaning of "carrying on business" has been debated in a series of tax and jurisdiction cases. There appear to be three main tests:

(a) the business must be carried out from some fixed place in England (a stand at an exhibition has been held to be enough in a jurisdiction case);

(b) the business must have been carried on for a period of time (nine days has been held to be enough in a jurisdiction case);

(c) if the business is carried on through an agent in the UK, the agent must have authority to commit his foreign principal. Hence there is no carrying on of business through an agent if the agent must refer contracts back to his foreign principal for a specific authorisation on each occasion. For these purposes the English courts will not see through the veil of incorporation and treat a subsidiary as an agent of its parent unless the subsidiary has quite clearly been acting merely as an agent for the purposes of carrying on the parent's business.

The required UK links are not substantial, but, on the other hand, mere contracting in England is usually not enough: there must be a fixed abode.

The Banking Act test may have a wider reach. Section 1 of the Banking Act 1979 provides that no unauthorised person "may accept a deposit in the course of carrying on a deposit-taking business". The Act does not stop lending money but it prohibits the financing of a money-lending business by the taking of deposits. It is considered that the Act does not control the acceptance of deposits outside the territorial jurisdiction: probably a deposit is accepted where the deposit taker is situated, although there is room for the "place of posting" and "place of receipt of telex" rules. It is unclear whether the business must be carried on in Britain as well as the taking of the deposit.

(3) Ambit of prospectus laws

In the case of prospectuses, two statutes have to be considered - the Prevention of Fraud (Investments) Act 1958 and the Companies Act 1948.

The PFI 1958 prohibits the unauthorised distribution (and possession for distribution) of "circulars" about various classes of security transactions. The statute contains no express territorial ambit. It is considered that distribution of a circular occurs where the circular is received. It is unclear if possession in the UK of a circular for distribution abroad is caught.

Under the Companies Act 1948, as amended, a UK company must register a prospectus offering securities to the public and the prospectus must contain elaborate prescribed information. If the securities are listed on the London Stock Exchange then the Exchange's "Yellow Book" requirements apply instead.

The rule requiring registration of a prescribed prospectus applied notwithstanding that the securities are entirely sold abroad. The reason is that a UK company has UK nationality and should therefore be subject to the standards of UK investor protection regardless of the location of investors.

In the case of foreign companies, it is an offence to issue, circulate or distribute "in Great Britain" any prospectus unless it is registered and contains prescribed particulars (see Part X of the Act). It is considered that distribution in Great Britain depends upon whether the prospectus is received in Great Britain.

IX AMBIT OF UK FRAUD RULES

(1) Generally

Fraud in a securities or banking transaction may be either civil or criminal. The infinite categories of fraud are governed by both common law and statutory rules and include such matters as fraudulent misrepresentation to purchase securities or place deposits, obtaining pecuniary advantage by fraud, and fraudulent conspiracy.

(2) Criminal Fraud

One may examine the topic using the international law of principles stated in an earlier section of this paper:

(a) Objective territorial principle Clearly the British courts can punish fraudulent conduct taking place entirely within Great Britain.

(b) Subjective territorial principle The English courts have shown a readiness to punish fraudulent schemes which are hatched in Britain even though the victims are entirely located abroad.

In R v Markus [1974] 3 All ER 705 an individual director of a UK company organised sales amongst West German investors of units in a Panama unit trust. The brochure contained fraudulent information. Markus was convicted under the relevant statute prohibiting fraud in relation to securities notwithstanding that the distribution of the brochure took place exclusively in Germany. However, each individual investor was asked to send an application form to London and the applications were all processed and dealt with in London. The courts held that the points of contact and activities in the United Kingdom were an essential link in the fraudulent scheme.

The principle is well established by other cases. Thus in R v Hornett [1975] RTR 256 the accused was convicted where forged documents were forged and uttered in the United Kingdom although with intent to fraud persons abroad. In Gold Star Publications Limited v DPP [1981] 2 All ER 257, HL, obscene magazines were produced in the United Kingdom entirely for export overseas. The House of Lords held that, even though this might amount to moral imperialism, the UK was not to be used as a source of flourishing trade in pornography. A minority dissenting judgment submitted that Parliament did not legislate to save foreign nationals in foreign countries from moral pollution. See also Treacy v DPP [1971] 1 All ER 10, HL.

(c) Protective principle ("effects" doctrine) The effects doctrine applies where criminal conduct abroad has a direct and foreseeable impact upon the legislating state. Under the English law, the impact must, it seems, constitute the prohibited conduct itself and a mere general and diffuse impact is not enough. In R v Baxter [1971] 2 All ER 359, CA the accused sent letters from Northern Ireland to pools promoters in England falsely claiming he had won. It was held that although the message was sent from abroad, it was intended to cause deception within the jurisdiction. In R v Oliphant [1905] TK 67 Lord Alverstone CJ said that "I am unable to draw any distinction between sending information by post or by telephone and giving the same information by direct personal communication in London". Hence the despatch of fraudulent offering material from abroad into England is a fraud in England because the deception is practised in England.

An extension of the doctrine is that the counselling and procuring of an offence which is committed in England is punishable even though the counselling and procuring take place entirely abroad. In R v Millar [1970] 1 All ER 557, CA a lorry firm manager in Scotland allowed a driver to take a truck into England with dangerously defective tyres. The tyre burst and third parties were killed. The Scottish manager was convicted of counselling and procuring the offence since he set in motion the agencies by which the crime was committed.

These cases therefore show the somewhat obvious proposition that a fraud hatched abroad but causing loss in England will be punishable in England. This is not truly an application of the effects doctrine because the crime itself takes place within British territory.

(3) Civil liability for fraud

Where action is brought for the tort of the deceit (which may include breach of statutory duty prohibiting fraudulent transactions) two questions have to be answered: (a) do the English courts have jurisdiction to hear the action?; (b) if they do, what law will they apply in determining whether a tort has been committed?

(a) Jurisdiction The English courts will have jurisdiction if (amongst other things) the defendant was either present within the jurisdiction if he is an individual (ephemeral presence being sufficient, hence the expression "Heathrow writ") or in the case of a company, the company is carrying on business in England (as to which see above). Where the claim is founded on tort then additionally under the Rules of Supreme Court, Order 11, rule 1(f) (not yet in force in the stated form) if the damage was sustained or resulted from an act committed within the jurisdiction then the English courts have discretionary jurisdiction exercisable on forum non conveniens principles. It will be appreciated therefore that the jurisdiction of the English courts is long-arm in this case.

(b) Governing law of the tort If a Swiss underwriter sells to a Swiss investor in Switzerland bonds issued by a Swiss company under circumstances which do not constitute fraud under the laws of Switzerland but do under the laws of England, it would seem surprising if, in the event that action were brought in the English courts, the English courts were to impose their own standards of liability on the transaction. If on the other hand an English securities dealer on business for a few days in Switzerland sells English securities to an English investor also on business in Switzerland, it would seem equally surprising if the English courts would fail to apply English law to what is essentially an English transaction.

In the United States the Restatement takes the view that the applicable law of the tort is that which is most closely connected to the wrong in question and provides in s 145 that "the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has the most significant relationship to the occurrence and the parties". In determining the most significant relationship one takes into account such factors as the place where the injury occurred, the place where the conduct causing injury occurred, the domicile, nationality, place or incorporation and place of business of the parties and the place where the relationship, if any, between the parties is centered. This flexibility was adopted in the leading New York case of Babcock v Jackson, 12 NY 2d 473; 240 NYS 2d 743; 191 NE 2d 279 (1963); (1963) 1 Lloyds Rep 286 (a guest passenger case).

On the European Continent the doctrine is almost universally adopted that one applies the law of the place where the tort occurred: see, for example, Latour v Guiraud (Cour de Cassation, Chambre Civile (1948) Dalloz 357).

English law on the subject does not exclusively follow any of the above theories. The two leading cases on the matter are Phillips v Eyre [1879] LR 6 QB 1 (action for assault and forced imprisonment alleged to have been committed in Jamaica by the Governor of the Island) and Boys v Chaplin [1971] AC 356 (motor accident in Malta between Englishmen temporarily stationed in Malta in British armed services: English law applied). The effect appears to be that an action in England on a tort committed abroad will fail (a) unless the conduct complained of is actionable as a tort under English domestic law and (b) there is no civil liability under the law of the place where the tort took place, or, possible and exceptionally, the act is wrongful under the law of the country which had the most significant relationship with the occurrence (see Dicey & Morris, Conflicts of Laws, Chapter 31).

It may therefore be that, in case of securities fraud, the English courts would achieve a very similar position to that achieved by the US courts in the supposed "extraterritorial" securities frauds cases such as Bersch Drexel Firestone, Inc

519 F 2d 974 (2d Cir 1975 (cert denied US 96 S Ct 453 (1975)); Leasco Data Processing Equipment Corp v Maxwell, 468 F 2d 1326 (2d Cir 1972) and Grunenthal GmbH v Hotz, 712 F 2d 4231 (9th Cir 1983). An important difference is the scope of the insider dealing rules and the type of insider dealing which can give rise to a civil claim. The matter is complex.