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.

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).

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).