

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 sociétés 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 conséquence, 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.

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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.

Commission Recommendations collective redress

After years of intensive debates on either sectoral instruments or a horizontal instrument, the European Commission released its long-awaited communication on collective redress on 11 June 2013. To those that have followed the discussions, it will not come as a surprise that the Commission is not proposing a harmonised horizontal EU collective procedure. Instead, it recommends a series of common, non-binding principles for collective redress mechanisms in the Member States that – in the words of Justice Commissioner Viviane Reding – respects the very different traditions in the Member States. The press release, text of the communication and recommendations are available [here](#). The news item reads as follows:

The European Commission has today set out a series of common, non-binding principles for collective redress mechanisms in the Member States so that citizens and companies can enforce the rights granted to them under EU law where these have been infringed. The Recommendation aims to ensure a coherent horizontal approach to collective redress in the European Union without harmonising

Member States' systems. National redress mechanisms should be available in different areas where EU law grants rights to citizens and companies, notably in consumer protection, competition, environment protection and financial services. By recommending to Member States to put in place national collective redress mechanisms the Commission wants to improve access to justice, while ensuring appropriate procedural guarantees to avoid abusive litigation. The Recommendation complements the proposal for a Directive on antitrust damage actions (see IP/13/XXXX) harmonising procedural law issues relating to private enforcement other than collective redress.

Let the (academic) debate continue!

Thanks to Steefan Voet, University of Ghent for the 'tip-off'.

Weighing European Private International Law in the Balance

The United Kingdom Government is currently undertaking a review of the competences of the European Union, asking what the European Union does, and how it affects government and the general public in the United Kingdom. 

As part of that review, the Ministry of Justice has published a Call for Evidence on the impact of European civil justice instruments and has organised two consultation events, in collaboration with Eva Lein, Research Fellow in Private International Law at the British Institute of International and Comparative Law. The first, on the instruments dealing with civil and commercial matters, was held on Monday 3 June. The second, examining the instruments in the area of family and succession law, is due to be held on Thursday 20 June. Chaired by John Hall of the Ministry, the list of speakers is as follows:

- Carolina Marín Pedreño, Dawson Cornwell
- Mark Harper, Withersworldwide
- Richard Frimston, Russell Cooke

- Professor Paul Matthews, King's College London

The event is free, but places are limited. If you would like to attend, please book online at the Institute's website. The Ministry has also invited written responses to the Call for Evidence (e-mail to balanceofcompetences@justice.gsi.gov.uk or in hard copy to Ministry of Justice, 102 Petty France, SW1H 9AJ). You can also, if this is your thing, share your thoughts about #BOCreview on Twitter @MojGovUK.

The current malaise among many in the UK with the European Union, its institutions and laws is well known. This, however, is an area in which the *acquis*, although not problem free, seems to be working relatively well and to have been favourably received by commercial organisations, including in the financial sector. The Brussels I and Rome I Regulations are generally well-regarded, and (although it is too early to pass judgment) the Rome II Regulation seems to be bedding down without undue difficulty. Moreover, the UK's opt-out in the civil justice field has given it the flexibility to participate in those instruments that it considers likely to be in the overall interest of businesses and citizens, while exercising caution in other areas. Greater disparities between the common law and the civil law in the areas of family law, wills and succession have resulted in the more frequent exercise of the opt-out, but the UK has remained engaged during negotiations to see if a better fit, satisfactory to other Member States, can be achieved (as in the case of the Maintenance Regulation). Overall, therefore, the balance of EU competence in this area appears satisfactory from the UK's perspective.

It should follow that the UK's policy goal in this area should not be one of retrenchment, but of continued engagement with its partners in the EU to enhance co-operation in the civil justice field, to the benefit of all. That does not, it must be emphasised, require a raft of new measures, or consistent tinkering with the old ones. Instead, it is submitted, the following activities should provide the focus of co-operation in the coming years:

- Strengthening the EU's institutional framework in the civil justice field, notably by establishing a specialist chamber or court (with specialist judges) dealing only with private law matters. This step, above all, is essential if the EU's legislative activity is to be effective and to maintain the confidence of the Member States and the citizens.

- Ensuring better integration of the private international law instruments with other legislative instruments (particularly Directives) adopting substantive private law rules for the internal market, including for the protection of consumers and employees. The Commission should, as a matter of course, assess the inter-action of proposed, private law measures with the private international law instruments at an early stage.
 - Monitoring the application and judicial development across the EU of the civil justice *acquis* as a whole over a longer period, allowing a period of reflection to assess its impact and encourage discussion of possible refinements and incremental developments to ensure better co-ordination of the instruments. The practice of routinely including “5-year review” clauses in civil justice instruments, resulting in a merry-go round of legislative reviews and proposals, should be abolished. It’s time to take stock of what we have – after all, it doesn’t look too bad.
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Liber Amicorum Jean-Michel Jacquet

A Liber Amicorum will be published at the end of the month to honor J.M. Jacquet, who has been the professor of private international law at the Graduate Institute for International Studies in Geneva since 1994 and the Editor in Chief of the *Journal du droit international (Clunet)* since 2003 (*Mélanges en l’honneur du professeur Jean-Michel Jacquet*).

The book will be structured as follows:

Première partie – Arbitrage et Juridiction Internationale

- Dolores Bentalila, Quelques réflexions sur le statut des tribunaux arbitraux fondés sur des traités en matière d’investissement
- Andrea Bonomi et David Bochatay, L’aménagement de la priorité laissée à l’arbitre pour statuer sur sa propre compétence
- Olivier Cachard, Arbitrage et soupçons de la légalisation de revenus issus

d'activités illicites

- Lucius Caflisch, Arbitrage et protection des droits de l'homme dans le contexte européen
- Jean Devèze, L'expert et l'arbitre, différents mais si proches
- Gabrielle Kaufmann-Kohler, The transnationalisation of national contract law
- Catherine Kessedjian, La pratique arbitrale
- Pierre Mayer, La dispersion des demandes connexes entre plusieurs procédures arbitrales est-elle inéluctable ?
- Éric Wyler, Le concept d'acceptabilité du Jus auctoritas au cœur de la juridiction internationale ?

Deuxième partie – Droit du commerce international et droit international économique

- Philippe Delebecque, Droit du commerce international et droit maritime
- Pascale Deumier, Les sources du droit et les branches du droit. À propos d'une conception doctrinale des sources du droit du commerce international
- Marcelo G. Kohen, La portée et la validité des clauses contractuelles exorbitantes de renonciation à l'immunité des États
- Éric Loquin, Retour sur les sources premières de la lex mercatoria : les usages du commerce international
- Suzy H. niKiéma, Les « mesures » d'expropriation indirecte en droit international des investissements : les actes et omissions de l'État d'accueil
- Jean-Baptiste Racine, La protection du professionnel contractant en matière internationale
- Luca G. Radicati di Brozolo, Règles transnationales et conflit de lois : réflexions à la lumière des principes UNIDROIT et des principes de la Haye
- Mélanie Samson, L'Organisation mondiale du commerce : un forum approprié pour la protection de la santé publique ?
- Jorge E. Viñuales, Vers un droit international de l'énergie : essai de cartographie

Troisième partie – Droit international privé

- Isabelle Barrière Brousse, Le droit international privé de la famille à l'heure européenne
- Sabine Corneloup, Entre autonomie conflictuelle et autonomie substantielle le choix du futur Droit commun européen de la vente. À propos de la proposition de règlement de la Commission européenne du 11 octobre 2011
- Hélène Gaudemet-Tallon, Unité et diversité : quelques mots de Droit international privé européen
- Marie-Ange Moreau, Continuité des règles de DIP en matière de contrat de travail international et communautarisation
- Thomas Schultz, Postulats de justice en droit transnational et raisonnements de droit international privé. Premier balisage d'un champ d'étude
- Anne Sinay-Citermann, État des lieux sur les articles 14 et 15 du Code civil en droit international privé
- Claude Witz, L'application du droit étranger en Allemagne (Questions choisies)

Quatrième partie - Droit africain

- Néji Baccouche, Impôt, révolution et démocratisation du système politique tunisien
 - Parfait Diédhiou, La reconnaissance et l'exécution des sentences arbitrales dans l'Acte uniforme relatif au droit de l'arbitrage de l'OHADA
 - Joseph Issa-Sayegh, Regards sur l'intégration régionale du droit social dans les États africains francophones subsahariens
 - Ousmane mBaye, L'Ouest africain à l'épreuve de la mondialisation : étude clinique du Sénégal
 - Paul-Gérard pouGoué et Gérard nGoumtsa Anou, L'applicabilité spatiale du nouveau droit OHADA de la vente commerciale et le droit international privé : une réforme inachevée
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Folkman on Comity

Theodore J Folkman (Murphy & King, P.C.) has posted Two Modes of Comity on SSRN.

Some have suggested that US courts should not deny recognition and enforcement to foreign judgments on grounds of fraud or a denial of due process in the particular foreign proceeding, as long as the foreign judiciary is systematically adequate. This paper, based on remarks given at the University of Pennsylvania Journal of International Law's Fall 2012 Symposium, evaluates that suggestion by considering the various kinds of comity that US courts accord to one another, in particular, the comity required by the Full Faith and Credit Clause and the comity a federal court gives to a state court in habeas corpus cases. It outlines the ways in which each of these two models of comity can be a model for US treatment of foreign court judgments, and it considers recent decisions in which US courts have shown a tendency to use a more deferential model of comity when considering whether to recognize foreign judgments.

HEC Seeks to Recruit Assistant Professor of PIL

The Department of Law and Taxation of HEC Paris (France) invites applications for Tenure-track faculty positions to begin in 2014.

HEC Paris is the leading Business School in France and one of the leading Business Schools in Europe. The teaching of Law is one of its distinctive features. In addition to a large diversity of mandatory and elective law and taxation courses, HEC Paris offers to its students specializations in international business law and taxation.

JOB DESCRIPTION/QUALIFICATIONS: The position's opening is in International Private Law, with emphasis on International Contract law, Legal environment of International negotiations, Arbitration. A strong track record in both research and teaching is required. Support for research is excellent, including grants from HEC. During their first three years at HEC, assistant professors benefit from a reduced number of teaching hours, simplified access to research funds and an exemption of administrative duties.

The remuneration and benefits package is competitive by international standards and will be commensurate with experience and profile. While HEC Paris is a bilingual school (English/French), the ability to teach in French is not mandatory.

Applicants are required to have (or be about to complete) a Ph.D. degree.

APPLICATION PROCEDURE: Interested applicants should send a cover letter, vitae, and selected research papers, to Elizabeth Hautefeuille by June 10, 2013 at the following address: email: hautefeuille@hec.fr

For additional information about HEC Paris, please refer to our website at: <http://www.hec.fr>

Brekoulakis on International Arbitration Scholarship and the Concept of Arbitration Law

Stavros Brekoulakis (Queen Mary University of London) has posted International Arbitration Scholarship and the Concept of Arbitration Law on SSRN.

This article is about the concept of arbitration law and its relationship with international arbitration scholarship. It argues that the field of international arbitration scholarship has developed in isolation and never fully engaged with the crucial movements of international legal scholarship that advanced a more

progressive and humanitarian concept of international law. The dearth of interdisciplinary scholarship in arbitration has had two undesirable implications. First, it has had a negative impact on how non-arbitration scholars and the public perceive arbitration. Secondly, and more importantly for the purposes of this article, it has crucially impaired the concept and autonomy of arbitration law. By remaining adherent to an old-fashioned version of positivism that accepts state regulation only, arbitration scholarship has failed to develop an account of international arbitration as a non-state community that has the capacity to produce legal rules. Eventually, it has failed to advance persuasive claims of normativity and autonomy of international arbitration. The article revisits the concept of arbitration law and advances the thesis that arbitration community has the normative potency to generate procedural practices and standards that guide the conduct of arbitration and breed expectations of compliance.

The paper is forthcoming in the *Fordham International Law Journal*.

Can a Court Sit Outside its Territorial Jurisdiction?

In *Parsons v The Canadian Red Cross Society*, 2013 ONSC 3053 (available [here](#)), Winkler CJ (of the Court of Appeal, here sitting down in the Superior Court of Justice) has held that a judge of the SCJ can sit as such outside Ontario. No authority, it seems, requires the SCJ to sit only in Ontario.

The decision seems to me, at least on an initial reading, largely based on pragmatism. It seems efficient to so allow and so the court does. But I have some preliminary sense that there are some larger concerns here that are not being fully thought through. The place where a court sits seems awfully fundamental to its existence and authority as a court. In addition, the brushing aside of concerns about the open court principle (see paras 48-50) seems too minimal.

Part of the decision is based on *Morguard* and the federal nature of Canada (see para 25), so maybe the judge could not so sit outside Canada?

For news coverage of the decision, see this story.

Could this idea get pushed beyond the fairly narrow bounds of this case? Say a case is started in Ontario and the defendant seeks a stay in favour of Alberta because of all the factual connections to that province. Could the plaintiff, if otherwise likely to see the proceedings in Ontario get stayed, ask the court to have one of its judges hear the case in Alberta, sitting as a judge of the Ontario court? That way the plaintiff gets an Ontario judgment and the defendant gets the case heard in Alberta...

Seminari estensi di diritto internazionale privato (Ferrara Workshops on Private International Law) - Summer 2013

A very interesting series of workshops on Private International Law has been **launched by the Department of Law of the University of Ferrara: *Seminari estensi di diritto internazionale privato* (Ferrara Workshops on Private International Law)**. The first two events, which will be hosted in the coming weeks, will take the form of a colloquium (in English) between an invited speaker and a discussant, ended by concluding remarks by a third scholar. Here's the programme:

 **Friday 28 June 2013 - 11h00**

Taking evidence abroad in civil matters - Open issues regarding Regulation (EC) No 1206/2001 (.pdf)

Invited speaker: *Jorg Sladic* (University of Maribor);

Discussant: *Pietro Franzina* (University of Ferrara);
Concluding remarks: *Elena D'Alessandro* (University of Turin).

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Friday 5 July 2013 - 10h30



The individual in the prism of private international law - Subject, Citizen, Person, Body (.pdf)

Invited speaker: *Chris Thomale* (University of Freiburg im Breisgau);
Discussant: *Pietro Franzina* (University of Ferrara);
Concluding remarks: *Alessandro Somma* (University of Ferrara).

Venue (for both seminars): Dipartimento di Giurisprudenza, Sala consiliare -
Corso Ercole I d'Este, 44 - Ferrara.

For further information: [pilworkshops \[at\] unife.it](mailto:pilworkshops@unife.it).

New Model Clauses for Use of UNIDROIT Principles

At its 92nd session (8 - 10 May 2013) the UNIDROIT Governing Council has adopted the Model Clauses for Use of UNIDROIT Principles of International Commercial Contracts

The Model Clauses were prepared by a restricted Working Group. Details on the "legislative" process are available [here](#).