

# A Comparative and Legislative Approach to Human Rights Litigation After *Kiobel*

As the impact of the Supreme Court's *Kiobel* decision continues to take shape before U.S. federal courts, one recent essay, entitled "Reviving Human Rights Litigation After *Kiobel*" (appearing in the near future in the October 2013 *American Journal of International Law*), encourages a comparative and legislative approach to the Alien Tort Statute. As Professors Vivian Grosswald Curran (Pitt Law) and David Sloss (Santa Clara Law) explain:

"This essay proposes a legislative response to *Kiobel* that would preserve some of the benefits of ATS human rights litigation, while minimizing the costs. Although the proposed legislation does not address the corporate liability questions that were at issue when the Supreme Court initially granted certiorari in *Kiobel*, the legislation would allow human rights victims to bring civil claims against perpetrators in some foreign-cubed cases. However, plaintiffs could not file such claims until after a federal prosecutor filed criminal charges against the perpetrator. This approach would allow federal executive officials to block claims that raised serious foreign policy concerns by choosing not to prosecute.

It would also promote a more robust dialogue between federal executive officials and groups representing prospective human rights plaintiffs. The proposed legislation is modeled partly on pending French legislation, as well as existing Belgian and German legislation. Statutes in all three countries share two critical features (assuming the French bill becomes law). First, victims of genocide, war crimes, and crimes against humanity have the right to initiate judicial proceedings against perpetrators who committed crimes extraterritorially, including in foreign-cubed cases. Second, public prosecutors in all three countries can block such judicial proceedings if they determine that a victim-initiated case would impair the state's foreign policy interests or would otherwise be contrary to public policy. The next section gives a brief overview of the foreign legislation. The concluding section explains and defends our proposal."

The full essay will be available soon at the *American Journal of International Law*

website (here). *[Editor's note: the PDF of the article has been removed, on copyright grounds, at the demand of the Journal.]*

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# **Lithuanian Court Asks ECJ whether Brussels Regime Forbids Recognition of Arbitral Antisuit Injunctions**

The Lithuanian Supreme Court has made a preliminary reference to the Court of Justice of the European Union asking whether the Brussels Regime forbids the recognition of arbitral anti-suit injunctions. In this case, after one party initiated court proceedings in Lithuania, the other party commenced arbitral proceedings in Sweden. The arbitral tribunal found that the Lithuanian court proceedings were in breach of the arbitral agreement and issued an antisuit injunction. The beneficiary of the injunction then sought recognition in Lithuania.

The Lithuanian Supreme Court is therefore asking the CJEU whether the Brussels Regime forbids arbitral antisuit injunction as well, and whether this might mean that the Brussels Regime would have impact on the recognition of arbitral awards issuing such injunctions.

See this report of John Gaffney @ OGEMID:

*In proceedings before the Lithuanian Supreme Court (LSC) concerning the recognition and enforcement of an arbitral award in SCC arbitral proceedings between Gazprom and the Lithuanian Ministry of Energy, the LSC has decided to make a preliminary reference to the Court of Justice of the EU (CJEU).*

## **Background**

*In 2004, Gazprom and the Ministry of Energy of Lithuania and other shareholders in the Lithuanian natural gas company, Lietuvos Dujos, entered*

*into a shareholders' agreement ("SHA"), which required all disputes arising out of or in connection with it to be resolved by arbitration under the Rules of the Stockholm Chamber of Commerce (SCC).*

*In 2011, the Ministry of Energy commenced proceedings before the Lithuanian courts in respect of the actions of Lietuvos Dujos in relation to the terms of a gas supply and gas transit concluded with Gazprom.*

*Gazprom commenced the SCC arbitration proceedings, arguing that Lithuania's attempt to litigate certain matters relating to the management of Lietuvos Dujos before the Lithuanian courts was a breach of SHA.*

*In a 2012 award, the arbitral tribunal (Derains, Nappert, Lamb) declared that the Ministry's initiation and prosecution of the Lithuanian court proceedings was partially in breach of the arbitration agreement contained in the SHA and ordered the Ministry to withdraw certain requests in the court proceedings and to limit its request in the same proceedings to measures that would not jeopardize the rights and obligations established in the SHA and that the Ministry could not request before an arbitral tribunal constituted pursuant to the arbitration clause of the SHA.*

### **West Tankers**

*In the West Tankers case, which also involved a preliminary reference concerning the relationship of arbitration and the Brussels I Regulation, but which involved a court-ordered anti-suit injunction, the CJEU held that it is incompatible with the Brussels I Regulation for a court of an EU Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement, where such proceedings come within the scope of the Regulation.*

### **Preliminary reference**

*In the Lithuanian proceedings brought by Gazprom to recognize and enforce the SCC award, the question arose, whether, by analogy with West Tankers - if an EU Member State court should not recognize a court-ordered anti-suit injunction, and if an arbitral tribunal were treated as an equivalent to a court - an EU Member State court should not enforce an arbitral award that*

*constitutes an anti-suit injunction or limits claims in court proceedings.*

*In this regard, the LSC decided to refer three questions to the CJEU:*

*1. Does an EU Member State court have a right to refuse to recognize an arbitration award, which constitutes a form of anti-suit injunction, on the grounds that such an award limits the jurisdiction of the national court to rule on its own competence in examining the case in accordance to the rules of jurisdiction of the Brussels I Regulation?*

*2. If the answer to 1. is yes, does the same apply in the case where the arbitral tribunal orders a party to limit its claims in proceedings before an EU Member State court?*

*3. Can a national court, for the purpose of ensuring the supremacy of the EU law and full effectiveness of the Brussels I Regulation, refuse to recognise the arbitral award if such an award limits the right of the national court to rule on its own jurisdiction and authority in a case that falls under the jurisdiction of Brussels I Regulation?*

*The premise of the questions, i.e., that arbitral tribunals should be considered as equivalent to courts, has a special resonance in EU law, considering that they are not considered as such under the Article 234 EC procedure itself.*

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# **The ECJ and ECHR Judgments on Povse and Human Rights - a Legislative Perspective**

*by Dorothea van Iterson*

*Dorothea van Iterson is a former Counsellor of legislation, ministry of Justice of the Netherlands[1]*

In the contributions published last month on this topic, the blame for what is felt to be the unsatisfactory operation of article 11 Brussels II bis is put on the parties who negotiated the relevant provisions of the Regulation. For those who are unfamiliar with the history of the Regulation and wish to participate in the debate about a possible recast of Brussels II bis, it may be helpful to recall how these provisions came into being[2].

The articles of Brussels II bis relating to the return of a child who has been wrongfully abducted reflect a political compromise which was reached with great difficulty after discussions of 2 ½ years in the Council working party dealing with the topic. This explains some of the ambiguities in the text. The main elements of the compromise were the following:

1) The 1980 Hague Child Abduction Convention, to which all Member States of the EU are parties, was preserved in relationships between Member States. Consequently, the courts of the Member State of the child's refuge continues to have jurisdiction in respect of requests for the return of an abducted child. The procedures under the 1980 Hague Convention seek to ensure a speedy voluntary return of the child. If a voluntary return cannot be secured, the courts of that State are required to hand down an order restoring the *status quo ante*[3]. There are very limited grounds for refusing the child's return. Return orders under the Convention are no judgments on the merits of custody. No decision on the merits may be taken by the courts of the child's State of refuge until it has been determined that the child is not to be returned under the Convention (article 16). As long as such determination has not been made, the courts of the child's habitual residence at the time of the removal are competent to deal with the merits of the custody issue. The conditions for the passage of jurisdiction as to the merits to the courts of the Member State of refuge are specified in article 10 of the Regulation.

2) Article 11, paras 2 to 5, Brussels II bis were agreed upon as a complement to the Hague system. They reflect policy guidelines developed over the years. These paragraphs were intended for the courts of the Member State of refuge of the child, not for the courts of the Member State of the child's habitual residence prior to the removal.

3) Article 11, paras 6 to 8, as included in the compromise, specifically address the situation in which the courts of the Member State of refuge have handed

down a non-return order based on article 13 of the Convention. The three paragraphs were accepted as a package. Paragraph 7 cannot be isolated from paragraphs 6 and 8. The competent court in the Member State of the child's habitual residence prior to the removal has to be informed of any non-return order given in the Member State of refuge. This court can then examine the merits of custody. The Council compromise did not purport to provide for immediate "automatic" enforceability abroad of a *provisional* return order handed down by those courts. "Any subsequent judgment which requires the return of the child", as referred to in paragraph 8, was to be understood as "any decision on the merits of custody which requires the return of the child"[4]. "Custody" comprises the elements stated in article 2, point 11, sub b, which corresponds to article 5 of the Hague Convention. It includes, among other rights and duties, the right to determine the child's residence.

4) Abolition of exequatur was accepted by way of an experiment for a very narrow category of judgments. According to the Council compromise, exequatur was to be abolished only for judgments *on the merits of custody* entailing the return of the child handed down following the procedural steps described in article 11, paras 6 and 7. It was considered that the issue of the child's residence should be finally resolved as part (or as a sequel) of the other custody arrangements and that the judgment on custody should put an end to the proceedings between the parents on the child's place of residence following the abduction. Successive provisional changes of residence were considered to be contrary to the child's interests.

5) Abolishing exequatur in this context means that once a certificate has been issued in accordance with article 42 Brussels II bis, the judgment is enforceable by operation of law in another Member State. No recourse can be had in the Member State of refuge to the grounds of non-recognition (and enforceability) stated in article 23. The tests mentioned in article 23 are carried out by a judge of the court which has handed down the judgment and who is asked to issue the certificate (article 42, second paragraph). The issuance of a certificate is therefore unlikely to be refused. The Aguirre/Pelz ruling of the ECJ has shown that questions may then arise about the statements made in the certificate.

6) "Enforceability by operation of law" means that the judgment is eligible for enforcement as if it had been given in the Member State where enforcement is sought (article 47 Brussels II bis). The judgment is not enforced "automatically",

as the procedures for enforcement are governed by the law of the requested Member State. The enforcement laws of the EU Member States were left untouched by the Brussels II bis Regulation. Many of those laws make enforcement conditional on a court decision in the requested State. Enforcement may be stayed or stopped in exceptional cases where human rights are in issue. The radical interpretation given by the ECJ in the Povse and Aguirre/Pelz rulings leaves us with questions regarding the meaning of article 47 and the actual approach to be taken by enforcement bodies if they find that there is an immediate danger for the child. Is it realistic to require them to enforce “automatically” a provisional order which contradicts an order of the same type which has just been handed down by the courts of their own country?

7) The implication of the Council compromise was that a *provisional* return order handed down by the courts of the Member State of the child’s habitual residence prior to the removal should be enforceable in the Member State of refuge *only* after the issuance of an exequatur in the latter State. The intention was that the checks provided for in article 23 should to be made in the exequatur proceedings.

8) The proceedings before the ECHR on Povse were about the judgment *on the merits of custody* which was finally handed down in Italy. See the ECHR judgment, point 69. The ECHR did not dwell on the provisional return order on which the ECJ answered a number of preliminary questions. Would the outcome of the ECHR proceedings have been the same if it had been asked to assess the provisional return order?

9) On the face of it, the ECJ’s ruling that article 11, para 8, Brussels II bis applies to a provisional return order of the courts of the Member State of habitual residence prior to the removal, seeks to reinforce the return mechanism of the 1980 Hague Convention. In reality it brings the EU closer to an abandonment of the Hague system. This is a matter for regret. If, in the forthcoming revision of Brussels II bis, exequatur were abolished in all matters relating to parental responsibility, the left-behind parent would resort to the courts of his own country immediately rather than seeking to obtain a return order in the State of refuge. It may be questioned whether such an approach would be conducive to balanced solutions which would, in the end, be accepted by the parties involved in an abduction case[5].

[1] The views expressed in this post are personal views of the author.

[2] For a detailed account see Peter McEleavy, *The New Child Abduction Regime in the European Union*, *Journal of Private International Law*, 2005, Vol.1, No.1.

[3] See the Explanatory Report by E. Perez-Vera, para 106, which states: “..the compulsory return of the child depends in terms of the Convention on a decision having been taken by the competent authorities of the requested State”.

[4] Cf. the ECJ’s correct statement in the Povse judgment that a “judgment on custody that does not entail the return of the child” in article 10 is to be understood as a final decision.

[5] See, on another regrettable development, Mr J.H.A. van Loon and S. De Dijcker, LL.M., *The role of the International Court of Justice in the Development of Private International Law*, *Mededelingen van de Koninklijke Nederlandse Vereniging voor Internationaal Recht*, No. 140, 2013, p. 109-110.

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# **Cuniberti on the New Provision of the Unidroit Principles on Contracts Infringing Mandatory Rules**

I (University of Luxembourg) have posted *A Critical Appraisal of Article 3.3.1 of the PICC on Contracts Infringing Mandatory Rules (Le Nouvel Article 3.3.1 Des Principes Unidroit 2010 Sur Le Contrat Violant Une Règle Impérative: Un Regard Critique Du Point De Vue Du Droit International Privé)* on SSRN. The English abstract reads:

*The 2010 UNIDROIT Principles of International Commercial Contracts include*




*several new provisions on illegality. This paper offers a critical appraisal of one of them, Article 3.3.1 on Contracts Infringing Mandatory Rules. First, the paper wonders the extent to which applicable mandatory rules will tolerate the attempt of Article 3.3.1 to regulate their application. The paper then focuses on the distinction between effects of the infringement upon the contract expressly prescribed by the applicable mandatory rule and effects non expressly prescribed. It argues that, while the distinction makes sense in the context of the American Restatement (Second) on Contracts, which inspired the drafters, it does not in the context of a private instrument which will essentially be used by arbitrators to decide particular disputes. Finally, the paper discusses the relevance of the distinction between effects of the infringement of a mandatory rule upon the contract and the right to exercise remedies under the contract.*

*Note: Downloadable document is in French.*

The paper is forthcoming in the *Uniform Law Review*.

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## **Fourth Issue of 2013's ICLQ**

The fourth issue of *International and Comparative Law Quarterly* for 2013  includes several pieces on private international law.

Simon Camilleri, Recast 12 of the Recast Regulation: a New Hope?

*This article seeks to consider the EU's new approach to arbitration as set out in Recital 12 of the Brussels I Regulation (Recast). The article first considers the Court of Justice of the European Union's West Tankers decision and the foremost English authority applying that case (The Wadi Sudr) in order to provide some background to the problem which gave rise to Recital 12. Following this, the article goes on to consider whether Recital 12 does in fact act as a solution to the problem created by the West Tankers decision.*

Justine Pila, The European Patent: an Old and Vexing Problem.

*In December 2012, the European Parliament supported the creation of a European patent with unitary effect. For the next year at least, the international patent community will be on the edge of its proverbial seat, waiting to see whether the proposal becomes a reality. If it does, it will be a significant event in both the long and rich history of patent law, and in the equally rich and understudied history of attempts to create a European patent system. In this article I consider the three post-war European patent initiatives of the most direct and enduring relevance in that regard with a view to answering the following questions. First, what drove them? Second, what issues confronted them? And third, how were those issues resolved and with what ultimate effect? In the concluding section I relate the discussion back to the present by offering some remarks on the current European patent proposal in light of the same.*

Csongor István Nagy, *The Application Ratione Temporis of the Insolvency Regulation in the New Member States.*

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## **Third Issue of 2013's Belgian PIL E-Journal**

The third issue of the Belgian bilingual (French/Dutch) e-journal on private international law *Tijdschrift@ipr.be / Revue@dipr.be* is out. It does not contain any articles, only case law.

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## **PILAGG/LSE Round Table Seminar**

*PILAGG (SciencesPo) / Transnational Law Project (LSE)*

Tuesday 19 November 2013

**Private Citizens of the World.  
Citizenship beyond the State: Past, Present and Future.**

Speaker:

Prof. Karen Knop, University of Toronto (Law)

Discussants:

Dr. Annabel Brett, University of Cambridge (History)

Dr. Floris De Witte, LSE (Law)

Date & time: Tuesday 19 November 2013, 16:00 - 18:00

Venue:

London School of Economics and Political Science

Old Building, Graham Wallas Room (5th floor)

Houghton Street, London, WC2A 2AE

All PILAGG / conflictflaws.net subscribers are very welcome to attend. Please contact the organizers - Jacco Bomhoff ([j.a.bomhoff@lse.ac.uk](mailto:j.a.bomhoff@lse.ac.uk)) or Jan Kleinheisterkamp ([j.kleinheisterkamp@lse.ac.uk](mailto:j.kleinheisterkamp@lse.ac.uk)) - beforehand. We will provide you with an invitation to show to LSE security staff upon your arrival, and with directions to the seminar room.

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## **What Are the Most Influential English Language Journal Articles or Papers in Private International Law?**

As part of an ongoing research project, I am in the midst of compiling the most influential English language papers in the field of private international law. Given the expertise of our readership, I wanted to solicit your thoughts on this question. Please feel free to post responses in the comments or via email to me. I

will happily share the compiled results in a future post. Many thanks!

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## **On MNCs and Human Rights: an Overall Picture (Article)**

“Las Empresas Multinacionales y Su Responsabilidad en Materia de Derechos Humanos: Una Visión de Conjunto” ([click here](#)) is the title of a new article by Professor Zamora Cabot, of the University of Castellón, on multinational corporations and human rights.

An Introductory Part (Part I), places this work in the field of governance of global public interests. In Part II the author critically reviews the recent decision of the USSC in *Kiobel* case, contesting the projection to the human rights ATCA litigation of the canon against the extraterritoriality of laws as applied in *Morrison*; the history-based interpretation made by Chief Justice Roberts is also contested in that it fossilizes the ATCA in its origins, thus difficulting a judicial reading of the Act adapted to our time. In Part (III), after having considered several cases in some European countries, the author evaluates critically the European legal framework, especially in relation to the jurisdiction of the Courts and the applicable law. In Part (IV) Professor Zamora Cabot studies a new interesting field: the Extraterritorial Obligations of States (ETOs) and how they operate as regard the responsibility of transnational corporations, either through international regulations or by national initiatives; among the latter the author highlights some Acts passed in the United States on trafficking of human beings or on transparency in the supply chain. In Part (V), the author focuses on the extractive industry and its problems related to indigenous minorities, as well as on the implementation in Spain of the United Nations Guiding Principles by means of a National Plan on Business and Human Rights being currently developed. Professor Zamora Cabot finishes with a Part VI, where he recalls his view on the US *Kiobel* case as a step backward in the field of human rights protection; however, as a partial compensation to this judicial decision, he highlights the increasing awareness of the problem in many other countries,

where public authorities and other stakeholders are advancing some proper solutions to the challenges posed by transnational corporations regarding the protection and development of human rights.

Ps: this article adds to one of the main lines of research of Prof. Zamora Cabot, focused on the liability of multinational enterprises as regards human rights. The work reflects a Report presented to the 25th Congress of the AEPDIRI, celebrated in September 2013 in the University Pompeu Fabra of Barcelona.

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## **International Seminar on Private International Law, Madrid 2014. Call for Papers**

A new edition of the International Seminar on Private International Law (Universidad Complutense de Madrid) organized by Prof. Fernández Rozas and Prof. de Miguel Asensio, will take place on the 8 and 9 May 2014, at the faculty of Law of the Universidad Complutense of Madrid - although some sessions may be held elsewhere in Madrid.

The seminar will combine a general approach focusing on recent developments and future prospects in various fields of private international law, and a specific one, meaning that special attention is to be paid to issues which are currently being discussed, or which are in need of particular study. In this edition special attention will be given to the legislative process of revision affecting the EU insolvency regulation, to the unification of private international law in matrimonial matters, to and the forthcoming implementation of the Brussels I bis Regulation. New trends outside Europe, with special attention to projects identified in America, will also be addressed.

As in previous editions the main lectures of the seminar will be in charge of well-

known scholars, such as Stefania Bariatti (Milano), Dário Moura Vicente (Lisbon) Hans Van Loon (former General Secretary of the Hague Conference), Bertrand Ancel (Paris II) and Johan Erauw (Gent). Nonetheless, the seminar is open to all scholars, either Spanish or foreigners, willing to participate with brief presentations. Papers can be presented in Spanish, English or French. Proposals including both the title and a brief summary are to be sent as soon as possible, and at any rate no later than the 2<sup>nd</sup> December, to Patricia Orejudo Prieto (patricia.orejudo@der.ucm.es). Subject to prior scientific evaluation, papers will be included in volume XIII (2013) of the *Anuario Español de Derecho Internacional Privado*. The final version of the accepted presentations is to be submitted before 14 April, 2014.

The registration deadline to attend the seminar will be announced in due time.

For more information see [here](#).