ECJ Rules on Impact of Opposition to European Order for Payment on Jurisdiction

On 13 June 2013, the Court of Justice of the European Union ruled in Goldbet Sportwetten GmbH v. Massimo Sperindeo (Case C 144/12) on the impact of opposition to a European Order of Payment on jurisdiction under the Brussels I Regulation.

European Orders for Payment are issued ex parte. Defendants are entitled to oppose them. If they do, the case is handled under traditional rules of civil procedure. An issue is whether defendants who merely oppose European Orders, but do not challenge jurisdiction at the same time, submit to the jurisdiction of the court which issued the European Order under Article 24 of the Brussels I Regulation.

The Case

On 19 April 2010, Mr Sperindeo, acting through his lawyer, lodged a statement of opposition to the European order for payment within the prescribed time-limit. The grounds for his opposition were that Goldbet's claim was unfounded and that the sum claimed was not payable.

Prompted by that statement of opposition, the Bezirksgericht für Handelssachen Wien referred the case to the Landesgericht Innsbruck (Innsbruck Regional Court), taking the view that the latter court was the competent court for the ordinary civil procedure within the meaning of Article 17(1) of Regulation No 1896/2006.

Before the Landesgericht Innsbruck, Mr Sperindeo pleaded, for the first time, a lack of jurisdiction of the Austrian courts, on the ground that he was domiciled in Italy. Goldbet contended that the Landesgericht Innsbruck had jurisdiction as the court for the place of performance of the obligation to pay a sum of money, in accordance with Article 5(1)(a) of Regulation No 44/2001. In any event, according to Goldbet, the Landesgericht Innsbruck had jurisdiction under Article 24 of Regulation No 44/2001, since Mr Sperindeo, having failed to plead lack of

jurisdiction when he lodged a statement of opposition to the European order for payment in question, had entered an appearance within the meaning of that article.

The Judgment

The ECJ ruled that the statement of opposition to the European Order can only produce the effects prescribed by Regulation No 1896/2006.

> *29 [Regulation No 1896/2006] is not adversarial. The defendant will not be aware that the European order for payment has been issued until it is served on him. As is apparent from Article 12(3) of Regulation No 1896/2006, it is only then that he is advised of his options either to pay the amount indicated in that order to the claimant or to oppose the order in the court of origin.*
>
> *30 The defendant's option of lodging a statement of opposition is thus designed to compensate for the fact that the system established by Regulation No 1896/2006 does not provide for the defendant's participation in the European order for payment procedure, by enabling him to contest the claim after the European order for payment has been issued.*
>
> *31 However, where a defendant does not contest the jurisdiction of the court of the Member State of origin in his statement of opposition to the European order for payment, that opposition cannot produce, in regard to that defendant, effects other than those that flow from Article 17(1) of Regulation No 1896/2006. Those effects consist in the termination of the European order for payment procedure and in leading – unless the claimant has explicitly requested that the proceedings be terminated in that event – to the automatic transfer of the case to ordinary civil proceedings.*
>
> *33 It will also be recalled, as is evident from Article 16(1) of Regulation No 1896/2006 and from recital 23 in the preamble thereto, that the defendant may use the standard form set out in Annex VI to that regulation in order to enter a statement of opposition to the European order for payment. That form does not provide for the option of contesting the jurisdiction of the courts of the Member State of origin.*

The ECJ also held the European Order and proceedings following opposition are

separate.

> *38 unlike the circumstances giving rise to that judgment, in which the defendant had put forward arguments on the substance of the case in ordinary civil proceedings, the arguments on the substance of the case were put forward in the main proceedings in this instance in the context of a statement of opposition to a European order for payment. Such a statement of opposition coupled with those arguments cannot be regarded, for the purposes of determining the court having jurisdiction under Article 24 of Regulation No 44/2001, as the first defence put forward in the ordinary civil proceedings that follow the European order for payment procedure.*
>
> *39 To consider such a statement of opposition as being equivalent to the first defence would be tantamount to acknowledging, as the Advocate General noted at point 36 of his Opinion, that the European order for payment procedure and the subsequent ordinary civil proceedings, in principle, constitute the same procedure. However, such an interpretation would be difficult to reconcile with the fact that the first of those procedures follows the rules laid down by Regulation No 1896/2006, whereas the second continues in accordance with the rules of ordinary civil procedure, as is evident from Article 17(1) of that regulation. Such an interpretation would also fail on account of the fact that although – in the absence of any challenge to international jurisdiction by the defendant – those civil proceedings take their course in the Member State of origin, they will not necessarily be conducted in the same court as that in which the European order for payment procedure is pursued.*

Final Ruling:

> *Article 6 of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, read in conjunction with Article 17 thereof, must be interpreted as meaning that a statement of opposition to a European order for payment that does not contain any challenge to the jurisdiction of the court of the Member State of origin cannot be regarded as constituting the entering of an appearance within the meaning of Article 24 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and the fact that the*

defendant has, in the statement of opposition lodged, put forward arguments relating to the substance of the case is irrelevant in that regard.

European Data Protection Authorities Order Google to Comply with European Data Protection Laws

The French data protection authority has issued the following statement this morning.

From February to October 2012, the Article 29 Working Party ("WP29") investigated into Google's privacy policy with the aim of checking whether it met the requirements of the European data protection legislation. On the basis of its findings, published on 16 October 2012, the WP29 asked Google to implement its recommendations within four months.

After this period has expired, Google has not implemented any significant compliance measures.

Following new exchanges between Google and a taskforce led by the CNIL, the Data Protection Authorities from France, Germany, Italy, the Netherlands, Spain and the United Kingdom have respectively launched enforcement actions against Google.

The investigation led by the CNIL has confirmed Google's breaches of the French Data Protection Act of 6 January 1978, as amended (hereinafter "French Data Protection Act") which, in practice, prevents individuals from knowing how their personal data may be used and from controlling such use.

In this context, the CNIL's Chair has decided to give formal notice to Google Inc., within three months, to:

- Define specified and explicit purposes to allow users to understand practically the processing of their personal data;
- Inform users by application of the provisions of Article 32 of the French Data Protection Act, in particular with regard to the purposes pursued by the controller of the processing implemented;
- Define retention periods for the personal data processed that do not exceed the period necessary for the purposes for which they are collected;
- Not proceed, without legal basis, with the potentially unlimited combination of users' data;
- Fairly collect and process passive users' data, in particular with regard to data collected using the "Doubleclick" and "Analytics" cookies, "+1" buttons or any other Google service available on the visited page;
- Inform users and then obtain their consent in particular before storing cookies in their terminal.

This formal notice does not aim to substitute for Google to define the concrete measures to be implemented, but rather to make it reach compliance with the legal principles, without hindering either its business model or its innovation ability.

If Google Inc. does not comply with this formal notice at the end of the given time limit, CNIL's Select Committee (formation restreinte), in charge of sanctioning breaches to the French Data Protection Act, may issue a sanction against the company.

The Data Protection Authorities from Germany, Italy, the Netherlands, Spain and the United Kingdom carry on their investigations under their respective national procedures and as part of an international administrative cooperation.

Therefore,

- The Spanish DPA has issued to Google his decision today to open a sanction procedure for the infringement of key principles of the Spanish Data Protection Law.
- The UK Information Commissioner's Office is considering whether Google's updated privacy policy is compliant with the UK Data Protection Act 1998. ICO will shortly be writing to Google to confirm their preliminary findings.

- The Data Protection Commissioner of Hamburg has opened a formal procedure against the company. It starts with a formal hearing as required by public administrative law, which may lead to the release of an administrative order requiring Google to implement measures in order to comply with German national data protection legislation.
- As part of the investigation, the Dutch DPA will first issue a confidential report of preliminary findings, and ask Google to provide its view on the report. The Dutch DPA will use this view in its definite report of findings, after which it may decide to impose a sanction.
- The Italian Data Protection Authority is awaiting additional clarification from Google Inc. after opening a formal inquiry proceeding at the end of May and will shortly assess the relevant findings to establish possible enforcement measures, including possible sanctions, under the Italian data protection law.

The Kiobel Judgment of the U.S. Supreme Court and the Future of Human Rights

In the aftermath of the *Kiobel* judgement of the U.S. Supreme Court a number of questions related to the access to justice in defence of human rights remain unanswered. The Max Planck Institute Luxembourg has decided to address the topic in a one-day seminar gathering academic, experts and professionals from Europe (Professors B. Hess, H. Muir Watt, C. Kessedjian, N. Jägers, P. Kinsch, Dr. C. Feinaeugle and A. Sessler) as well as from the U.S. (Professors D. Stewart and D.T. Childress III). We also expect the attendance of representatives of other stakeholders, such as NGOs.

The event will take place in Luxembourg on July, 4th; click here to see the program.

Venue: Max Planck Institute (4 Alphonse Weicker, L 2721). Language: English.

To register just send an email to registration@mpi.lu

Call for Papers: ASIL-ESIL-Rechtskulturen Workshop on International Legal Theory

Politics and Principle in International Legal Theory

Call for Papers

On November 14–15, 2013, the University of Michigan Law School will host the Second Annual ASIL–ESIL–*Rechtskulturen* Workshop on International Legal Theory. It is a collaboration between Michigan Law School, the Interest Groups on International Legal Theory of the American and European Societies of International Law, and the *Rechtskulturen* Program, an initiative of the *Wissenschaftskolleg zu Berlin* at Humboldt University Law School. The principal aim of this collaboration is to facilitate frank discussion among legal scholars from diverse backgrounds and perspectives on the fundamental theoretical questions that confront the discipline today.

American and European legal scholars often approach international legal theory with different assumptions about the relationship between law and politics, as well as the relationship between normative theory and positive jurisprudence. Positivist, realist, natural-law, critical, feminist, TWAIL and policy-oriented approaches are present in both American and European international legal scholarship, yet the prevalence and salience of these approaches for international lawyers on either side of the Atlantic differ. In an effort to both better understand and move beyond these regional dynamics, workshop participants will discuss the role of “politics” and “principle” in international legal discourse from a variety of perspectives. Examples of topics that might be relevant include:

- How should scholars and practitioners of international law negotiate the competing demands of “politics” and “principle”? How do they actually negotiate such demands?
- What role does politics (or the study of international relations) play in law and international legal scholarship? What role should it play?
- How does law inform politics (or the study of international relations)? What role should law play?
- What role remains for principle(s) in an era of post-modern value-relativism and global legal pluralism?

We anticipate that the workshop will generate new perspectives on these enduring theoretical questions, as well as intensify transatlantic engagement on emerging debates within international legal theory. Addressing a variety of topics in constructive confrontations beyond comparison, we will seek to overcome transatlantic divides and to open new avenues in global international law scholarship.

Selection Procedure and Workshop Organization

Interested participants should submit an abstract (800 words maximum) summarizing the ideas they propose to develop for presentation at the workshop. Submissions of all proposals that engage the workshop’s theme are encouraged. Papers that have been accepted for publication prior to the workshop are in principle eligible for consideration, provided that they will not appear in print before the workshop. Papers will be chosen for presentation by peer review, taking into account not only the need for a balance of topics and viewpoints, but also for geographic diversity among the participants.

Although discussants will be assigned to introduce the papers at the workshop, all participants will be expected to read all of the contributions in advance and come prepared to contribute to the discussion. The organizers hope that the event will serve as a showcase for innovative research on international legal theory, while at the same time strengthening personal and professional ties between scholars on either side of the Atlantic, and beyond.

Abstract submissions should be sent to asil.esil.rechtskulturen@gmail.com by July 21, 2013. Successful applicants will be notified by August 12, 2013. Papers must be fully drafted and ready for circulation by October 14, 2013. Applicants are

strongly encouraged to assess all possible options with regard to receiving funding from the institutions with which they are affiliated. If funding cannot be obtained in this way, they should indicate as part of their submission whether they will require financial assistance to cover the costs of travel and accommodation for the event.

Questions regarding the workshop may be directed to:

Evan Criddle	ejcriddle@wm.edu
Jörg Kammerhofer	joerg.kammerhofer@jura.uni-freiburg.de
Alexandra Kemmerer	alexandra.kemmerer@wiko-berlin.de
Julian Davis Mortenson	jdmorten@umich.edu
Kristina Daugirdas	kdaugir@umich.edu

Kleinschmidt on the European Certificate of Succession

Jens Kleinschmidt (Max Planck Institute for Comparative and PIL, Hamburg) has Optionales Erbrecht: Das Europäische Nachlasszeugnis als Herausforderung an das Kollisionsrecht (The European Certificate of Succession: An Optional Instrument as a Challenge for Private International Law) posted on SSRN.

> *The legal systems of the EU Member States have developed varying instruments that enable an heir or legatee to prove his position and protect third parties dealing with the holder of such an instrument ("certificates of succession"). However, these instruments are often of little use when presented abroad. In cases where the estate is located in more than one country, heirs or legatees are therefore required to apply for several national certificates. This will cost them time and money. The EU Succession Regulation (Reg. 650/2012) tackles this unsatisfying situation in two ways. On the one hand, Art. 59 on the*

"acceptance" of authentic instruments may promote the circulation of national certificates of succession. Under this approach, however, national certificates retain the effects attributed to them by their country of origin. On the other hand, therefore, Arts. 62 ff. create a supranational European Certificate of Succession (ECS) which may be applied for if heirs or legatees of a legatum per vindicationem need to invoke their status or exercise their rights in another Member State. The ECS does not replace the national systems but rather constitutes an optional instrument that may be applied for in lieu of a national certificate. In order to fulfil its purpose, the content of the ECS must be based on uniform private international law rules. Here, despite the harmonization efforts of the Regulation, three areas present particular challenges: (i) the relationship with conflicts rules for matrimonial property, (ii) dealing with legal institutes unknown to the legal system of the Member State where the ECS is presented, and (iii) determining the law applicable to incidental questions. Uniform interpretation and uniform characterization can only be safeguarded by the ECJ, to which, however, not all national authorities competent for issuing an ECS may refer their questions for a preliminary ruling. The ECS is based on a set of uniform rules on competence and procedure that respect the autonomy of the Member States and at the same time ensure that the ECS may perform its tasks. The question remains whether the ECS will be regarded as an attractive option compared to the existing national certificates. The far-reaching, uniform effects of the ECS and the advantages brought about by standardization regarding language and content speak in favour of the ECS. However, in certain areas a national certificate may afford a more comprehensive protection. Moreover, the implementation of the ECS into practice will have to allay the fear that its issuance may be excessively cumbersome.

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Note: Downloadable document is in German.

The paper is forthcoming in the *Rabel Journal of Comparative and International*

Private Law (RabelsZ).

ELI – UNIDROIT Joint Project on Civil Procedure

The European Law Institute has announced its intention to explore whether to launch a joint project with UNIDROIT on European civil procedure building on the ALI – UNIDROIT Principles of Transnational Civil Procedure.

> *On 23 May, ELI representatives John Sorabji, Matthias Storme, Remo Caponi and Christiane Wendehorst attended a meeting in Rome kindly hosted by UNIDROIT.*
>
> *The meeting focused on the development of a joint project between the ELI and UNIDROIT in cooperation with the American Law Institute (ALI) on the topic of European Civil Procedure.*
>
> *This meeting enabled various parties of this joint venture to dicuss the scope and aims of the project, ahead of a workshop to be held on 18-19 October where ALI representatives will also be present.*
>
> *The productive meeting resulted in a draft agenda for October's workshop. It is hoped that the two day event, which will feature a public conference and an expert seminar, will see plans and targets officially established.*
>
> *The seminar on 19 October will only be open to those invited, but any ELI Fellows who are interested in this field should register their interest with the Secretariat, who will pass this information on to the organisers.*

South African Constitutional Court rules on taking of evidence

It is not every day that a Constitutional Court rules on a matter of evidence. The case *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others* concerned the taking of evidence in South Africa for a criminal investigation in Belgium. It was on a matter of common interest in South Africa and Belgium: diamonds. In the course of a criminal investigation in Belgium, the authorities issued a letter of request for evidence in South Africa. This concerned evidence that had to be produced by Brinks Southern Africa, established in South Africa. This company was not involved in the suspected criminal activities, but transported diamonds for Tulip from Angola and Congo to the United Arab Emirates. Tulip was the intermediary of Omega, the Belgian company who allegedly imported the diamonds under false certificates to conceal their real value and therefore the company's taxable profit. The documents that the Belgian authorities sought to be transferred concerned invoices by Brinks Southern Africa to Tulip.

The request was approved by the Minister of Justice and given to a magistrate to carry out. The magistrate issued a subpoena to an employee at Brinks. Before she could submit the documents, Tulip got wind of the request. After negotiations and a temporary interdict by the High Court for Brinks not to transfer the documents, Tulip approached the court for a review of the approving of the request. The issue then arose whether Tulip had standing under the Constitution or under common law to bring these proceedings.

Some of the issues in the case concern criminal procedure law, but the matter of standing is also of interest for civil cases, to my mind.

The judgment (issued on 13 June 2013) is available on the website of the Constitutional Court and on the Legalbrief site.

UK Supreme Court Rules on Anti Suit Injunctions

Yesterday, the Supreme Court of the United Kingdom ruled in Ust-Kamenogorsk Hydropower Plant JSC (Appellant) v AES Ust-Kamenogorsk Hydropower Plant LLP (Respondent) that English courts have jurisdiction to injunct the commencement or continuation of legal proceedings brought in a foreign jurisdiction outside the Brussels Regulation/Lugano regime where no arbitral proceedings have been commenced or are proposed.

The Court issued the following Press Summary.

Background

The appellant is the owner of a hydroelectric power plant in Kazakhstan. The respondent is the current operator of that plant. The concession agreement between the parties contains a clause providing that any disputes arising out of, or connected with, the concession agreement are to be arbitrated in London under International Chamber of Commerce Rules. For the purposes of this appeal the parties are agreed that the arbitration clause is governed by English law. The rest of the concession agreement is governed by Kazakh law.

Relations between the owners and holders of the concession have often been strained. In 2004 the Republic of Kazakhstan, as the previous owner and grantor of the concession, obtained a ruling from the Kazakh Supreme Court that the arbitration clause was invalid. In 2009 the appellant, as the current owner and grantor of the concession, brought court proceedings against the respondent in Kazakhstan seeking information concerning concession assets. The respondent's application to stay those proceedings under the contractual arbitration clause was dismissed on the basis that the Kazakh Supreme Court had annulled the arbitration clause by its 2004 decision.

Shortly thereafter the respondent issued proceedings in England seeking (a) a declaration that the arbitration clause was valid and enforceable and (b) an anti-

suit injunction restraining the appellant from continuing with the Kazakh proceedings. An interim injunction was granted by the English Commercial Court and the appellant subsequently withdrew the request for information which was the subject of the Kazakh proceedings. However, the respondent remained concerned that the appellant would seek to bring further court proceedings in Kazakhstan in breach of the contractual agreement that such disputes should be subject to arbitration in London. As a result the respondent continued with the proceedings. The English Commercial Court found that they were not bound to follow the Kazakh court's conclusions in relation to an arbitration clause governed by English law and refused to do so. The Commercial Court duly granted both the declaratory and final injunctive relief sought.

The appellant appealed to the Supreme Court of the United Kingdom on the grounds that English courts have no jurisdiction to injunct the commencement or continuation of legal proceedings brought in a foreign jurisdiction outside the Brussels Regulation/Lugano regime where no arbitral proceedings have been commenced or are proposed.

Judgment

The Supreme Court unanimously dismisses the appeal. The English courts have a long-standing and well-recognised jurisdiction to restrain foreign proceedings brought in violation of an arbitration agreement, even where no arbitration is on foot or in contemplation. Nothing in the Arbitration Act 1996 ("the 1996 Act") has removed this power from the courts. The judgment of the court is given by Lord Mance.

Reasons

- An arbitration agreement gives rise to a 'negative obligation' whereby both parties expressly or impliedly promise to refrain from commencing proceedings in any forum other than the forum specified in the arbitration agreement. This negative promise not to commence proceedings in another forum is as important as the positive agreement on forum [21-26].
- Independently of the 1996 Act the English courts have a general inherent power to declare rights and a well-recognised power to enforce the negative aspect of an arbitration agreement by injuncting foreign proceedings brought in breach of an arbitration agreement even where

arbitral proceedings are not on foot or in contemplation [19-23].

- There is nothing in the 1996 Act which removes this power from the courts; where no arbitral proceedings are on foot or in prospect the 1996 Act neither limits the scope nor qualifies the use of the general power contained in section 37 of the Senior Courts Act 1981 ("the 1981 Act") to injunct foreign proceedings begun or threatened in breach of an arbitration agreement [55]. To preclude the power of the courts to order such relief would have required express parliamentary provision to this effect [56].
- The 1996 Act does not set out a comprehensive set of rules for the determination of all jurisdictional questions. Sections 30, 32, 44 and 72 of the 1996 Act only apply in circumstances where the arbitral proceedings are on foot or in contemplation; accordingly they have no bearing on whether the court may order injunctive relief under section 37 of the 1981 Act where no arbitration is on foot or in contemplation [40].
- The grant of injunctive relief under section 37 of the 1981 Act in such circumstances does not constitute an "intervention" as defined in section 1(c) of the 1996 Act; section 1(c) is only concerned with court intervention in the arbitral process [41].
- The reference in section 44(2)(e) of the 1996 Act to the power of the court to grant an interim injunction "for the purposes of and in relation to arbitral proceedings" was not intended to exclude or duplicate the court's general power to grant injunctive relief under section 37 of the 1981 Act [48].
- Service out of the jurisdiction may be affected under Civil Procedure Rule 62.2 which provides for service out where an arbitration claim affects arbitration proceedings or an arbitration agreement; this provision is wide enough to embrace a claim under section 37 to restrain foreign proceedings brought or continued in breach of the negative aspect of an arbitration agreement [49].

H/T: Dominic Pellew

EU Regulation on Mutual Recognition of Protection Measures in Civil Matters

In its 3244th meeting, held in Luxembourg on 6 June 2013, **the JHA Council adopted the regulation on mutual recognition of protection measures in civil matters**, proposed by the Commission in 2011 (see our post by *Marta Requejo* here). The text of the regulation, subject to the ordinary legislative procedure, had been previously adopted by the European Parliament at first reading on 22 May 2013, introducing a number of amendments to the Commission's proposal that were the result of a compromise reached with the Council (the full procedure file is available on the OEIL website; the key events of the legislative history have been reported by *Pietro Franzina* and *Ilaria Aquironi* on Aldricus).

Here's an excerpt of the Council's press release:

> *The regulation will enter into force on the twentieth day following that of its publication in the Official Journal and shall apply from 11 January 2015. The United Kingdom and Ireland have decided to take part in the application and the adoption of this instrument.*
>
> *Denmark will not be bound by it or subject to its application.*
>
> ***What's new?***
>
> *The regulation will apply to protection measures ordered with a view to protecting a person when there exist serious grounds for considering that that person's life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk, for example as to prevent any form of gender-based violence and violence in close relationships, such as physical violence, harassment, sexual aggression, stalking, intimidation or other forms of indirect coercion. It is important to underline that this regulation will apply to all victims irrespective of whether they are victims of gender-based violence.*
>
> *The national legal traditions in the area of protection measures are highly*

diverse. In some national laws protection measures are regulated by civil law, in others by criminal law and some regulate them under administrative law.

A European Sister Judgment for Kiobel?

***An analysis of the Versailles Court of Appeal* case AFPS and OLP v. Alstom and Veolia,** by Elise Maes, Research fellow of the Max Planck Institute Luxembourg

On 22 March 2013, the Court of Appeal of Versailles (France) ruled in the case *AFPS and OLP v. Alstom and Veolia* on the civil liability of two French companies for their role in the alleged illegal construction of a light rail system in the occupied West Bank in Israel.

Facts

In 2000, the Israeli company Citypass Limited was established, which consists of four Israeli companies and two French companies (Alstom Transport and Connex, which operated under the name Veolia Transport as of 2006). Citypass signed in 2004 a public service concession contract with the state of Israel to design, manufacture, exploit and maintain a light rail system. Further on, Alstom and Veolia signed additional contracts with Citypass, regulating the specific rights and obligations in the execution of the concession contract. Alstom and Veolia were however not a party to the general concession contract between Citypass and the State of Israel.

The light rail system connects the City of Jerusalem with the West Bank, which is occupied by Israel. The construction of this transportation system was highly criticised by pro-Palestinian movements, who stated that this project abetted the Israeli occupation. One of these pro-Palestinian groups, the AFPS (l'Association France Palestine Solidarité), filed a claim in 2007 against Alstom and Veolia

before a French lower court (*tribunal de grande instance de Nanterre*). Later that year the OLP (l'Organisation de Libération de la Palestine) joined the lawsuit voluntarily and became co-plaintiff. The plaintiffs asserted that the state of Israel illegally occupied Palestinian territory and therefore the construction of the light rail, which continues the alleged illegal Jewish colonisation, is in itself illegal and thus violates several international law provisions. The plaintiffs formulated three demands. First of all, they asked to declare the contract void for unlawful contractual object or purpose. The unlawful contractual object or purpose allegedly lay in the fact that Israel's true motivation in constructing the light rail system was to continue and secure the occupation in the West Bank in violation of several international law provisions, such as the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 (Fourth Geneva Convention) and the Hague Conventions. Secondly, they demanded a prohibition on the further execution of the contract under financial compulsion ("astreinte"), which can be compared to an injunction suit. Finally, they also asked for compensation. The court in Nanterre dismissed the case on 30 May 2011. On 22 March 2013, the Court of Appeal of Versailles confirmed the dismissal.

Corporations not subject to international law

This post will not go into detail about all elements of the substantive claims, but will focus on the justified rejection of civil liability of corporations under international law. The Versailles Court of Appeal rightly stated that the invoked treaties (among which the Fourth Geneva Convention and the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict) only contain obligations for the contracting State parties. More specifically, the Court ruled explicitly that the defendant companies neither signed the mentioned international law provisions, nor were they recipients of obligations that the treaties contain and as a consequence they are not subjects of international law ("*Les societies intimées morales de droit privé qui ne sont pas signataires des conventions invoquée (sic), ni destinataires des obligations qui les contiennent, ne sont pas, en consequence, des sujets de droit international.*").

The decision is interesting for two reasons.

First of all, the decision is noteworthy with regard to its reasoning. One might argue that it is not *because* the corporations did not sign the treaties or *because* they are not recipients of obligations mentioned in the treaties, that they are not

subjects of international law. Instead, the generally acknowledged position in international law that corporations are not counted among the subjects of international law could have been the starting point of the Court's reasoning. From this principle that corporations do not have international personality follows then that corporations cannot sign international treaties and international law cannot inflict rights and obligations on them. Although this reasoning is different, the outcome remains the same: international law has no direct effect on companies.

A European sister for Kiobel?

Furthermore, what makes this French judgment all the more interesting is that the United States Court of Appeals for the Second Circuit appears to have rendered a "sister judgment" in the case Kiobel v. Royal Dutch Petroleum. Both cases show some differences. Kiobel dealt for instance also with the issue of universal jurisdiction and the Supreme Court in the end decided on those grounds. The cases do however have in common that they depart from facts of extraterritorial conduct of corporations that comprised an alleged breach of international law. The Second Circuit was the first and only appellate court to rule that corporations could not be held liable for violations of international law under the American Alien Tort Claim Acts (ATCA).

Depending on the focus, different conclusions can be drawn from the comparison between both cases.

When it comes to the question whether *corporations are subject to international law*, it cannot be derived from these two judgments that there is a convergence between the United States and the French view on this matter. The Versailles Court referred in its judgment to the American ATCA-case law and decided that it was not relevant for the French case, because the ATCA-case law deals with the application of domestic American law. Indeed, Kiobel dealt with the issue of corporations that had violated international law being civilly liable under *federal common law* (ATCA). The French case on the other hand handled the issue of corporations committing violations of international law and their civil liability under *international law* (the fourth Geneva Convention and the Hague Convention of 1954). Therefore, it cannot be concluded that the Second Circuit's view accords with the Versailles Court's ruling that international law does not create liability for corporations.

On the other hand, when focusing on *civil liability of corporations for violations of international law*, both cases do coincide. In the Second Circuit decision, as well as in the French case, the corporations were not held civilly liable, respectively under domestic law and international law. There seems to be a tendency in the United States and Europe to decline corporate liability for international law breaches (although the Supreme Court in Kiobel did not close the door to all cases of international law violations committed by corporations, given that the Court did not decide explicitly that corporations are immune from the ATCA). Additionally, the intersection between both cases is interesting because they both illustrate that the legal framework for corporate liability for violations of international law is currently underdeveloped, be it under international law or under the applicable national law. As long as multi- and transnational corporations do not have international personality or there is no sufficient national legal framework that regulates corporate international conduct, companies will keep benefiting from this legal gap. With the volume of international commercial transactions growing every day, actions of private companies become increasingly influential. It appears that international law and national legal systems have not yet adapted to this changed reality.