Another Alien Tort Statute Case Dismissed and a Preliminary Scorecard

As readers of this blog are aware, the United States Supreme Court in the recent case of *Kiobel v. Royal Dutch Petroleum* applied the presumption against extraterritoriality to limit the reach of the Alien Tort Statute. In short, the Court held that the ATS did not apply to violations of the law of nations occurring within the territory of a foreign sovereign.

Today, the United States Court of Appeals for the Second Circuit issued an opinion in the case of *Balintulo v. Daimler AG* holding that the *Kiobel* decision barred a class action against Daimler AG, Ford Motor Company, and IBM Corporation for alleged violations of the law of nations in selling cars and computers to the South African government during the Apartheid era. Rather than dismiss the case itself, the Second Circuit remanded the case to the district court to entertain a motion for judgment on the pleadings. This case is important because it rejected the plaintiffs' theory that "the ATS still reaches extraterritorial conduct when the defendant is an American national." Slip op. at 20. It is also important because it explains that "[b]ecause the defendants' putative agents did not commit any relevant conduct within the United States giving rise to a violation of customary international law . . . the defendants cannot be *vicariously liable* for that conduct under the ATS." Slip op. at 24.

This case as well as the Ninth Circuit's recent decision in *Sarei v. Rio Tinto* (similarly dismissing an ATS suit) would seem to point to substantial contraction in ATS litigation. But, not so fast.

A federal disctrict court in Massachussettes recently let an ATS case go forward notwithstanding *Kiobel* where it was alleged that a U.S. citizen in concert with other defendants took actions in the United States and Uganda to foment "an atmosphere of harsh frighenting repression against LGBTI people in Uganda." *Sexual Minorities Uganda v. Lively*, 2013 WL 4130756 (D. Mass. Aug. 14, 2013). According to the district court, "*Kiobel* makes clear that its restrictions on extraterritorial application of American law do not apply where a defendant and

his or her conduct are based in this country." This statement is plainly at odds with the Second Circuit decision.

Similarly, a federal district court in D.C. recently held that an ATS case could go forward that involved an attack on the United States Embassy in Nairobi.. *Mwani v. Bin Laden*, 2013 WL 2325166 (D.D.C. May 29, 2013). This was so because, according to the district court, "[i]t is obvious that a case involving an attack on the United States Embassy in Nairobi is tied much more closely to our national interests than a case whose only tie to our nation is a corporate presence here. . . . Surely, if any circumstances were to fit the Court's framework of "touching and concerning the United States with sufficient force," it would be a terrorist attack that 1) was plotted in part within the United States, and 2) was directed at a United States Embassy and its employees." This case is now on appeal.

To be clear, these cases are in the minority of the post-*Kiobel* decisions. By my count, it appears that 12 courts have dismissed ATS cases on extraterritoriality grounds and that the two cases higlighted above are the only courts to push the boundaries of the "touch and concern" language in *Kiobel*.

As always with ATS litigation, it will be interesting to see how the case law develops.

Second Issue of 2013's Journal of Private International Law

The latest issue of the *Journal of Private International Law* was just released.

Sixto Sánchez-Lorenzo, Common European Sales Law and Private International Law: Some Critical Remarks

> *The Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales constitutes an attempt to avoid transaction costs caused by legal diversity within the European Union. However, the character*

and scope of CESL rules, together with their complex interaction with European conflict-of-laws rules and the substantive acquis, leads to a scenario of legal uncertainty. This means that the intended objective will not be achieved and, in certain cases, that consumer protection is sacrificed in favour of traders' interests. In order to illustrate this critical conclusion, this article analyses the character and scope of CESL rules. Secondly, the application of CESL rules is considered in cases of an express or implied choice of law and in the absence of such a choice. Finally, further reflections will focus on the application of overriding mandatory rules and on the seminal question of the applicable law to interpret contracts.

Gregor Christandl, Multi-Unit States in European Union Private International Law

When in private international law reference is made to a multi-unit State, the question arises which one of the various territorial legal regimes applies to the specific case. With the predominance of territorial connecting factors in EU private international law, this question will become more important in the near future, given that territorial legal regimes will increasingly have to be applied also to non-nationals of multi-unit States. An analysis of the provisions on reference to multi-unit-States in the EU Succession Regulation as well as in previous EU-Regulations on private international law shows a lack of continuity and coherence which reveals that there may be insufficient awareness of the different features of the three models that can be identified for solving the problem of multi-unit-States in private international law. By offering a system of these basic models, this Article puts the provisions on multi-unit-States of the EU Succession Regulation under critical review and pleads for a general, simple and coherent solution with the hope of improving future EU private international law legislation on this point.

Tena Ratkovic, Dora Zgrabljicrotar, Choice-of-Court Agreements under the Brussels I Regulation (Recast)

In court proceedings commenced after 10 January 2015 the choice of court agreements in the European Union will be regulated by the new Brussels I Regulation (recast). The amendments introduced by the Recast aim to increase the strength of party autonomy as well as predictability of the litigation venue. Therefore, several changes have been made – the requirement that at least one party has to be domiciled in a Member State was abandoned for choice of court agreements, the substantive validity conflicts rule and a rule on severability have been introduced. Most importantly, the rules on parallel proceedings have been altered. This article examines those modifications and discusses their effect on the European Union courts' desirability as a place for litigation.

Peter Arnt Nielsen, Libel Tourism: English and EU Private InternationalLaw

Libel tourism, which is much related to the UK, is caused by a mixture of factors, such as the law applicable, national and European rules of jurisdiction, national choice of law rules, and case law of the CJEU. These issues as well as aspects of recognition and enforcement of libel judgments in the US and EU are examined. Proposals for reform and legislative action in the EU are made. The effect of the Defamation Act 2013 on libel tourism, in which the UK attempts to strike a better balance between freedom of expression and privacy and to deal with libel tourism, is examined.

Stephen Pitel, Jesse Harper, Choice of Law for Tort in Canada: Reasons for Change

In 1994 the Supreme Court of Canada in Tolofson v Jensen adopted a new and controversial choice of law rule for tort claims. Under that rule, the law of the place of the tort applies absolutely in interprovincial cases and applies subject only to a narrow exception in international cases. The approaching twentieth anniversary of this important decision is an appropriate time to consider how the rule is operating. In particular, the rule needs to be assessed in light of (a) calls for legislative reform from the Manitoba Law Reform Commission, (b) the European Union's adoption of the Rome II Regulation for choice of law in non-contractual obligations, (c) the ongoing operation of a competing rule under Quebec's civil law and (d) the application of the rule by Canadian courts since 1994. This article will assess Canada's tort choice of law rule and analyse the desirability of reform, looking in particular at the rigidity of the rule, the scope of its exception and possible alternative rules.

Henning Grosse Ruse-Khan, A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging Between Intellectual Property, Trade, Investment and Health

The idea of employing conflict-of-laws principles to address competing rationalities in international law is unorthodox, but not new. Existing research focusses on inter-systemic conflicts between different areas of international law – but has stopped short of proposing concrete conflict rules. This article goes a step further and reviews the wealth of private international law approaches and how they can contribute to applying rules of another, 'foreign' system. Against the background of global intellectual property rules and their interfaces with trade, investment, health and human rights, the dispute over plain packaging of tobacco products serves as a test case for conflict-of-laws principles. It shows how these principles can provide for concrete legal tools that allow a forum to apply external (ie foreign) rules – beyond interpretative concepts such as

systemic integration. The approach hence is one way to take account of the pluralism of global legal orders with significant overlaps and intersections.

Fordham CLIP on Internet Jurisdiction in England and the U.S.

Joel Reidenberg, Jamela Debelak, Jordan Kovnot, Megan Bright, N. Cameron Russell, Daniela Alvarado, Emily Seiderman and Andrew Rosen (Fordham CLIP) have posted Internet Jurisdiction: A Survey of Legal Scholarship Published in English and United States Case Law on SSRN.

This study provides a survey of the case law and legal literature analyzing jurisdiction for claims arising out of Internet activity in the United States. A companion study, released simultaneously, explores similar issues as they are treated in the German legal system. The goal of the report is to identify trends in legal literature and case law and to serve as a comprehensive, objective resource to assist scholars and policy-makers looking to learn about the issues of jurisdiction on the Internet.

The U.S. study shows that most academic scholarship discusses all three aspects of jurisdiction law — personal jurisdiction, choice of law and jurisdiction to enforce — within the individual articles. In addition, the literature treats a noticeably wide variety of legal areas — including, for example, analyses of specific cases, particular issues related to e-commerce, and the regulation of online speech — but overall, does not appear to have a consensus on an approach or solution that cuts across the varied areas of law addressed by the scholarship. Thus, in effect, a review of academic scholarship shows that Internet jurisdiction is as varied as the legal issues and fields of law it permeates.

With respect to U.S. case law, Fordham CLIP's research indicates that issues

surrounding Internet jurisdiction gravitate toward the Ninth Circuit and the Second Circuit more so than other federal circuits. Moreover, contrary to the body of academic literature, the research demonstrates that U.S. courts predominantly adjudicate matters of personal jurisdiction in Internet cases rather than other subsets of jurisdiction, and that Internet jurisdiction issues trend toward intellectual property and defamation cases. Lastly, the case law shows that, although the Zippo and Calder decisions remain the clear, predominant legal standards and tests for Internet jurisdiction matters, when and how these rules are applied by U.S. courts lacks uniformity.

Fordham CLIP on Internet Jurisdiction in Germany

Desiree Jaeger-Fine, Joel Reidenberg, Jamela Debelak and Jordan Kovnot (Fordham CLIP) have posted Internet Jurisdiction: A Survey of German Scholarship and Cases on SSRN.

In late June 2013, Fordham CLIP completed a study, "Internet Jurisdiction: A Survey of German Scholarship and Cases." This project provides a survey of the case law and legal literature analyzing jurisdiction for claims arising out of Internet activity in Germany. A companion study, released simultaneously, explores similar issues as they are treated in the United States. The goal of the report is to identify trends in legal literature and case law and to serve as a comprehensive, objective resource to assist scholars and policy-makers looking to learn about the issues of jurisdiction on the Internet with a focus on the German legal system and relevant EU laws.

The research survey shows that, although various trends can be identified within German and EU case law, no consensus on the treatment of international jurisdiction can be ascertained. Although the academic literature demonstrates awareness of the problems and pitfalls in Internet-related cases, clear solutions are seldom offered. Moreover, notwithstanding German Federal Supreme Court

and European Court of Justice decisions that have set the stage for further development, the research indicates that the coexistence of German and European Law, as well as the presence of separate subject matter-specific legal regimes, preclude the identification of any real consensus views.

Gomez on the Enforcement of the Lago Agrio Judgment

Manuel Gomez (Florida International University College of Law) has posted The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment Outside of Ecuador on SSRN.

The Lago Agrio judgment is by all measures the largest and most complex award rendered against a multinational oil company in Ecuador, and perhaps in the entire region. With regard to its size, the type of remedies awarded to the plaintiffs by the Sucumbíos court, and the mechanisms through which those remedies will be made effective, the enforcement of the Lago Agrio judgment has rekindled a debate on several important issues that pertain to the litigation of complex cases in South America. The Lago Agrio judgment has revealed the complexity of the multi-layered, multi-step process of enforcing a foreign judgment across different jurisdictions. In so doing, the Lago Agrio ruling has a direct bearing on the larger debate about the judicial protection of collective rights in Latin America, the controversial treatment of punitive damages in countries of the civil law tradition, and the undue influence of litigants on the performance of the courts. The development of the Chevron-Ecuador litigation in South America is one of the most important pieces in the context of this saga and has been generally neglected from the consideration of academicians. This Article fills that gap.

By switching its attention away from the litigation handled by U.S. courts, and focusing into the generally overlooked South American court cases, this Article helps to complete the puzzle of the Chevron saga with regard to the factors that

affect the recognition and enforcement of foreign judgments in that region. More specifically, this Article will discuss the interplay between the procedural steps routinely required by the national laws of the enforcing jurisdictions, the treaty obligations assumed by the nations involved, the statutory defenses allowed to the parties, and the litigation strategies employed by counsel to effectively assist or impede the judgment from being fulfilled. The contribution of this Article is two-fold. First, it discusses with certain level of detail the recognition and enforcement regime of foreign judgments across Latin America with special attention to the domestic and the international legal regimes applicable to Argentina and Brazil. Second, by giving importance to the context within which the Lago Agrio litigation and related proceedings are taking place, this Article addresses defendant's strategies to evade the enforcement of an adverse judgment, and the incentives and challenges faced by plaintiffs, including the strategies procedural and otherwise, to obtain the recognition and enforcement of said foreign judgment. Although the discussion offered in this Article in centered on a single case, in a broader sense this Article highlights the practical difficulties of transnational judgment enforcement and the strategies employed by the parties across multiple countries.

The article is forthcoming in the *Stanford Journal of Complex Litigation* 2013.

CJEU to Rule on Prorogation and Transfer of Jurisdiction under the Brussels II a Regulation

Ester di Napoli earned a PhD from the University of Padova with a dissertation on European private international law in family matters.

The Civil Division of the Court of Appeal of England and Wales recently made a request for a preliminary ruling on the interpretation of Articles 12 and 15 of Regulation (EC) No 2201/2003 concerning **jurisdiction and the recognition**

and enforcement of judgments in matrimonial matters and the matters of parental responsibility (the Brussels II *a* Regulation). So far, none of these provisions has been the object of a preliminary ruling by the CJEU.

Articles 12 and 15 provide a number of exceptions to the general rule set forth in Article 8, according to which matters of parental responsibility should be decided by the courts of the Member State where the child is habitually resident. Pursuant to Article 12(3), the courts of a Member State shall also have jurisdiction where (a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State, and (b) the jurisdiction of such court has been accepted by all the parties to the proceedings and is in the best interests of the child ("prorogation of jurisdiction"). Under Article 15, jurisdiction may be transferred, in exceptional circumstances, to a court with which the child "has a particular connection", provided that the court in question appears to be "better placed to hear the case".

The CJEU is asked to clarify, in the first place, how long a prorogation of jurisdiction made in conformity with Article 12 should be deemed to last, *i.e.* whether the jurisdiction of the prorogated court (in the case at hand, a Spanish court) only continues until there has been a final judgment in the proceedings for the benefit of which the prorogation was made, or if it continues "even after the making of a final judgment". Secondly, as regards Article 15, the CJEU is asked to determine whether jurisdiction may be transferred from one Member State (Spain) to another (United Kingdom) in circumstances where there are no current proceedings concerning the child in the first State.

The case from which the referral originated concerns a minor ("S"). In February 2010, S, then a 5-year-old child, left Spain and moved to England with his mother. A few weeks later, the father instituted proceedings in Spain regarding various issues concerning the parental responsibility over S. The parents subsequently reached an agreement (only signed by the mother) on some of these issues, including the provision for S to reside with the mother in England. A few months later, the father re-instigated the proceedings before the same Spanish Court with a new application for residence. At the same time, the mother applied for substantive relief in England. The English Court then made an order declaring that S was habitually resident in England and Wales, and that the English courts had exclusive jurisdiction to determine issues in respect of the child. The parents

renewed their negotiations in Spain and prepared a further agreement, specifying the arrangements for S's future care. In doing so, the mother made clear that she was relying on Article 12(3) of Brussels II *a* Regulation, as she believed that the English Court had sole jurisdiction to make orders in respect of S. The agreement ('convenio') was signed by both parents in July, witnessed by a court clerk and then endorsed by the Spanish Court by an order of October 2010. The order actually brought the Spanish proceedings to an end.

In December 2010, the mother commenced new proceedings in the English Courts, seeking a variation of the contact arrangement decided in the Spanish 'convenio'. In response, the father commenced proceedings in Spain and then in England, seeking enforcement of the Spanish order of October 2010.

In December 2011, the English Court issued an order, by consent, confirming that the mother had accepted the jurisdiction of the Spanish court, in conformity with Article 12(3) of the Brussels II *a* Regulation, which later resulted in the Spanish order of October 2010, and that she no longer intended to object to the enforcement of such Spanish order.

She then moved to ask the Spanish Court to declare that it lacked the jurisdiction to deal with S or any proceedings concerning S, and that in the event the Court considered that it continued to have jurisdiction, asked for the transfer of the proceedings to England, pursuant to Article 15 of the Brussels II *a* Regulation. In February 2012, the Spanish Court confirmed that there was no reason to declare lack of jurisdiction, the judgment having become final, and there being no pending proceedings between the parties.

The High Court subsequently declared that the prorogation of jurisdiction of the Spanish Court under Article 12(3) of the Brussels II *a* Regulation by the mother had come to an end with the making of the final order of October 2010, that there was no residual jurisdiction in Spain, and that the English Court did not need to seek a transfer (as, in any event, there were no "living" proceedings in Spain to transfer pursuant to Article 15). The English Court concluded that it could properly assume jurisdiction to determine issues relating to S pursuant to Article 8 of the Brussels II *a* Regulation.

Thanks to Nina Hansen of Freemans Solicitors, London.

Proposal for Amendment of the Brussels I-Regulation

The recently reformed Brussels I-Regulation is up for reform: according to a proposal for a Regulation of the European Parliament and of the Council (COM(2013) 554 final) of July 26, 2013 the Brussels I-Regulation (Regulation (EU) No 1215/2012 (recast)) will be changed to account for the 2012 Unified Patent Court Agreement and the 2012 Protocol to the Benelux Treaty setting up the Benelux Court of Justice.

The proposal aims (1) to clarify that the Unified Patent Court and the Benelux Court of Justice are courts in the meaning of the Brussels I-Regulation, (2) to clarify the rules on jurisdiction, and (3) to define the application of *lis pendens* and related actions with respect to the Unified Patent Court and the Benelux Court of Justice.

The proposal is available here.

2007 Hague Protocol in Force since August 1st

The Hague Conference on Private International Law has announced that on 1 August 2013, the *Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* (hereinafter the 2007 Hague Protocol) came into force at the international level between Serbia and the European Union (all Member States of the European Union with the exception of Denmark and the United Kingdom).

The Hague Conference is marking this occasion by making the Explanatory Report on the 2007 Hague Protocol, drawn up by Andrea Bonomi, publicly available. Click here to download an electronic copy of the Explanatory Report.



In accordance with a decision of the Council of the European Union and Article 15 of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters relating to maintenance obligations, the 2007 Hague Protocol has been applied since 18 June 2011 between all Member States of the European Union (with the exception of Denmark and the United Kingdom). Click here for more detailed information in this respect.

For more general information on the 2007 Hague Protocol, please click here.

Woodward on Legal Uncertainty and Aberrant Contracts

William J. Woodward Jr. (Santa Clara Law School) has posted Legal Uncertainty and Aberrant Contracts: The Choice of Law Clause on SSRN.

> *Legal uncertainty about the applicability of local consumer protection can destroy a consumer's claim or defense within the consumer arbitration environment. What is worse, because the consumer arbitration system cannot accommodate either legal complexity or legal uncertainty, the tendency will be to resolve cases in the way the consumer's form contract dictates, that is, in favor of the drafter. To demonstrate this effect and advocate statutory change, this article focuses on fee-shifting statutes in California and several other states. These statutes convert very common one-way fee-shifting terms (consumer pays business's attorneys fees if business wins but not the other way around) into two-way fee-shifting provisions (loser pays winner's fees in all cases). As written, these statutes level the lopsided playing field created by the*

drafter and, indeed, may give consumers access to lawyers in cases where their claims or defenses are strong. But choice of law provisions, found in the same consumer forms, introduce near-impenetrable uncertainty into the applicability of those same statutes, thereby reducing or eliminating the intended statutory benefits. Statutory change is needed to restore the intended benefits of the otherwise applicable fee-shifting statutes (and of other local consumer protection similarly degraded by drafters' choice of law clauses); the article concludes by presenting a roadmap for state statutory reform.

CJEU to Issue a New Opinion on the External Competence of the EU

Pietro Franzina is associate professor of international law at the University of Ferrara.

The European Commission has recently asked the Court of Justice of the European Union (CJEU) to render an opinion pursuant to Article 218(11) of the TFEU concerning the Union's competence to entertain "external" relations in the area of judicial cooperation in civil matters (Opinion 1/13: see the announcement in the *Official Journal* of 3 August 2013). The proceeding comes almost ten years after the request (then submitted by the Council) that eventually resulted in the Lugano Opinion of 7 February 2006.

The new question reads as follows: "Does the acceptance of the accession of a third country to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction fall within the exclusive competence of the Union?".

Although little is known of the background of the request, the latter seems to refer to the proposals presented by the Commission, back in 2011, contemplating the adoption of Council decisions requiring Member States to "deposit

simultaneously", "in the interest of the Union", a declaration aimed to accept the accession of various States (Gabon, Andorra, Seychelles, the Russian Federation, Albania, Singapore, Morocco and Armenia) to the Hague Child Abduction Convention.

It is worth recalling that, under Article 38(4) of the Convention, the accession of a State "will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession".

In the Commission's view, as stated in the explanatory memorandum accompanying the proposals mentioned above, international child abduction falls – in consonance with the Lugano Opinion – "into the exclusive external competence of the European Union, because of the adoption of internal Union legislation by means of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility". As a matter of fact, the Regulation "introduces even stricter rules than the 1980 Hague Convention on parental child abduction", "refers directly to the Hague Convention and upholds its principles in European Union law".

In these circumstances, since the Convention does not contain any provisions allowing the accession of international organizations, like the European Union, it is for the Member States to ratify or accede to the Convention in the interest of the Union. According to the Commission, this implies that the Member States should likewise declare that they accept, in the interest of the Union, the accession of new States to the Convention, whenever a decision to that effect has been taken by the Union.

None of the proposals has been adopted so far. Various countries have acceded to the Convention after the accession of the States indicated above, but none of the new accessions has been followed by a Commission proposal envisaging an acceptance "in the interest of the Union": reference is made to the accession of Guinea (7 November 2011), Lesotho (18 June 2012), Korea (13 December 2012) and Kazakhstan (3 June 2013).

In the meanwhile, some Member States have "individually" declared their acceptance of some of the accessions in question. Belgium, for example, accepted

the accession of Armenia, Seychelles, Morocco, Singapore and Andorra, while Spain did the same in respect of all of the States mentioned above, as well as Guinea (for more information, see the Spreadsheet showing acceptances of accessions to the Child Abduction Convention at the website of the Hague Conference on Private International Law).

It is beyond the scope of this post to outline the arguments that could in principle be put forward by the European institutions and the Member States in favour, or against, the Commission's claim regarding the Union's external competence in respect of these acceptances.

Rather, it is worth observing that the implications of the Court's opinion – were this to uphold the Commission's view – would not be limited to the situation from which the request originated.

On the one hand, the Child Abduction Convention is not the only international convention in the field of private international law providing for an acceptance procedure similar to the one illustrated above (see, for example, Article 39 of the Hague Convention of 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters).

On the other hand, and more importantly, declarations of acceptance such as those considered in the Commission's request are but one of the several acts that may be performed in connection with an international treaty, once the latter has been concluded. Should the Court decide that, in principle, it is for the Union to accept the accession of a third country to a convention to which a Member State is a party (provided that the accession affects the operation and effects of the internal legislation of the Union), this would probably pave to the way to the Union becoming solely responsible for a number of other initiatives regarding the conventions concluded by Member States in the area of private international law, such as the withdrawal of reservations or the denunciation of the relevant treaties.