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Rethinking the Commercial Law Treaty.....*John F. Coyle* 343

In international commercial transactions, it is not always clear which state's law will apply to govern a particular contract. Historically, states have sought to address this problem by means of two types of treaties. The first aims to solve the problem by bringing about the substantive unification of commercial law across multiple jurisdictions; once the law is everywhere the same, then it no longer matters which state's law applies to govern the contract. The second aims to solve the problem in part by empowering the transacting parties to choose the law that will govern their contract; once these parties know that their choice of law will be respected by national courts, then the uncertainty as to the governing law goes away.

The conventional wisdom has long been that substantive unification represents the better approach to solving the problem of legal uncertainty. This Article argues that, in fact, a choice-of-law approach may be superior. It does so, first, by identifying weaknesses in two rationales frequently advanced in favor of substantive commercial law treaties—that they are uniquely able to reduce transaction costs and that they offer law uniquely suited to the needs of international commercial transactions. It then explains how a choice-of-law treaty could lead to the development of better commercial law that more accurately captures the preferences of parties engaged in international commerce by facilitating the development of an international market for commercial law.

Economic Loss, Punitive Damages, and the *Exxon Valdez* Litigation.....*Dr. Ronen Perry* 409

On March 24, 1989, the Exxon Valdez *ran aground on Bligh Reef off the Alaskan coast, spilling millions of gallons of crude oil into Prince William Sound. At the*

time, the spill was probably the worst environmental disaster in American history, and it sparked unusually extensive and complex litigation, as well as a vast academic literature. The Article uncovers a fundamental yet unnoticed inconsistency in American land-based and maritime tort law that surfaced through the Exxon Valdez *litigation. On the one hand, liability for purely economic losses was strictly limited under* Robins Dry Dock v. Flint, *leaving dozens of thousands of victims uncompensated. On the other hand, liability was expanded through an award of punitive damages to relatively few successful claimants. While these two components of the legal saga might not seem incompatible from a simple doctrinal perspective, they are inconsistent on a deeper level. The inconsistency transcends the* Exxon Valdez *litigation: It is a troubling trait of land-based and maritime tort law, which happened to surface when the Exxon oil submerged. After delineating the contours of the incongruity, the Article proposes a conceptual framework for resolution. Generally, it holds that if courts believe liability must be expanded beyond the limits set by the exclusionary rule in order to obtain certain levels of deterrence and retribution, relaxing the exclusionary rule and allowing more victims to recover is a more defensible path than awarding punitive damages to the already compensated few.*

Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act.....*Amy Deen Westbrook* 489

The Foreign Corrupt Practices Act (FCPA) was enacted over thirty years ago to prohibit bribery of foreign officials by U.S. persons. In the last few years, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have dramatically expanded the FCPA through a surge in its enforcement. Responding to complex developments in law, the global economy, and agency politics, the DOJ and the SEC have brought ten times as many cases as in prior years, and assessed hundreds of millions of dollars in penalties. At the same time, the substantive reach of the law has been extended through the increased enforcement. Thus, ad hoc enforcement actions, rather than legislation, regulation, or

judicial decision, have transformed the FCPA. In the absence of formal process or reasoned articulation, the scope of the law is currently unclear. Businesses have little official guidance in designing effective compliance programs and may be more likely to violate the FCPA. Unruly enforcement, and the resulting lack of clarity about what the FCPA requires, may compromise the law's efficacy. Therefore the DOJ and the SEC should encourage compliance by providing clear, general guidance about the scope of the FCPA. The Article concludes with specific questions about the FCPA that such guidance should resolve.

NOTES

ERISA Subrogation and the Controversy over *Sereboff*: Silencing the Critics, the Divided Bench Is a Legitimate Standard .....*Ashley Aunita Prebula Frazier* 579

ERISA protects employees in the administration of employer-sponsored benefit plans. When a party is injured by third parties and a health and welfare benefit plan governed by ERISA pays benefits, conflicts have arisen between insurers seeking subrogation and individuals seeking full recovery. Injured parties claim they should not have to reimburse insurers while insurers deny responsibility for damage caused by third parties. The Supreme Court set the standard for plan fiduciary rights to ERISA subrogation in Sereboff v. Mid Atlantic Medical Services, Inc. Sereboff *held that the plain wording of 29 U.S.C. § 1132(a)(3) means equitable relief available under the historically divided courts of law and equity. The Court reasoned that the statute specifies only "equitable relief" rather than specific categories of equitable relief, such as constructive trusts and equitable liens. Controversy continues as scholars criticize the standard as unsupported by ERISA and contrary to ERISA's purposes. This Note asserts that the standard is supported by statute and precedent:* Mertens v. Hewitt Associates *and* Great-West Life & Annuity Insurance Co. v. Knudson. *This Note concludes that the Court established a workable standard, the ultimate legitimacy of which lies in the equitable balance it achieves between fiduciary rights to*

enforce ERISA plan subrogation provisions and the protection of beneficiaries. The critics should accept the Court's equitable solution: equitable relief under the divided bench.

The Panic Defense and Model Rules Common Sense: A Practical Solution for a Twenty-first Century Ethical Dilemma ..... *Teresa Marie Garmon* 621

The attorney–client relationship remains one of the most highly regarded associations in society and is of indispensable importance for criminal defendants, but it is not a relationship that lasts forever. The Model Rules of Professional Conduct (Model Rules) not only allow breaking this affiliation, but also sometimes demand it. Yet, in other circumstances, the Model Rules and judicial custom may force an attorney to proceed with a representation—even in the face of fundamental disagreement with the core defense in a criminal case. Through the avenue of the gay panic defense, this Note explores how attorneys can become trapped between their own moral beliefs and professional responsibilities, thus exposing a larger conflict in professional ethics. How should an attorney proceed when a case demands a defensive strategy that the attorney finds reprehensible? Should counsel set aside personal views, arguing the best defense for a client no matter how deep his disagreement? This Note demonstrates that the best interest of a client may, at times, be best served by allowing the attorney to withdraw. Therefore, this Note proposes amending the Model Rules to explicitly allow attorneys to withdraw in the most extreme moral conflicts—an abort button to be used sparingly, but swiftly, so that a client's interests can be best served, even if by another lawyer.

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