ASIL International Legal Theory Interest Group Symposium on the Rise of Non-State Law

See below for an announcement regarding an extremely interesting conference on Non-State Law next week in Washington, DC

Symposium of the International Legal Theory Interest Group, titled “The Rise of Non-State Law”
May 2, 2013, 8:30 a.m. – 5:15 p.m.
ASIL Headquarters, Tillar House – 2223 Massachusetts Avenue, NW
Washington, DC 20008

Trends in legal philosophy, international law, transnational law, law & religion, and political science all point towards the increasing role played by non-state law in both public and private ordering. Indeed, numerous organizations, institutions, associations and groups have emerged alongside the nation-state, each purporting to provide their members with rules and norms to govern their conduct and organize their affairs. This International Legal Theory Interest Group Symposium aims to explore this Rise of Non- State Law by bringing together experts on international law, transnational law, legal theory and political philosophy to consider the growing impact of non-state law.

For full details, see this announcement (ASIL Flier).

BIICL Conference on Unilateral Jurisdiction and Arbitration

Clauses

The British Institute of International and Comparative Law will hold a seminar on Unilateral Jurisdiction and Arbitration Clauses, Valid or Not? on Wednesday 8 May 2013 from 17:15 to 19 pm.

> *This seminar examines so-called unilateral or asymmetric dispute resolution clauses, which oblige only one of the parties to bring their case in a specific court, while the other is free to select between different fora. Recently, the French Cour de Cassation has decided that this type of clause is invalid. Since, the validity of one-way jurisdiction clauses has been debated in various countries. The debate includes the question how hybrid arbitration clauses are to be assessed.*
> *Speakers will discuss the French Supreme Court's decision; the views of different Member States on the interpretation of Art. 23 Brussels I Regulation; the future of unilateral jurisdiction clauses; and the interpretation of hybrid arbitration clauses.*

Chair:
Craig Tevendale, Partner, Herbert Smith Freehills

Speakers:
Professor Gilles Cuniberti, University of Luxemburg
Dr Maxi Scherer, Special Counsel, WilmerHale; Senior Lecturer, Queen Mary (London)
Professor Matthias Lehmann, University of Halle-Wittenber

For more information, see here.

ECJ Strikes Down Mandatory Use

of Language in Contracts

On the basis of a 'Letter of Employment' dated 10 July 2004 and drafted in English, Mr Las, a Netherlands national resident in the Netherlands, was employed as Chief Financial Officer for an unlimited period by PSA Antwerp, a company established in Antwerp (Belgium) but part of a multinational group operating port terminals whose registered office is in Singapore. The contract of employment stipulated that Mr Las was to carry out his work in Belgium although some work was carried out from the Netherlands.

When he was dismissed, Mr Las challenged the validity of the Letter of Employment on the ground of a 1973 Belgian Decree on Use of Languages, which provides:

> *Article 1 – This decree is applicable to natural and legal persons having a place of business in the Dutch-speaking region. It regulates use of languages in relations between employers and employees, as well as in company acts and documents required by the law.*
>
> *Article 2 – The language to be used for relations between employers and employees, as well as for company acts and documents required by law, shall be Dutch.*
>
> *Article 10 – Documents or acts that are contrary to the provisions of this Decree shall be null and void. The nullity shall be determined by the court of its own motion. (…) A finding of nullity cannot adversely affect the worker and is without prejudice to the rights of third parties. The employer shall be liable for any damage caused by his void documents or acts to the worker or third parties.*

Is this Belgian Decree contrary to the freedom of movement of workers in the European Union?

Yes it is, the Grand Chamber of the European Court held on April 16th in Anton Las v. PSA Antwerp NV (case C 202/11).

This is because "*such legislation is liable to have a dissuasive effect on non Dutch speaking employees and employers from other Member States and therefore*

constitutes a restriction on the freedom of movement for workers."

Of course, the Court held, the "*objective of promoting and encouraging the use of Dutch, which is one of the official languages of the Kingdom of Belgium, constitutes a legitimate interest which, in principle, justifies a restriction on the obligations imposed by Article 45 TFEU.*"

But this legislation is not proportionate to those objectives. " *[P]arties to a cross-border employment contract do not necessarily have knowledge of the official language of the Member State concerned. In such a situation, the establishment of free and informed consent between the parties requires those parties to be able to draft their contract in a language other than the official language of that Member State*."

Ruling:

> *Article 45 TFEU must be interpreted as precluding legislation of a federated entity of a Member State, such as that in issue in the main proceedings, which requires all employers whose established place of business is located in that entity's territory to draft cross-border employment contracts exclusively in the official language of that federated entity, failing which the contracts are to be declared null and void by the national courts of their own motion.*

HCCH Family Law Briefings, March 2013

The *International Family Law Briefings* of the Hague Conference are quarterly updates provided by its Permanent Bureau regarding the work of the Hague Conference in this field.

The Briefings for March are now available:

Content March 2013

- Introduction
- The 2007 Hague Child Support Convention: an update
    - Entry into Force
    - Caseworker's Practical Handbook
    - Electronic Country Profile
    - Explanatory Report in Spanish
    - Heidelberg Global Maintenance Conference: March 2013
    - New 2007 Child Support Convention. Materials developed to assist Judges and the General Public
    - Fundraising continues for iSupport, the future electronic case management, communications and fund transfer system under the 2007 Convention
- The 1993 Hague Intercountry Adoption Convention: an update
    - Meeting of an Expert Group on the financial aspects of intercountry adoption (8–9 October 2012)
    - Working Group to develop a common approach to preventing and addressing illicit practices in intercountry adoption cases
    - Francophone Workshop on the 1993 Hague Intercountry Adoption Convention, (Dakar, Senegal, 27–30 November 2012)
- Special Commission on the practical operation of the Apostille Convention (The Hague, 6-9 Novembe 2012)
- UNICEF Conference on the Theory and Practice of Child Protection Systems (New Delhi, India, 13–16 November 2012)
- Opening of the Centre for Private International Law of the Hague Conventions in Niš, Serbia
- The Hague Children's Conventions: Status Update

Mr Bernasconi New Secretary General of Hague Conference

Mr Christophe Bernasconi was appointed new Secretary General of the Hague Conference on Private International Law effective July 1st, 2013. He will succeed

Hans van Loon, who will retire on June 30th.

A biography of Mr Bernasconi, who joined the Conference in 1997 as Secretary, is available here.

Supreme Court to Hear Another ATS Case

Following on the heels of the Supreme Court's decision in *Kiobel* (highlighted here), the Court today granted certiorari in the case of *DaimlerChrysler AG v. Bauman, et al.* In granting cert., the Supreme Court will either resolve the cryptic reference in Chief Justice Roberts's opinion for the Court that "mere corporate presence" cannot suffice to avoid the presumption against extraterritoriality, or it might resolve the case purely on personal jurisdiction grounds. If the former, we will know significantly more about how much the ATS will be contracted. If the latter, we will know much more about agency and affiliate jurisdiction, which is an area of increasing importance in transnational litigation.

To be clear, here is the Question Presented in *Daimler*:

Daimler AG is a German public stock company that does not manufacture or sell products, own property, or employ workers in the United States. The Ninth Circuit nevertheless held that Daimler AG is subject to general personal jurisdiction in California—and can therefore be sued in the State for alleged human-rights violations committed in Argentina by an Argentine subsidiary against Argentine residents— because it has a different, indirect subsidiarythat distributes Daimler AG-manufactured vehicles in California. It is undisputed that Daimler AG and its U.S. subsidiary adhere to all the legal requirements necessary to maintain their separate corporate identities. The question presented is whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State.

While this case is before the Court on the personal jurisdiction question, the Court would, I think, also be able to decide the broader ATS question, assuming, as in *Kiobel*, the Court treats the question as one going to jurisdiction and not the merits.

In related ATS news, the Court today also vacated and remanded *Rio Tinto PLX, et al. v. Sarei, et al*. to the Ninth Circuit for further proceedings in light of the *Kiobel* decision.

Dickinson on Harmonisation of Forum Non Conveniens Test in Australian and Trans-Tasman Proceedings

Andrew Dickison (University of Sydney) has posted Harmonisation of the Forum Conveniens Tests in Australian and Trans-Tasman Proceedings: A Discussion Paper on SSRN.

> *This discussion paper, written as part of the ongoing consultation by the Commonwealth Attorney-General's Department in relation to the possible reform of Australia's private international law rules (and available also on the consultation website), considers whether the statutory tests applied by Australian courts in deciding whether decline jurisdiction in favour of another Australian court on what may broadly be described as "appropriate forum" (forum conveniens) grounds, should be harmonised with the newly adopted regime in Part 3 of the Trans-Tasman Proceedings Act 2010 (Cth) governing decisions to decline jurisdiction in favour of a court in New Zealand. The creation of a harmonised forum conveniens regime for all Australian and Trans-Tasman cases has been put forward as one element of the broader review of rules of jurisdiction, choice of court and choice of law rules mandated by the Standing Committee on Law and Justice in its meeting held on 12-13 April*

2012.

Watté, Barnich and Jafferali on Belgian Decisions on Choice of Law (1995-2010)

Nadine Watté, Laurent Barnich and Rafaël Jafferali (Université Libre de Bruxelles) have posted Chronique de Jurisprudence Belge (1995-2010) (Conflits de lois) (Review of Belgian Case-Law (1995-2010) (Conflicts of Laws) on SSRN.

> *This paper analyses the most significant judgements rendered by Belgian courts in the field of the conflicts of laws during the time period under review, during which Belgian Code of Private International Law (Statute of 16 July 2004) was adopted. Some of the analysed judgements are still based on the preceding conflicts of laws rules because they were rendered before the entry into force of the Code or because of its transitory rules. It seemed therefore interesting to mention the solution which would have been given under the new rules.*
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> *Note: Downloadable document is in French.*

Kiobel: no Role for the United States as World Police

Many thanks to Elise Maes for this reflection on the Kiobel decision. Elise Maes is research fellow of the Max Planck Institute Luxembourg for International,

European and Regulatory Procedural Law.

After more than a decade of awaiting and predicting the final outcome in the case of Kiobel v. Royal Dutch Petroleum Co., the United States Supreme Court reached a decision on April 17, 2013.

The case is a class action suit brought by Esther Kiobel on behalf of Nigerian residents against Royal Dutch Petroleum and its affiliates "Shell Transport and Trading Company" and "Shell Petroleum Development Company of Nigeria" (hereinafter referred to as "Shell"). The defendant companies are incorporated in the Netherlands, the United Kingdom, and Nigeria, respectively. They have been engaged in oil exploration and production in the Ogoni region of Nigeria. A group of Nigerian citizens protested against the environmental destruction caused by Shell's oil exploration in the region. The plaintiffs claim that Shell has been complicit in the torturing and killing of the protestors by the Nigerian military. In other words, Shell allegedly aided and abetted the Nigerian government in committing violations of the law of nations in Nigeria.

None of the relevant facts of the case seem to point towards the United States. The unlawful conduct took place in Nigeria, the victims are Nigerian citizens (who are now legal residents of the United States) and the companies who allegedly took part in the crimes are incorporated in European and African countries. Nonetheless, in 2002 the plaintiffs filed their claim with a United States District Court. The suit was brought under the Alien Tort Statute (ATS), 28 U.S.C. §1350, enacted in 1789, which states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

At issue in the *Kiobel* case was the proper interpretation of the Alien Tort Statute. Originally, the Supreme Court was only asked to rule on the matter whether corporations can be held liable for international human rights violations under the ATS. But the Court broadened the scope of its judgment and also answered the question whether and under what circumstances US courts may hear a case brought under the ATS, for violations of the law of nations occurring within the territory of a sovereign other than the United States.

Last Wednesday (April 17, 2013), the Supreme Court rendered its judgment and ruled unanimously. Four justices concurred with the Chief Justice's opinion. The

other four justices concurred in the outcome of the decision, but followed a different reasoning. Succinctly put, the Court decided that the plaintiffs were not entitled to damages under the ATS. More broadly, the Court ruled that the ATS is not applicable to actions committed on foreign soil. The justices stated that "the presumption against extraterritoriality applies to claims under the Alien Tort Statute, and nothing in the statute rebuts that presumption". *T*his judgment seems to put an end to the extraterritorial jurisdiction of the United States for claims brought under the ATS for human rights violations that were committed on foreign territory and that have no sufficient link to the United States. From now on, one cannot file a claim for human rights violations against a corporation in the USA, simply because they have a presence in the USA. Chief Justice Roberts justly wrote that "corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." An additional connection to the United States is required. Justice Kennedy wrote in his concurrence that the Court's opinion leaves open a lot of significant questions regarding the reach and interpretation of the ATS. One of these remaining questions would indeed be what would constitute an additional sufficient connection. Professor Childress' recent blog post provides several hypotheses and possible answers to that question (https://conflictoflaws.de/2013/what-will-kiobels-impact-be-on-alien-tort-statute-claims/).

Even though the Kiobel case turned out to be a substantial victory for the defendant corporations, they did not get their most favorable outcome. When it comes to the first question regarding the interpretation of the ATS, the Supreme Court has not closed the door to all cases of human rights violations committed by corporations. The Court did not decide that corporations are immune from the ATS.

The reactions to the judgment are – as expected – divided. Multinational companies read the judgment with a sigh of relief. Human rights lawyers on the other hand state that this judgment is not only a disaster for the Nigerian citizens, but the narrow interpretation of the ATS also drastically cuts down on the means and odds to seek redress for other future victims of international human rights violations in foreign and especially in developing countries. The USA are said to be turning their back on a global trend towards human rights enforcement. Some argue that the Supreme Court has interpreted the ATS in a way that is inconsistent with decades of use of the ATS. For over thirty years, the ATS has

been used to bring human rights cases before federal courts.

Nonetheless, the judgment has its merits. From a human point of view, it is an understatement to say that it is tragic that the plaintiffs in this case will not be compensated. However, one cannot bend the law as far as one would like it to reach. The text of the ATS does indeed grant the United States jurisdiction for certain international law violations, but it does not explicitly state that this is the case for conduct on foreign soil. By clearly bringing the presumption against extraterritoriality to the fore, the Supreme Court restores the guiding principle that a nation does not have jurisdiction for causes of action that occur outside their borders. And even for foreign victims of human rights violations committed on foreign territory, the Supreme Court left the door to the US courtrooms ajar. The Chief Justice's words "and even where claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application" indicate that in limited cases there is still the possibility to set aside the presumption against extraterritoriality. In other words, a case that concerns human rights violations committed on foreign territory but which nonetheless shows a greater nexus to the United States, may still fall under United States jurisdiction. Whereas professor Childress argues that in the end the possibilities for foreign victims to file ATS claims in federal court will be very limited, in my view the Supreme Court has left the US courts just the right amount of space to rule in cases of international human rights violations concerning foreign victims. A too far reaching extraterritorial jurisdiction for the United States in international human rights cases would establish a type of legal colonialism. It is not up to the United States – or any other country for that matter – to become the world police when it comes to human rights violations and to rule on these violations, regardless of where they occur. Or as Justice Story puts it: "No nation has ever yet pretended to be the custos morum of the whole world…" (*United States* v. *The La Jeune Eugénie*). In the Kiobel case, it would be up to Nigeria to choose their own means to deal with the conflict in their own way.

In conclusion, it may be said that the Supreme Court has found the right balance in the Kiobel judgment: the Court does not claim the United States to be "a uniquely hospitable forum for the enforcement of international norms" irrespective of where the violation takes place, but leaves room to rule on such cases and to give redress to the victims, as long as these cases show a sufficient

connection with United States territory.

Vogeler on Free Choice of Law in Private International Law of Non-Contractual Obligations

Andreas Vogeler has written a book on free choice of law in the European Private International Law of non-contractual obligations (*Die freie Rechtswahl im Kollisionsrecht der außervertraglichen Schuldverhältnisse.* Tübingen, Mohr Siebeck 2013). The official summary reads as follows:

> *With the codification of Art. 14 of the Rome II Regulation, European lawmakers harmonized the exercise of party autonomy for non-contractual obligations in European law. Andreas Vogeler does a systematic study of party autonomy in the framework of international private law, at the same time providing recommendations for politics and practical use.*

Further information is available on Mohr Siebeck's website (in German).