# What will Kiobel's Impact be on Alien Tort Statute Claims?

What follows is also posted at SCOTUSBlog:

After two rounds of briefing, two oral arguments, and a significant wait for an opinion, what do we know about the future of Alien Tort Statute (ATS) litigation in light of the *Kiobel* decision? I think at least three things: (1) plaintiffs' ability to file ATS claims in federal court is now substantially limited; (2) plaintiffs will likely try to file such cases under U.S. state and foreign law, in some cases in U.S. state and foreign courts in the first instance; and (3) this will help usher in a brave new world of transnational litigation where federal, state, and foreign courts compete to regulate international human rights claims.

*First*, according to the Court in the *Kiobel* decision, ATS cases are subject to the presumption against extraterritoriality recently rearticulated in *Morrison v. National Australia Bank*. For an ATS claim to survive a motion to dismiss, it must "touch and concern" activities occurring in the "territory of the United States." ATS claims that seek relief for violations of the law of nations occurring wholly outside of the United States are now barred. Note that *Kiobel* is an easy case for the Court to apply this rule because "all the relevant conduct took place outside of the United States." The federal courthouse doors are now shut for these cases.

However, the keys may still be in the door if plaintiffs can creatively plead around the presumption. For instance, a plaintiff might argue that a major portion of the tortious activity occurred in the United States even though the injury was caused in a foreign country. Yet, according to the Court, "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritoriality. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." But, what would such cases be? Much is still left unanswered by the Court when it comes to ATS litigation.

So, let's start with what is clear. A foreign plaintiff suing a foreign defendant for acts or omissions occurring wholly *outside* of the United States that allegedly violate the law of nations (a so-called "F-cubed case" as presented in *Kiobel*)

cannot bring suit under the ATS, even when there is personal jurisdiction in the United States. Conversely, a foreign plaintiff suing a defendant (foreign or domestic) for acts or omissions occurring wholly *inside* of the United States that allegedly violate the law of nations can bring suit under the ATS. Although, we know nothing from the Court's opinion about how the ATS should be applied in such a case, except that lower courts should remain acutely sensitive to foreign policy implications. As noted by Justice Kennedy in his concurring opinion, "[t]he opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute." Let's take a look at some of those questions and where their answers might lead us.

Can a foreign plaintiff sue a U.S. defendant for acts or omissions occurring *wholly outside* of the United State that allegedly violate the law of nations?

According to the opinion by Chief Justice Roberts, which was joined by Justices Scalia, Kennedy, Thomas, and Alito, the answer is "no." Even though the United States would have prescriptive jurisdiction under international law, as the case involves a U.S. defendant domiciliary, this too would be an extraterritorial application of the ATS. Note that this would be a case that Justices Ginsburg, Breyer, Kagan, and Sotomayor would allow to go forward under the ATS. This could also be an example of a case where, as noted by Chief Justice Roberts, "the claims touch and concern the territory of the United States" and "do so with sufficient force to displace the presumption against extraterritoriality." But, I doubt it, because "the claims" themselves have nothing to do with "the territory of the United States," and "mere [] presence" is not enough. So, it appears that escaping the presumption against extraterritoriality in the ATS context is not about "who" the defendant is but about "where" the tortious conduct took place.

Can a foreign plaintiff sue a foreign defendant for acts or omissions occurring *in part in* the United States that lead to an injury in a foreign country that allegedly violates the law of nations? For instance, what if the plaintiff alleges that an officer of a foreign corporation gives directions from an office in New York that directly lead to a foreign tort that allegedly violates the law of nations?

This is a closer question, but I think the answer is "no." I also think that reasonable judges interpreting the Court's *Kiobel* opinion might disagree on this. To get to "no," one has to look closely at Justice Alito's concurrence, joined by Justice Thomas, which has the potential to serve as a model for lower court judges

writing future opinions in the area, even if it could not command a majority at the Court. According to Justice Alito, the answer to this question requires one to look at the "focus" of the ATS. In light of the Court's opinion in *Sosa*, not just any domestic conduct will be enough to escape the presumption. In Justice Alito's view, "unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations," the ATS claim will fail.

Here is the multi-million dollar question: What would such a case look like where the injury occurs abroad but some of the tortious conduct occurs in the United States and that U.S. conduct itself violates the law of nations? Does Justice Alito mean to say that individuals or corporations in the United States aiding and abetting or conspiring to commit a tort in violation of the law of nations in a foreign country might still be sued under the ATS? If so, the ATS might not be dead yet. Such cases would be rare.

Can a foreign plaintiff sue a U.S. defendant for acts or omissions occurring *in part in* the United States that lead to injury in a foreign country? For instance, what if the plaintiff alleges that a U.S. corporate official directed corporate agents in a foreign country to take action that allegedly violates the law of nations? I think the answer here would also be "no" for the reasons given in the prior paragraphs, unless, assuming lower courts follow Justice Alito, that conduct itself violates an international law norm. These cases would also be rare.

At bottom, foreign plaintiffs will only be able to proceed under the ATS when they are injured in the United States or when substantial activities occur in the United States that violates the law of nations, even though the injury is ultimately felt abroad. As such, the Court has substantially limited the ability of plaintiffs to file ATS cases in federal court.

*Second*, assuming these answers are correct, what will happen next? We should expect many ATS cases to be refiled in federal court to conform to the Court's new rule. As discussed above, we should expect some cases to be filed alleging that the tortious activity was planned or directed from the United States. However, in light of the fact that nearly all post-*Morrison* cases that tried to escape the presumption by pleading some U.S. conduct have failed, one might similarly expect significant obstacles to federal ATS cases, especially if courts follow Justice Alito's reasoning and in light of plausibility pleading requirements.

In light of this and as I have argued in the *Georgetown Law Journal*, the next round of international human rights cases will be filed under state law in federal court and, in some cases, under state law in state courts. There is also every reason to believe that foreign law and foreign courts may become another battleground for such cases. Courts and commentators must now focus on the appropriate role of transnational human rights litigation in U.S. courts generally. In what circumstances should state law reach transnational human rights claims? Should preemption, due process, and related doctrines constrain the ability of plaintiffs to raise such claims under state law? Should forum non conveniens be robustly applied when cases are filed under foreign law in the United States? Should courts be concerned that forcing such cases to be filed abroad may bring these cases back to the United States in later enforcement of judgment proceedings where the U.S. court has only limited review? Should Congress step in and resolve these issues?

*Finally*, the *Kiobel* decision raises a significantly broader institutional and normative question: What happens when U.S. federal courts close their doors to transnational cases? As I explain in a new draft piece that will be looking for a law review home shortly, recent Supreme Court decisions regarding the Alien Tort Statute, extraterritorial application of U.S. federal law, plausibility pleading, personal jurisdiction, class action certification, and forum non conveniens pose substantial obstacles for transnational cases to be adjudicated by U.S. federal courts. As noted, the result of this is that plaintiffs are now seeking other law – U.S. state and foreign law – and other fora – including U.S. state and foreign courts – to plead transnational claims. When U.S. federal courthouse doors close, other doors open for the litigation of transnational cases.

In my view, we are at the beginning of a brave new world of transnational litigation where federal, state, and foreign courts compete through their courts and law to adjudicate transnational cases and regulate transnational activities. Maybe it is time for increased regulatory cooperation between the federal government and the states as well as between the United States and other countries to resolve these transnational legal issues.

# Köhler on Overriding Mandatory Provisions in European Private International Law

Andreas Köhler from the University of Passau has written a book on overriding mandatory provisions in European Private International Law (*Eingriffsnormen – Der 'unfertige Teil' des europäischen IPR*, Tübingen, Mohr Siebeck 2013). The author has kindly provided us with the following summary:

> *After a detailed dogmatic analysis of the so-called "mandatory rules problem", Andreas Köhler shows that, with the enactment of the Rome I and II Regulations, European Law on the conflicts of law now governs exclusively the applicability of provisions compliance with which is crucial for a country to protect its public interests, such as its political, social or economic system.The application of those provisions depends on a special conflict of law rule – originating from European Law – which must be developed modo legislatoris within the scope of the general clauses codified by Article 9 Rome I resp. Article 16 Rome II; in this sensethe so-called "mandatory rules problem" could be considered as Franz Kahn´s "unfinished part" of the – henceforth European – Private International Law. Based on this premise, the author develops a model for a coherent approach to mandatory rules (and to those protecting the socially weaker party) furthering the important objective of harmonizing judicial decisions in Europe but still subject to review by the European Court of Justice. One important consequence of Köhler's approach is an unconditional obligation to apply mandatory rules of other member states, since the special conflict of law rule regardingsuch provisions originates from European Law and therefore binds all member state courts. In addition Köhler proves that the application of any foreign mandatory rules is not affected by the restrictive requirements of Article 9 III Rome I. Hence, it is possible to create a multilateral system for suchprovisions in European conflicts law.*

Further information is available on the publisher's website (in German).

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# US Supreme Court Delivers its judgment in Kiobel

> *The presumption against extraterritoriality applies to claims under the Alien Tort Statute, and nothing in the statute rebuts that presumption.*

The opinion is available here.

For initial comments, see the insta-symposium over at opiniojuris.

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# Common European Sales Law Meets Reality – A European Debate on the Commission's Proposal

On 14 and 15 June 2013, the annual conference of the European Private Law Review (GPR) will take place in Halle (Saale), Germany. Renowned officials, politicians, judges, and academics from various EU Member States are going to discuss the Commission's Proposal for a Common European Sales Law. Speakers include Diana Wallis, the former Vice President of the European Parliament; Verica Trstenjak, formerly Advocate General of the European Court of Justice and now professor at the University of Vienna; Denis Mazeaud, UniversitéPanthéon-Assas; Paul Varul, University of Tartu; Pascal Ancel, Université de Luxembourg; Loukas Mistelis, Queen Mary, University of London, and Martin Schmidt-Kessel, University of Bayreuth. A unique feature of the conference is that it is not

restricted to the legal aspects of the proposal, but also includes other perspectives, such as anthropology, the role of the media in judging the instrument and the place of the new sales law in academic education. The registration form is available here.

The programme reads as follows:

**Friday, 14 June 2013**

- 1:00 to 1:30 pm Registration
- 1:30 to 2:00 pm Introduction
    - 1. Welcome Address,
      *Prof. Dr. Matthias Lehmann*, Martin Luther Universität Halle-Wittenberg
    - 2. Greetings,
      *Thomas Wünsch*, State Secretary, Ministry of Justice and Equal Treatment, Saxony-Anhalt
- 2:00 to 3:45 pm CESL in Politics
    - 1. Making European Sales Law I: Insights from Brussels
      *Mikolaj Zaleski,* European Commission, DG Justice, Unit A2 – Contract Law
    - 2. Making European Sales Law II: Particularities in a Federal System
      *Dr. Frank Warnecke*, Ministry of Justice and Equal Treatment, Saxony-Anhalt
    - 3. Droit commun européen de la vente et la France: Je t'aime, moi non plus
      *Prof. Dr. Denis Mazeaud*, Université Panthéon-Assas
      4. Benefits and Drawbacks of CESL for Smaller Member States
      *Prof. Dr. Paul Varul*, University of Tartu, Estonia
    - 5. Is the UK Afraid of European Private Law and Should It Be?
      *His Hon Judge David Mackie CBE*, QC, High Court of Justice, England and Wales
- 3:45 to 4:15 pm Coffee break
- 4:15 to 6:00 pm CESL in Society
    - 1. CESL and the Media: Reduction of Complexity or Scaremongering?
      *Diana Wallis*, Former Vice President of the European Parliament

        - 2. Civil Law Codifications as Symbols of National Sovereignty
          *Prof. Dr. Marie-Claire Foblets,* Max-Planck-Institute for Anthropological Research, Halle
        - 3. Hitting That Blue Button Down There: Does the Consumer Have a Real Choice?
          *Alice Wagner*, Vienna Chamber of Labour
    - 6:00 PM Cocktail Reception

**Saturday, 15 June 2013**

- 9:00 to 10:45 am CESL in Court
    - 1. The Challenge Faced by the ECJ and Possible Responses
      *Prof. Dr. Verica Trstenjak,* Universität Wien, Former Advocate General, European Court of Justice
    - 2. National Courts: How Can They Keep Track?
      *Prof. Dr. Luz María Martínez Velencoso*, Universidad de Valencia
    - 3. Taking CESL to ADR: The Solution?
      *Prof. Dr. Loukas Mistelis*, Queen Mary University of London
- 10:45 to 11:15 am Coffee break
- 11:15 AM to 1:00 pm CESL in University
    - 1. Good and Bad Timing: The Place in the Curriculum
      *Prof. Dr. Pascal Ancel,* Université de Luxembourg
    - 2. The Language in Which CESL Shall be Taught
      *Prof. Dr. Christoph Busch,* EBS Law School, Wiesbaden
    - 3. Civil Sales Law, Commercial Sales Law, Consumer Sales Directive, CISG, CESL – Enough is Enough?
      *Prof. Dr. Martin Schmidt-Kessel,* Universität Bayreuth
- 1:00 pm Conclusion

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# French Conference on Punitive

# Damages

The University of Nancy will host an international workshop on the *Circulation of Punitive Damages* on 24 May 2013.

**Introduction**

9:30 – 10:00 : *Les dommages-intérêts punitifs en quête de fondement*, Philippe Jestaz (Emeritus Université Paris XII)

10:00 – 10:40 : *Dissuader et punir : les dommages et intérêts punitifs remplissent-ils vraiment la fonction qui leur est assignée ? Le regard de l'économiste du droit*, Samuel Ferey (Faculté de droit Nancy)

**1 – La compatibilité des dommages-intérêts punitifs avec un système civiliste**

10:50 – 11:10 : *La réception des punitive damages en Louisiane : un modèle pour l'Europe continentale ?*, François-Xavier Licari (Faculté de droit Metz)

11:20 – 11:40 : *La réception des dommages-intérêts punitifs au Québec : un modèle pour l'Europe continentale ?*, Sylvette Guillemard (Université Laval, Québec)

11:50 – 12:10 : *La présence cachée des dommages-intérêts punitifs en Allemagne*, Paul Klötgen (Faculté de droit Nancy)

12:10 – 12:50 : Discussion générale

**2 – Le rayonnement des dommages-intérêts punitifs**

14:00 – 14:20 : *Les punitive damages et le droit américain de l'arbitrage*, George A. Bermann (Columbia School of Law)

14:30 – 14:50 : *Les dommages-intérêts punitifs dans la jurisprudence arbitrale de la CCI*, Emmanuel Jolivet (ICC)

15:00 – 15:20 : *Les dommages-intérêts punitifs à l'épreuve du contrôle national de*

*l'exequatur*, Olivier Cachard (Faculté de droit de Nancy)

15:30 – 15:50 : *La quantification du préjudice dans les actions en dommages-intérêts fondées sur les infractions aux articles 101 ou 102 TFUE*, Mattia Melloni (Autorité luxembourgeoise de la concurrence)

16:00 : Discussion générale et cocktail

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# Second Issue of 2013's ICLQ

The second issue of *International and Comparative Law Quarterly* for 2013 includes three articles exploring private international law issues and a case commentary of the *VALE Építési Kft* decision of the European Court of Justice.

Pablo Cortés and Fernando Esteban de la Rosa, *Building a Global Redress System for Low-Value Cross Border Disputes*

> *This article examines UNCITRAL's draft Rules for Online Dispute Resolution (ODR) and argues that in low-value e-commerce cross-border transactions, the most effective consumer protection policy cannot be based on national laws and domestic courts, but on effective and monitored ODR processes with swift out-of-court enforceable decisions. The draft Rules propose a tiered procedure that culminates in arbitration. Yet, this procedure neither ensures out-of-court enforcement, nor does it guarantee compliance with EU consumer mandatory law. Accordingly, this article argues that the draft Rules may be inconsistent with the European approach to consumer protection.*

Sirko Harder, *The Effects of Recognized Foreign Judgment in Civil and Commercial Matters*

> *This article investigates what effects a recognized foreign judgment in civil and commercial matters has in English proceedings. Does the judgment have the*

*effects that it has in the foreign country (extension of effects) or the effects that a comparable English judgment would have (equalization of effects), or a combination of these? After a review of the current law, it will be discussed what approach is preferable on principle. The suggested approach will then be illustrated by considering whether a foreign decision on one legal basis of a certain claim ought to preclude English proceedings involving another legal basis of the same claim. Finally, it will be discussed whether and how the effects of a recognized foreign judgment in England are affected by interests of a third country.*

Christopher Bisping, *The Common European Sales Law, Consumer Protection and Mandatory Overriding Provisions in Private International Law*

*This article analyses the relationship of the proposed Common European Sales Law (CESL) and the rules on mandatory and overriding provisions in private international law. The author argues that the CESL will not achieve its stated aim of taking precedence over these provisions of national law and therefore not lead to an increase in cross-border trade. It is pointed out how slight changes in drafting can overcome the collision with mandatory provisions. The clash with overriding mandatory provisions, the author argues, should be taken as an opportunity to rethink the definition of these provisions.*

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# Belgian Court Rules on Jurisdiction for Restitution Claims

On 13 December 2012, the Court of Appeal of Liege held that restitution claims fall within the scope of Article 2 of the Brussels I Regulation.

A Belgian company was suing a Luxembourg company in Belgium. The companies had concluded a contract for carriage of goods. The Belgian company claimed restitution of certain payments from the Luxembourg party.

The Belgian Court wondered whether restitution claims belong to Article 5.1 or 5.3 of the Brussels I Regulation. It concluded that they do not, because under the Belgian law of obligations a claim in restitution is quasi-contractual and thus neither contractual nor delictual. As a consequence, the court held, only Article 2 applied.

It is unclear whether any party argued that there might be autonomous interpretation of the Brussels I Regulation, and that the European Court of Justice judgment in *Kalfelis* might well stand for the proposition that quasi-contractual claims are delictual for the purpose of Article 5.3 of the Regulation.

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# First Issue of 2013's Flemish PIL E-Journal

The first issue of the Belgian e-journal on private international law *Tijdschrift@ipr.be / Revue@dipr.be* for 2013 was just released.

The journal is meant to be bilingual (French/Dutch), but this issue is almost exclusively in Dutch, except for one judgment from the Court of Appeal of Liege.

No article in this issue.

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# New French Book on International Commercial Law

Catherine Kessedjian, who is professor of law at Paris II University and a former Deputy Secretary General to the Hague Conference, has published a new treatise on French International Commercial Law.


As is traditional in France, the book includes developments on international commercial contracts, but also on the law governing corporations (including international insolvency) and international dispute resolution.

A table of contents and more details are available here.

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# Born on the European Private International Law of Book-Entry Securities

Michael Born has published a book on the European Private International Law of Book-Entry Securities (*Europäisches Kollisionsrecht des Effektengiros*, Tübingen, Mohr Siebeck 2013). The official summary reads as follows:

> *The law applicable to securities held in book-entry form in securities accounts is subject to a variety of European private international law rules. However, these provisions have not yet established a complete and consistent conflict of laws regime. Michael Born analyses the inconsistencies and gaps and also examines the options for eliminating the identified shortcomings.*

Further information is available on the publisher's website (in German).