Kiobel–The Plot Thickens

What does a plaintiff do when the United States Government originally supports your case and then, after the Supreme Court requests further briefing, comes out against you? That is the question that the plaintiffs in *Kiobel v. Royal Dutch Petroleum* are facing today. As previously reported here, the United States Supreme Court initially granted certiorari in *Kiobel* on the questions of whether (1) the issue of corporate civil tort liability under the Alien Tort Statute, 28 U.S.C. § 1350, is a merits question or instead an issue of subject matter jurisdiction; and (2) corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide or may instead be sued in the same manner as any other private party defendant under the ATS for such egregious violations. After oral argument, the Court took the atypical step of ordering reargument and asked for briefing on the following question: "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."

As reported yesterday, Petitioners filed their supplemental brief arguing that in at least some circustances the ATS can be applied extraterritorially. Late yesterday, the United States Government filed its supplemental amicus brief.

All I can say is "Wow!" In its initial brief, the United States urged reversal of the Second Circuit and argued that "[c]ourts may recognize corporate liability in actions under the ATS as a matter of federal common law." In other words, the Government believed the plaintiffs deserved their day in court and should not be precluded from suing corporations. Now, the Government has changed its position. In its supplemental brief, it urges partial affirmance and explains that the Court should not "fashion a federal common-law cause of action" on the facts of this case where "Nigerian plaintiffs are suing Dutch and British corporations for allegedly aiding and abetting the Nigerian military and police forces in committing [crimes] in Nigeria."

But, that isn't all. The Government goes on to argue that courts should apply forum non conveniens and exhaustion doctrines at the beginning of ATS cases to limit the filing of ATS cases in the United States where the U.S. nexus is slight. In the brief's conclusion, the SG reiterated its view that corporations are amenable

to suit, by explaining that the Second Circuit should still be reversed on that point. But, that point, in the SG's view, is now secondary.

Notably, one name and department that appeared on the initial amicus brief does not appear on the supplemental brief–Harold Koh and the State Department.

So, what can we make of this? Reading betwen the lines, my sense is that the SG's office and perhaps the Executive Branch generally saw the writing on the wall based on the Court's oral argument and rebriefing order that ATS litigation was going to be shut down based on extraterritoriality–a position the Bush Administration had previously argued. Not wanting to go that far, the SG's office tried to give the Court comfort that cases with no U.S. nexus would not be filed here and other doctrines like forum non conveniens and exhaustion would keep those cases out of U.S. courts. What are we to make of Harold Koh and the State Department's absence? It sounds like there might be some disagreement between the SG's office and the State Department on approach. What would the State Department's argument be, I wonder?

It will be interesting to see what the Defendant/Respondents make of all of this.

The New Face of Brussels I

On June 27, the British Institute for International and Comparative Law will hold a conference on the Recast of the Brussels I Regulation from 5 to 6:30 pm.

> *The Brussels I Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is one of the key instruments of European Private International Law. It is currently undergoing a review process.*
>
> *Various changes have been suggested by the European Commission in the Review Proposal, some of them have been subsequently amended in the legislative process. This event focuses on the latest news from Brussels on the text of the recast.*

In addition, the event will highlight and debate several important recent Brussels I decisions.

Participants:
Robert Bray, European Parliament
Professor Jonathan Harris, King's College London; Serle Court
Professor Andrew Dickinson, University of Sydney; Clifford Chance, London
Professor Marta Recejo, University of Santiago de Compostela

The conference will be followed by a book launch reception for The Brussels I Review Proposal Uncovered, edited by Dr Eva Lein, the Herbert Smith Senior Research Fellow in Private International Law at the Institute.

Extraterritorial Application of U.S. Law–Two Recent Developments

This past week has seen two interesting developments in cases regarding the extraterritorial application of U.S. law. First, as detailed here, District Court Judge Donneta Ambrose rejected Alcoa's claims that a recent civil RICO suit should be dismissed under Rule 12(b)(6) because it amounted to the inappropriate extraterritorial application of U.S. RICO law. As Judge Ambrose's decision recognizes, it is one of many recent decisions regarding the extraterritorial application of RICO. Recent decisions confirm that the Morrison decision, see here, applies to RICO. The question is whether on the facts of a given case the plaintiffs are seeking an extraterritorial application of the RICO statute or merely seeking civil liability for what amounts to domestic conduct. District Courts appear to be divided on the appropriate analysis. Some courts focus on whether the enterprise is foreign or domestic (as does Judge Ambrose) and other courts focus on whether the location of the alleged racketeering activity is in the United States. Put a slightly different way, district courts seem to be conducting a version of a conducts (enterprise) and effects (location of racketeering activity) test–a test which was rejected in the securities context in

Morrison. Given the differing rationales, appellate review certainly seems warranted.

The second development is the continuing saga of Kiobel, which has previously bee highlighted on this blog. Petitioners/Plaintiffs have now filed their supplemental briefing arguing that the Alien Tort Statute applies, at least in some circumstances, to conduct occuring in a foreign sovereign's territory. Further briefing by Respondent/Defendant is expected by August 1.

Conference Announcement: Collective Redress in Cross-Border Context

Conference on Collective Redress in the Cross-Border Context
In the framework of the Henry G. Schermers Fellowship Programme<http://www.hiil.org/henry-g-schermers-fellowship>, held this year by Professor S.I. Strong, the Hague Institute for the Internationalisation of Law (HiiL) and the Netherlands Institute of Advanced Studies (NIAS)<http://www.nias.nl/Pages/NIA/2/764.bGFuZz1FTkc.html> announce a workshop on the theme 'Collective Redress in the Cross-Border Context: Arbitration, Litigation and Beyond.'
The workshop aims to explore the various means that can be used to resolve collective legal injuries that arise across national borders. The types of dispute resolution mechanisms to be discussed range from class and collective arbitration, mass arbitration and mass claims processes, class and collective litigation, and large-scale settlement and mediation. The workshop will bring together practitioners, academics, and representatives of non-governmental organisations, all of whom have an interest and expertise in public and private resolution of collective redress in the international realm.

For the first time, NIAS and HiiL are offering a works-in-progress conference in

association with the Henry G. Schermers workshop. This conference is designed to allow practitioners and scholars who are interested in this area of law to discuss their work and ideas in the company of other experts in the field.

Confirmed speakers for the Schermers workshop include:
* Jan Willem Bitter, Simmons & Simmons LLP/Netherlands Arbitration Institute (The Netherlands) * Christian Borris, Freshfields/German Arbitration Institute (Germany) * Laura Carballo Piñeiro, University of Santiago de Compostela (Spain) * Christopher R. Drahozal, University of Kansas (USA) * Gregory A. Litt, Skadden, Arps, Slate, Meagher & Flom LLP (USA) * Daan Lunsingh Scheurleer, NautaDutihl (The Netherlands) * Gerard Meijer, Nauta Dutihl/Erasmus University Rotterdam/PRIME Finance (The Netherlands) * Rachel Mulheron, University of London, Queen Mary (UK) * Victoria Orlowski, ICC International Court of Arbitration (France) * Geneviève Saumier, McGill University (Canada) * Garth Schofield, Permanent Court of Arbitration (The Netherlands) * S.I. Strong, Henry G. Schermers Fellow, HIIL/NIAS, University of Missouri (USA)
The three-day event will be held June 20-22, 2012, at the NIAS site in Wassenaar, twenty minutes outside of the Hague. The events are free to the public, but registration is required. For more information on the event, including the full programme for both the Schermers workshop and works in progress event, see the HiiL website at: http://www.hiil.org/events/hiil-nias-workshop-collective-redress. Questions may also be directed to Professor S.I. Strong at strongsi@missouri.edu<mailto:strongsi@missouri.edu>.

Verschraegen on Private International Law in Austria

Bea Verschraegen,

Internationales Privatrecht - ein systematischer Überblick, Manz, Wien 2012

Bea Verschraegen, Professor for Comparative Law at the University of Vienna, has recently published a textbook on Private International Law in Austria. It provides an up-to date presentation of the applicable rules and regulations and, thereby, fills a long-lasting gap in the Austrian literature on Private International Law. The official announcement reads as follows:

> *A new systematic presentation of Private International Law for study and practice has just been published by Bea Verschraegen (Professor for PIL and Comparative Law at the University of Vienna). The entire body of significant PIL for Austria is examined, including relevant European and international law. With it, Bea Verschraegen also handles recent innovations in conflict of laws, for instance the Rome III Regulation, the European Maintenance Obligations regulations and the 2007 Hague Maintenance Convention.*
>
> *Bea Verschraegen's work contributes in particular to European integration and the corresponding changes to the fundamentals of conflicts of law. The book is intended as a reference guide from questions related to Private International Law to European and Austrian law. Therefore, the more detailed section is positioned at the beginning of the book for ease of reference, followed by the more general section thereafter.*
>
> *The book comprises the following chapters:*
>
> *I. Detailed Section:*
>
> - *Law of Persons*
> - *Family law*
> - *Law of Succession*
> - *Law of Contractual Obligations*
> - *Law of Non-Contractual Obligations*
> - *Property law*
> - *Company law*

- *Competition law (Trade law and anti-trust law)*
- *Intellectual Property law*

II. General Section

A full table of contents and a preview is available on the publisher's website.

Tang on Consumer Collective Redress in European PIL

Zheng Sophia Tang (Leeds University) has posted Consumer Collective Redress in European Private International Law on SSRN.

> *Collective redress is a cost-sharing and procedure-consolidating mechanism. In the area of consumer litigation, it is introduced primarily to compensate the weakness of expensive and time-consuming court proceedings in small claims in order to increase consumers' access to justice. Consumer contractual claims are characterised as of small value, which largely discourages individual consumers from resorting to judicial action to protect their legal rights. Collective redress combines separate consumer claims against the same defendant based on the similar circumstances into one single action. It is helpful to resolve the litigation difficulty, to promote consumers' access to redress and to improve good commercial performance. A recent survey shows 76% of European consumers would be more willing to defend their rights in court if they could join other consumers. It is also believed that collective redress could offer businesses an opportunity to resolve an issue once rather than having repeated proceedings.*
>
> *The concept of collective redress is not new. Some common law countries, such as US, Canada and Australia have already established mature and widely used 'class action' mechanism, which enables one or more individuals to bring an action on behalf of putative claimants against the same defendant. Each*

putative claimant is presumed to consent being presented in the action and being bound by the judicial decision, unless he actively gives notice to opt out. The US-style class action does not exist in Europe, though the revised versions with similar elements exist in the Netherland and Sweden. Currently, thirteen Member States have adopted collective redress mechanisms for consumer claims. Although practices in these countries vary largely, they could be generally categorised into three groups: (1) group action, where exactly defined claimants bring actions in one procedure to enforce their similar claims together. Each group litigant is a party in the litigation; (2) representative action, where an organisation, an authority or an individual brings actions on behalf of a group of individuals, who are not the real party of the litigation; (3) test case procedure, under which mass individual claims are filed, and a leading decision is given to one case, which decides the common factual and legal issues of similar legal actions, and serves as an example for other similar cases.

Collective redress in Europe is at an experimental stage and the existing collective redress mechanisms in most Member States are largely domestic tools, the effect of which is primarily limited to domestic claims. There is no common standard in the EU as to the functioning and regulation of collective actions. With the consumer-oriented culture, increasing consumers' access to justice has attracted much attention. In its Consumer Policy Strategy for 2007-2013, the European Commission announced that it would consider the feasibility of an EU initiative on collective action in protecting consumers' access to justice. In November 2008, the European Commission has published a Green Paper on Consumer Collective Redress, which provides four proposals for the possible development of consumer collective redress in Europe, two of which might be of particular interest to conflicts lawyers: (1) to require Member States having a collective redress mechanism to open up the mechanism to consumers from other Member States (option 2 of the Green Paper), and (2) to initiate a non-binding or binding EU measure to ensure that a collective redress judicial mechanism exists in all Member States (option 4). The European Commission specifically points out that these two options with clear cross-border features could generate conflict of laws difficulties.

This research focuses on the jurisdiction problems in cross-border collective redress in Europe. The European jurisdiction rules have two characteristics: firstly, protective jurisdiction is available for consumer contractual claims.

Section 4 of the Brussels I Regulation provides that if a contract falls within the protective scope, a consumer is always entitled to sue a business defendant in the consumer's domicile. This approach is incompatible with the nature of cross-border collective redress, where consumers may come from different Member States. Secondly, special jurisdiction rules are designed according to the 'classification' of the claim. There is no special jurisdiction rule designated for the 'collective redress' (Art 6 concerns multiple defendants instead of multiple claimants) and it is necessary to see whether any of the existing jurisdiction provisions can be properly applicable to a collective action.

These characteristics determine the difficulties to apply the Brussels rules in cross-border collective redress. In a representative action, the representative individual(s) or association brings the lawsuit on behalf of all represented consumers, where the real litigating party is the representative instead of the represented consumers. If the protective jurisdiction does not apply, one needs to study whether the action is a matter relating to contract under Art 5(1). There is no doubt that each putative claimant that has been represented has a contractual claim, but should Article 5(1) require the existence of a contractual claim between the 'litigating parties?' Even if the group action is classified as a matter relating to contract, applying the jurisdiction rules of Article 5(1) can be difficult in a representative action where the goods are delivered to, or services are provided for, consumers domiciled in different Member States.

In group action or test case procedure, each consumer is the real litigant and could individually enforce the decision. Since the Brussels I Regulation does not provide specific jurisdiction rules for these mechanisms, it is necessary for a court to consider jurisdiction over the claim of each consumer in the collective action. A consumer in a contract that falls within the scope of protective jurisdiction is entitled to sue a business defendant either in the court of the defendant's domicile or in the court of the consumer's domicile. According to this rule, where the consumers are domiciled in more than on Member State, only the courts of the defendant's domicile could have jurisdiction. The courts of any one of the consumers' domicile can only hear the action brought by the claimant consumer who has his domicile within this country.

It is concluded that under the current Brussels I Regulation, cross-border consumer collective redress can only be brought in the court of a defendant's domicile, unless all the consumers are domiciled in one Member State.

> *However, it does not mean that the current approach is definitely a barrier to cross-border collective redress. On one hand, it brings disadvantages to those consumers domiciled in a country where very few consumers have transactions with the business and it prevents collective action from being brought where a business's commercial activities are spreading over many Member States and the number of consumers in each State is not high. On the other hand, it brings certainty to business defendants, especially small and medium sized companies, and reduces litigation costs. The research will continue to analyse the socio-economic impact of the current jurisdiction rule, and to consider whether it is necessary to reform the Brussels I Regulation by introducing an innovative provision specifically for collective redress.*

The paper was published in the *Journal of Private International Law* in 2011.

Actio Pauliana and More (in Spanish)

Dr. Laura Carballo-Piñeiro, from the University of Santiago de Compostela (Spain) has just published two new articles. The first one, entitled *Acción pauliana e integración europea: una propuesta de ley aplicable (Actio Pauliana* and European Integration: A Proposal Regarding Applicable Law), has appeared in the last number of the *Revista Española de Derecho Internacional;* the abstract reads as follows:

> "The *actio pauliana* is a *rara avis* within Private Law, the principle of which is to uphold sound private relationships. The principle, however, is called into question by acts of fraudulent transfer – the challenging of a valid and effective act in order to recover a creditor's losses involves two conflicting interests that makes identification of the law applicable to the *actio pauliana* a difficult question to remedy. This paper deals with this longstanding problem by examining new EU conflict of laws instruments, which provide the basis for determining the allocation of a debtor's insolvency among his creditors"

The second contribution, *Protección de inversores, acciones colectivas y Derecho internacional privado (Investor Protection, Collective Redress and Private International Law),* is to be found in the *Revista de Sociedades,* 2011 (July-December). Here is the abstract:

> The financial crisis has increased claims on grounds of false or mistaken information given to investors in order to capture capital. Many of them are brought before the United States' jurisdiction seeking for the advantages provided by the securities class actions, which allow to decide in an only proceeding claims involving multiple investors, including the ones resident in other countries. Economic procedural reasons are pushing other States, like Germany or the Netherlands, to introduce some kind of collective remedy as well. This paper aims at presenting how these procedural mechanisms work as well as at addressing the situation of collective justice for investors in Spain, at the moment just restricted to the investor characterized as consumer. Besides, the already depicted internationalization of markets demands to tackle traditional issues of Private international law, i.e. the criteria on international jurisdiction to interpose a collective action in investment matters, the applicable law to such matters and recognition and enforcement of decisions, maybe the most pressing issue taking into account possible foreign claims against Spanish companies or in which Spanish investors are included. Eventually, this paper closes with the interest of evolving in Spain a collective action comprehending all kind of investors, an issue which could be finally decided by an European instrument, on which the European Commission is actively working.

Basedow on the Optional

Instrument of European Contract Law

Jürgen Basedow, Director of the Max-Planck-Institute for Comparative and International Private Law Hamburg, has posted "The Optional Instrument of European Contract Law: Opting-in through Standard Terms – A reply to Simon Whittaker" on SSRN. The paper can be downloaded here. The abstract reads as follows:

> *In a paper recently published (The Optional Instrument of European Contract Law and Freedom of Contract, ERCL 7 (2011) 371 – 388 at p. 388), Simon Whittaker has criticized the "reduction of an individual consumer's protection" resulting from the adoption of an optional instrument on European contract law such as the one now contemplated by the European Commission (the "Optional Instrument"). The article contains a number of propositions which will not be tackled here. This comment is confined to consumer contracts and to a pertinent key assumption of Whittaker: that a standard term exercising the option in favour of the Optional Instrument would be subject to judicial review under Directive 93/13 on unfair contract terms in consumer contracts.*

German Federal Labour Court Rules on Jurisdiction in Posted Workers Case

In a judgement of 15 February 2012, the German Federal Labour Court *(Bundesarbeitsgericht)* had to deal with the question of whether German courts have jurisdiction concerning contribution claims of a specialised social security fund against a company domiciled abroad. Referring to Articles 1 (1) Sentence 1, 76, 67 of the Brussels I-Regulation as well as Section 8 Sentence 2 of the Posted

Workers Act (now: Section 15 of the Revised Posted Workers Act) the court answered the question in the affirmative.

The facts of the case were as follows: The defendant, a Lithuanian company had been responsible for the building of the Lithuanian pavilion at the EXPO 2000 in Hannover. To build the pavilion it had sent at least 42 Lithuanian workers to Germany in January and February 2000. Therefore, the German Holiday and Wage Adjustment Fund for the Building and Construction Industry (*Urlaubs- und Lohnausgleichskasse für die Bauwirtschaft),* a specialised social security fund responsible, among others, for securing workers' holiday benefits including workers' minimum holiday compensation, required the company to pay contributions. The Lithuanian company, however, refused. It argued that it had fulfilled all its obligations under Lithuanian law. The Holiday and Wage Adjustment Fund, therefore, filed a lawsuit for the outstanding contributions that eventually ended up in the German Federal Labour Court

In answering the question whether German courts had jurisdiction the German Federal Labour Court first discussed whether the suit was within the scope of the Brussels I-Regulation. It held that the claim did not fall within the social security exception of Article 1 (2) lit. c) of the Brussels I-Regulation. The notion of social security had to be interpreted in accordance with Council Regulation(EC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (now: Article 3 (1) of Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security system). Article (4) (1) of this Regulation defined social security matters as matters relating to sickness and maternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits and family benefits. The notion of social security, therefore, did not cover holiday benefits as the ones in dispute in the case at hand.

The court then went on to discuss whether it had jurisdiction under the Brussels I-Regulation. It found that Article 2 (1) of the Brussels I-Regulation, requiring claimants to bring a lawsuit in the courts of the Member States of the defendant's domicile, did not apply because the defendant was not domiciled in Germany. It was not even domiciled in a Member State at the time because Lithuania joined the European Union as late as 2004. However, since Article 2 (1) was subject to

the remaining provisions of the Brussels I-Regulation, including Article 67, which provides that the Brussels I-Regulation does not prejudice the application of provisions governing jurisdiction in specific matters, which are to be found in Community instruments or in national legislation implementing such instruments the court relied on Section 8 of the Posted Workers Act (now: Section 15 of the Revised Posted Workers Act) to find that German courts had jurisdiction: implementing Article 6 of the Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Section 8 of the Posted Workers Act allowed judicial proceedings to be brought in the Member State in whose territory the worker is or was posted in order to enforce the right to the terms and conditions of employment guaranteed in Article 3 of the Directive. An employee who is or was posted in Germany could, therefore, file a suit in Germany to enforce the minimum conditions of employment outlined in Article 3 of the Directive including holiday benefits. The court found that the same held true for a specialised social security fund such as the Holiday and Wage Adjustment Fund regarding claims against posting companies for outstanding contributions relating to holiday benefits. Furthermore, the court held that interpretation of Section 8 of the Posted Workers Act made clear that it did not matter whether the posting company was domiciled in a EU member state.

The full decision can be downloaded here (in German).

Many thanks to Thomas Pfeiffer for the tip-off.

JHA Council (7-8 June 2012): EU Regulation on Successions and

Wills Adopted – General Approach on Brussels I Recast – CESL

The Justice and Home Affairs (JHA) Council of the EU, currently holding its meeting in Luxembourg (7-8 June), **adopted today the successions regulation** (Regulation on jurisdiction, applicable law, recognition and enforcement of decisions, acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European certificate of succession): see the Council's note and RAPID press release. The final text can be found in doc. no. PE-CONS 14/12.

Denmark, Ireland and the United Kingdom do not participate in the regulation, pursuant to the special position they hold in respect of the Area of Freedom, Security and Justice, **while Malta voted against the adoption**, expressing concerns on the uncertainty that the new rules will create in the legal regime of international successions, vis-à-vis current Maltese law (see the Maltese statement in the Addendum to Council's doc. no. 10569/1/12).

As pointed out in a previous post, an agreement had been reached by the Council and the Parliament in order to adopt the new instrument at first reading: a history of the legislative procedure, along with the key documents, is available on the OEIL and Prelex websites. Once the regulation is published in the OJ, the whole set of Council's documents relating to the procedure, currently not available, will be disclosed. An interesting reading on the legislative history can also be found on the IPEX website, which gathers the opinions of national parliaments of the Member States on draft EU legislation.

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Two other PIL items are set on the agenda of the JHA meeting on Friday 8 June. **The Council is expected to approve a general approach on the Brussels I recast** (see the state of play in Council's doc. no 10609/12 and the draft text set out in doc. no 10609/12 ADD 1), **and to hold a debate on the orientation and the method** to handle the further negotiations on the proposal for regulation **on a Common European Sales Law** (CESL). As regards the latter, here's an excerpt from the background note of the meeting:

The first discussions on the [CESL] proposal have made it clear that this file entails divergences among member states. Several member states had therefore requested that a political debate at the level of the Council takes place before proceeding further with technical discussions.

To this end, the Presidency submits a discussion paper to the Council (10611/12) proposing that ministers address questions related to the legal basis and the need for the proposal, its scope (focus on sales contracts concluded on-line) and whether to start work on model contract terms and conditions.