American vs. European Approaches to Extraterritoriality in Civil Litigation

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15 June 2017: US Senate votes to impose new sanctions on Russia

Germany and Austria: “We cannot ... accept the threat of illegal extraterritorial sanctions being imposed on European companies that are participating in efforts to expand Europe’s energy supply network!”
Overview

A. What Is Extraterritoriality?
B. Extraterritoriality in Regulation
C. Extraterritoriality in Civil Litigation
D. The Way Forward?
What is Extraterritoriality?

- fact that a state reaches beyond its borders
- different types:
  - extraterritorial legislation ("jurisdiction to prescribe")
  - extraterritorial jurisdiction ("jurisdiction to adjudicate")
- extraterritoriality as a misnomer
- rather a question of degree:
  To what extent may a state regulate matters not exclusively of domestic concern?
What is Extraterritoriality?

• public international law allows extraterritoriality
  Permanent Court of International Justice, Lotus (1927)

• consequences:
  ➢ “effects doctrine”
    states are entitled to regulate events that affect their markets
  ➢ “genuine link”
    states can regulate any event that has a genuine link to their territory
Why Extraterritoriality?

- technology, deregulation, trade
- increasing interconnectedness of the world
- “debordering” of the state
EXTRATERRITORIALITY IN REGULATION
Extraterritoriality in Regulation

Extraterritoriality as the “law of the mighty”

<table>
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<tr>
<th>USA</th>
<th>EU</th>
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<td>• long history of extraterritorial regulation</td>
<td>• a newcomer in extraterritorial regulation</td>
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<td>• embargo legislation, e.g. Helms Burton Act (1996)</td>
<td>• extraterritorial financial law, e.g. EMIR (2013)</td>
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Extraterritoriality in Regulation

EU law, example 1:
European Market Infrastructure Regulation (EMIR)
Art 4(1)

“Counterparties shall clear all OTC derivative contracts
... (v) between two entities established in one or more third
countries that would be subject to the clearing
obligation if they were established in the Union,
provided that the contract has a direct, substantial and
foreseeable effect within the Union ...”
EU law, example 2: General Data Protection Regulation (GDPR) Art 5(2)

“This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:

(a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union...”
EXTRATERRITORIALITY IN CIVIL LITIGATION
Extraterritoriality in Civil Litigation

The reversal in US law:
preumption against extraterritoriality

Kiobel v. Royal Dutch Petroleum (2013)
RJR Nabisco v. European Community (2016)
Extraterritoriality in Civil Litigation

- different ways of interpreting the presumption against territoriality:
  1. internationalist rationale
  2. disengagement rationale
  3. double strategy
    - US wants to keep the extraterritorial option
    - but does not want to provide a forum for the whole world
EU: distinction between public law and private law

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<th>Public Law (=regulation)</th>
<th>Private Law (=sanctions)</th>
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<td>• often contained in special EU acts (e.g. EMIR, GDPR)</td>
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<td>• provide for their own scope of application</td>
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<td>• often contained in Member State law</td>
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<td>• EU conflicts rules apply (Brussels Ibis; Rome I and II)</td>
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Extraterritoriality in Civil Litigation

• examples for extraterritoriality in European private law:
  1. General Data Protection Regulation, Art 79
     • right to an effective judicial remedy for data breach
  2. Rating Agency Regulation, Art 35a
     • civil liability of rating agencies
  3. Overriding mandatory rules
     • application of extraterritorial public policy rules of the forum (Art. 9(2) Rome I, Art 16 Rome II)

➤ EU law applies extraterritorially without being called that way
Extraterritoriality in Civil Litigation

- even seemingly “neutral” EU conflicts rules contain an extraterritorial element
  1. internet jurisdiction
     - ECJ C-509/09 and C-161/10 eDate v. Martinez (2011)
  2. jurisdiction for prospectus liability suits
     - ECJ C-375/13 Kolassa (2015)
  3. rules on damages
     - e.g. Art. 4, 5, 7 Rome II

➢ The EU embraces extraterritoriality in civil litigation as a means to protect its citizens and interests
The Way Forward

• extraterritoriality is here to stay
• some limits must be respected
• these limits are not provided by
  ➢ public international law,
  ➢ the presumption against extraterritoriality, or
  ➢ traditional conflicts analysis
• must be developed on the basis of international morality (comity, global ordering, cooperation)
1. states should respect market regulation

- “As consumers and investors are choosing their markets, they choose the applicable law.”

- example:
  - law of place where product is bought
  - law of market on which securities are acquired
  - law of controller for data protection
2. States should apply their own law only where they accept that others apply their law under similar circumstances

- “Do unto others as you would have them do unto you.” (golden rule)
  - antitrust law
  - anti-bribery rules
  - rules against tax evasion
  - embargos
3. States should enforce foreign extraterritorial rules protecting similar concerns

- Principle of reciprocity (“scratch my back”)
  - rules against terrorism
  - rules against money laundering
  - rules against narcotics
  - rules against securities fraud
The Way Forward

Should states do more?

• Should they contribute to a “new world order” and
  ➢ provide a forum for human rights litigation?
  ➢ enforce global employment standards?
  ➢ allow climate change litigation?

• question of “universal jurisdiction and legislation”
Should states provide for universal jurisdiction and law?

**Con**
- no nation is the ‘custos morum’ of the whole world
- possible complications for international relations
- equal spending of national resources

**Pro**
- solution of global problems can only be achieved together
- where some states fail, others must step in
- collective action problem – one has to start
Thank you for your attention!

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