

Another ATS Case Seeking Supreme Court Review

As previously reported here, the United States Supreme Court recently granted certiorari in the case of *Kiobel v. Royal Dutch Petroleum* to consider the following questions: (1) Whether 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) whether 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. In addition to *Kiobel*, the Court also granted cert. in *Mahamad v. Rajoub* to consider whether the Torture Victim Protection Act of 1991 permits actions against defendants that are not natural persons.

There is now another cert. petition pending that follows up on the Ninth Circuit's recent decision in *Sarei v. Rio Tinto*, discussed here. Among other things, the petitioners in *Sarei* ask the Supreme Court to grant the petition and to hear the case along with *Kiobel*. Unlike *Kiobel*, the *Sarei* petitioners raise arguments beyond the question of corporate liability under the ATS for human rights violations. Their questions presented are as follows: 1. Whether U.S. courts should recognize a federal common law claim under the ATS arising from conduct occurring entirely within the jurisdiction of a foreign sovereign, especially where the claim addresses the foreign sovereign's own conduct on its own soil toward its own citizens. 2. Whether U.S. courts should recognize a federal common law claim under the ATS based on aiding-and-abetting liability, even absent concrete factual allegations establishing that the purpose of the defendant's conduct was to advance the principal actor's violations of international law. 3. Whether a plaintiff asserting a federal common law claim under the ATS addressed to conduct occurring entirely within the jurisdiction of a foreign sovereign must seek to exhaust available remedies in the courts of that sovereign before filing suit in the United States, as international and domestic law require. 4. Whether federal common law claims asserted under the ATS for violations of international human rights law.

Interestingly, petitioners rely a great deal on former statements of interest filed by

the United States filed in various ATS suits to buttress many of their arguments related to these questions presented. Given that the United State has not weighed in yet in *Kiobel*, it will be interesting to see how the Solicitor General deals with these arguments, either in *Kiobel* or in this case in the event it is granted.

It could be a very big Supreme Court Term indeed for the ATS and for international law litigation generally before the Supreme Court.

Third Issue of 2011's Journal of Private International Law

The latest issue of the *Journal of Private International Law* has just been published. The contents:

Arbitration and the Draft Revised Brussels I Regulation: Seeds of Home Country Control and of Harmonisation?

Luca G Radicati di Brozolo

In this article I discuss the provisions on arbitration of the European Commission's December 2010 draft recast of Reg (EC) 41/2001 against the backdrop of the earlier proposals on the inclusion of arbitration within the scope of the Regulation. The analysis focuses principally on the functioning and implications of the lis pendens mechanism laid down by Article 29(4) of the draft, pointing out the analogy between the role conferred on the law and forum of the seat of the arbitration and the mechanism of home country control that is at the heart of European Union law. The article also analyses the reasons and positive consequences of the Commissions' restraint in not extending the scope of the Regulation to other arbitration-related issues, especially the circulation of judgments dealing with the validity of arbitration agreements and awards.

*The article's conclusion is that the Commission's proposal is well balanced. Whilst it does not solve all problems relating to conflicts between court proceedings and arbitration within the EU, it addresses the most pressing one, that of concurrent court and arbitration proceedings. Moreover, it does so in terms which, in contrast to the use of anti-suit injunctions in aid of arbitration, are reconcilable with the basic tenets of European Union law. Its approach is indisputably favourable to the development of arbitration and does not jeopardise the *acquis* in terms of arbitration law of the more advanced member States.*

European Public Policy (with an Emphasis on Exequatur Proceedings)

Jerca Kramberger Škerl

After addressing the historical role of the public policy defence in private international law, the author defines European public policy and researches its protection in the case-law of the Court of Justice of the EU and the European Court of Human Rights.

The paper further discusses the possible differences and contradictions between the fundamental values of the European Convention on Human Rights and EU law in the context of giving effect to foreign judgments. Regulations already abolishing the exequatur are assessed from the human rights point of view. The relationship between European public policy and the fundamental values arising from public international law is also treated.

Finally, the author evaluates the impact of the adoption of the Lisbon treaty and the process of revision of the Brussels I Regulation on the protection of European public policy in the EU Member states.

Reflections on the Mexico Convention in the Context of the Preparation of the Future Hague Instrument on International Contracts

José Antonio Moreno Rodriguez and María Mercedes Albornoz

*The Hague Conference is creating a soft law instrument on international contracts, which is expected to promote a general admission of the principle of party autonomy. Even if it is nowadays accepted in developed countries, this principle still needs consolidation in other regions of the world, like Latin America. In this context, the importance of the modern solutions adopted by the Mexico Convention on the law applicable to international contracts is outstanding. It is not only that the Mexico Convention clearly accepts party autonomy, but it is also well-known even outside the American continent, for its reception of *lex mercatoria* –an achievement that we do not find in the European Rome I Regulation. This article carries out an analysis of the main provisions of the Mexico Convention, in order to highlight some of the reflections it should provoke during the preparation of the Hague instrument.*

Where Does Economic Loss Occur?

Matthias Lehmann

It is well-known that rules of private international law for torts often refer to the place where the damage has occurred. Locating this place poses serious difficulties if no physical object has been harmed, but only economic or “financial” loss has been suffered. These cases are of tremendous practical importance. The contribution provides an in-depth analysis of the problem and compares solutions adopted by EU and Swiss courts. Finally, the author suggests an original step-by-step approach as to how to determine the place of economic loss.

International Litigation Trends in Environmental Liability: A European Union-United States Comparative Perspective

Carmen Otero García-Castrillón

At times where environmental concerns take a predominant role and corporate social responsibility is at the forefront of various legal debates, the fact that the laws and/or the judicial proceedings -to establish it and to order remedies- in the country of damage could be inadequate or even non-existent, makes it

appropriate to reflect on the opportunities provided by the international litigation system of the European Union (EU) as compared to the system of the United States (US). Responding to the recent case law, this paper reflects on the international environmental litigation trends from a private international law perspective, analysing the jurisdiction and conflict of laws issues that, within this field, interact with a number of international civil liability conventions. In this regard, the complex determination of the applicable law and the liability limitations in the EU do not prevent the conclusion that, due to recent jurisdiction and applicable law trends in the US, international environmental litigation may be turning to the eastern side of the Atlantic.

Intellectual Property Rights Infringements in European Private International Law: Meeting the Requirements of Territoriality and Private International Law

Sophie Neumann

The article tends to compare and analyse the private international law solutions adopted by the European legislator and their possible justification for the infringement of intellectual property rights against the background of territoriality of intellectual property rights and against the background of the different methodological approaches adopted, on the one hand, by the Rome II Regulation for the applicable law and, on the other hand, by the Brussels I Regulation for jurisdiction. The thesis to be analysed is that the respective solutions concerning the infringement of intellectual property rights can be read both in an intellectual property perspective against the background of territoriality and in a private international law perspective against the background of a more “genuine” private international law interests’ analysis. Both perspectives are affected by territoriality and therefore often lead, notwithstanding the methodological differences, to the same result in practice.

Dual Nationality = Double Trouble?

Thalia Kruger and Jinske Verhellen

The occurrence of dual nationality is increasing, due to several reasons. This article investigates the considerations private international law uses to deal with dual nationality, especially in civil law countries, where nationality is an important connecting factor and is sometimes even used for purposes of jurisdiction. Four such considerations are identified: preference for the forum nationality, the closest connection, the influence of EU law, and the principle of choice by the parties. When analysing the applications of these four considerations in issues of jurisdiction, applicable law and the recognition of foreign authentic acts or judgments, one sees that not all conflicts are real. The authors argue that false conflicts (for instance where jurisdiction can be based on the common nationality of the spouses under the Brussels IIbis Regulation) need no resolution. Both nationalities can carry equal weight in these cases. For real conflicts (for instance application of the law of the common nationality of the spouses under Art. 8c of the Rome III Regulation), a broad closest-connection test should be maintained, rather than a preference for the forum nationality (which relies heavily on arguments of State sovereignty). A closest-connection test based on objective factors is the most reliable in ensuring an outcome respectful of legal certainty.

International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level

Katarina Trimmings and Paul Beaumont

Recent developments and research in the area of reproductive medicine have resulted in various treatment options becoming available to infertile couples. One of them is the use of a surrogate mother. Over the last two decades, surrogacy has become an increasingly popular method of reproductive technology.

Surrogacy targets the same clientele as its counterpart, adoption. It follows that with an increasingly limited global market for adoption, surrogacy will continue expanding. It is no exaggeration to say that the modern world has already witnessed the development of an extensive international surrogacy market. This market, although initially largely unnoticed, has recently attracted a great deal

of interest by the media.

A source of worry, however, is the completely unregulated character of global surrogacy. Addressing this issue, this paper seeks to outline a potential legislative framework for a private international law instrument that could regulate cross-border surrogacy arrangements.

Review Article

A review article by Sirko Harder of K Boele-Woelki, T Einhorn, D Girsberger and S Symeonides (eds), *Convergence and Divergence in Private International Law: Liber Amicorum Kurt Siehr*

You can access this issue online and purchase individual papers. You can, alternatively (and it's recommended by us), subscribe to the Journal.

Zamora Cabot on the Islamic Veil

Prof. Zamora Cabot (University of Castellón, España) has just published an article on multiculturalism, entitled "Europa entre las corrientes de la multiculturalidad: incidencia del velo islámico en el Reino Unido" (Papeles en el tiempo de los derechos, num. 14, 2011. ISBN: 1989-8797)

This paper addresses the topic of the Islamic veil, one of the most significant ones in the area of multiculturalism in Europe, with reference to the example of the United Kingdom. Its first section highlights the values which should frame the issue, namely tolerance and legal pluralism, singularly at the current time: a time in which the events in the Arab world force Europeans to an exercise of empathy, and towards finding a way to match discourse and real practice of these values.

The second section focuses in the UK, exploring the social and political substrate and milestones that must be taken into account to understand the legal response given in that country to the Islamic way of dressing. Some general observations are made on these clothes, also aiming to provide the reader with a better

understanding of the English legal response; and the well known decision of the House of Lords in the Begum case is analyzed from a critical point of view. In this regard, the important efforts made by the various courts, crowned by that decision, are neither ignored nor underestimated; nevertheless, they deserve a negative assessment, as it seems that formal considerations and the will to maintain the status quo have prevailed at the expense of an analysis based on pluralism, that should have led to a different outcome.

The burqa or full veil is discussed in section four, through a variety of scenarios based on different practices in different contexts. Pragmatism and respect for religious convictions are remarkable in all of them: for example, when facing the delicate question of the use of the burqa in proceedings before the courts.

The concluding section praises the liberal spirit of British society where, unlike several European countries, these matters have not been addressed through a repressive apparatus. That is why the UK is considered in this work as a remarkable example that ought to be emulated.

Thiede and McGrath on Mass Media, Personality Rights and European Conflict of Laws

Thomas Thiede and Colm P. McGrath have posted Mass Media, Personality Rights and European Conflict of Laws on SSRN. The abstract reads:

In this article the authors critically analyse the current approach of the European Court of Justice (ECJ) alongside the proposed alternatives to a unified European conflict of laws rule dealing with the problem of cross-border infringements of personality rights. Having exposed the weakness of these approaches they set out one suggested path for reform.

Andrea Bonomi: Varia on Succession and PIL

Prof. Andrea Bonomi, Vice-Dean of the Faculté de droit et des sciences criminelles and Director of the Centre de droit comparé, européen et international (CDCEI), University of Lausanne, has just published a critical opinion on the Proposal for a Regulation in matters of succession in the collective book *Innovatives Recht* (Festschrift für Ivo Schwander), under the title “La compétence des juridictions des Etats membres de l’Union Européenne dans les relations avec les Etats tiers à l’aune des récentes propositions en matière de droit de la famille et des successions”. He has kindly sent me an abstract :

The Commission’s Proposal for a Regulation in matters of succession covers among alia the jurisdiction of the courts of EU Members States. By virtue of the recent Proposals for Regulations for matrimonial property and for the property consequences of registered partnership, the court with jurisdiction over the administration and distribution of the estate of a spouse or registered partner also has jurisdiction to rule on the winding up of the matrimonial property *régime* and on the property consequences of the partnership.

Normally, the competent court will be that of the last habitual residence of the deceased. However, where the deceased had his/her last habitual residence in a non-Member State, the competent court will have to be determined in accordance with Art. 6 of the Succession Proposal. This provision is for many reasons unfortunate, in particular because it creates the conditions for positive conflicts among the courts of several Member States and with the courts of non-Member States, as it is shown in the relationship to Switzerland.

In this article we analyze the shortcomings of Art. 6 and suggest some possible improvements of this provision (deleting Art. 6(c); reducing the role of nationality by retaining this criteria only in the case of a choice of the national law; reducing the reach of the court’s residual jurisdiction by excluding the property situated outside the European Union; including a

lis pendens rule applicable in the relation to third States' courts; including a *forum necessitatis* to avoid negative conflicts). We hope that this provision will be corrected during the negotiation process.

A second recent, obviously worth commenting contribution of Prof. Bonomi is his "Succession internationales: conflits de lois et de juridictions", The Hague Academy Collected Courses, vol. 350 (2010), pp. 71-418. The study takes the course taught by him in The Hague in 2007 as point of departure, and deepens and broadens the insights made at the time for the audience (which included me!). Clicking Table des matières you will have access to the index of the publication.

International Arbitration Law Review, Vol. 14, Issue 5

The latest issue of the International Arbitration Law Review (Vol. 14, no. 5, 2011) is out.

Contents include several topics of interest to the intersection of private international law with commercial and investor state arbitration, including:

Hong-Lin Yu, How far can party autonomy be stretched in setting the grounds for the refusal of arbitral awards?

Charles Kotuby Jr, 'Other international obligations' as the applicable law in investment arbitration

Sanja Djajic, Contractual claims in treaty-based arbitration - with or without umbrella and forum selection clauses



Also in this edition are:

Thierry Berger & Mark Roberts, The new ICC Rules of Arbitration: a brief overview of the main changes

Judy Zhu, China's CIETAC Arbitration – New Rules under review

Richard Smith, Angeline Welsh & Manish Aggarwal, Jivraj v Hashwani – the UK Supreme Court overturns a controversial Court of Appeal ruling on arbitration

Luis Fernando Bermejo, Mandatory ICC provision in Guatemala's Arbitration Law is declared unconstitutional by the Constitutional Court of Guatemala

Christmas Presents from the CJEU

Two private international law offerings from the wise folk of the Court of Justice before they disappear on their Christmas vacations. First, the judgment in Case C-384/10, Voogsgeerd, concerning the employment provisions in Art. 6 of the 1980 Rome Convention. With the Court's earlier decision in Case C-29/10, Koelzsch (see the earlier post by Gilles Cuniberti [here](#)), the Court provides substantial guidance as to the application of Art. 6 and its successor, Art. 8 of the Rome I Regulation. These two decisions look set to be cited in tandem in international employment cases for years to come. Secondly, the judgment in Case C-191/10, Rastelli Davide on the question whether the Insolvency Regulation permits joinder of co-insolvent parties whose centre of main interests (COMI) is in another Member State in circumstances where their affairs are intermixed with the insolvent party whose COMI is in the Member State seised of insolvency proceedings. The question, therefore, is essentially whether a jurisdictional hook similar to that found in Art. 6(1) of the Brussels I Regulation can be implied in the Insolvency Regulation regime. Unsurprisingly, the CJEU gives a negative answer to that question and holds further that the intermixture of assets, of itself, is not sufficient to justify the conclusion that two companies have their COMI in the same Member State.

Happy Christmas to all col.net readers.

New Book on Public Contracts and International Arbitration

A new book exploring issues raised by arbitrations involving states and states entities was published earlier this fall. The book, which was edited by professor Mathias Audit (Université Paris Ouest Nanterre la Défense), offers a variety of contributions in French and in English. 

INTERNATIONAL AND REGIONAL PERSPECTIVES

- ICC arbitration & public contracts : the ICC Court's experience of arbitrations involving states and stage entities
- L'arbitrage CIRDI et les contrats de nature publique passés avec un Etat ou une entité étatique
- International arbitration and Public Contracts in Latin America

NATIONAL PERSPECTIVES

- Arbitrage international et contrats publics en France
- Arbitrage international et contrats publics en Belgique
- Arbitrage international et contrats publics au Canada

The full table of contents is available [here](#).

The book can be ordered [here](#).

Fourth Issue of 2011's Journal du Droit International

The fourth issue of French *Journal du droit international* (*Clunet*) for 2011 was just released. It contains five articles and several casenotes. A table of content is accessible [here](#). 

Four articles explore private international law issues.

In the first one, Jonathan Mattout, who practices at the Paris office of Herbert Smith, wonders whether the English Bribery Act is a danger for French businesses (*Le Bribery Act ou les choix de la loi britannique en matière de lutte contre la corruption.- Un danger pour les entreprises françaises ?*). The English abstract reads:

The entry into force of the UK Bribery Act is an important step forward in the fight against corruption. This demanding legislation allows the UK to meet its international commitments. It requires all relevant commercial organisations carrying on a business in the UK to have in place adequate procedures designed to prevent bribery or face a serious risk of criminal prosecution. The Act reaches out beyond the UK and gives a new role to compliance, which will inevitably lead foreign businesses trading in the UK to adapt to its requirements. It is likely that this new legislation will inspire similar changes in France.

In the second article, Thomas Schultz, who lectures at the University of Geneva, and David Holloway, who is barrister at Number 5 Chambers in London, provide an account of the emergence and development of comity in the history of private international law (*Retour sur la comity . - Première partie : Les origines de la comity au carrefour du droit international privé et du droit international public*). The English abstract reads:

In a series of two articles, to be published in the present and the next issue of the Clunet, the authors provide an account of the emergence and development of comity in the history of private international law, discussing where comity came from, how it developed and what purposes it was initially meant to fulfil. The purpose of such recalling of comity is to provide a historical background and conceptual starting point for the increasing current attempts to rely again on the comity doctrine in court decisions and private and public international law scholarship. In the current article, we review the forces that led to strict territoriality in the 17th century and how comity became needed to mitigate it. We will see how regulatory overlaps contributed to making the Thirty Years War inevitable and will discuss the subsequent efforts to do away with such regulatory overlaps through territorial sovereignty, whose radicalism made

comity necessary to accommodate the transnationalism of commerce and societies. In the second article, we will present the early history of the concept of comity in the context of the history of private international law generally. We will focus on the evolution of the use of comity through the great stages of its history. We will thus embark on a voyage from Rome and the ius gentium, to Perugia with Bartolus de Saxoferrato, to Holland and the Voets, to Berlin and Prussia with Savigny, to the United States with Joseph Story, and to the UK with Mansfield, Westlake and Dicey.

Valerie Pironon, who is a professor of law at Nantes University, is the author of the third article which discusses the method of focalisation of torts and contracts in e-commerce after recent cases of the European Court of Justice and the French Supreme Court for private and criminal matters (*Dits et non-dits sur la méthode de la focalisation dans le contentieux - contractuel et délictuel - du commerce électronique* . - (À propos de trois arrêts : CJUE, 7 déc. 2010, aff. C-585/08, *Peter Pammer c/ Reederei Karl Schlüter GmbH & Co. KG* et C-144/09, *Hotel Alpenhof GesmbH c/ Oliver Heller*. - Cass. com., 7 déc. 2010, n° 09-16.811, *Sté eBay Inc. et a. c/ SA Louis Vuitton Malletier*. - Cass. com., 29 mars 2011, n° 10-12.272, *Sté eBay Europe et a. c/ SARL Maceo et a*).

In recent case law, our highest jurisdictions seem to use the method of the focus to identify the competent judge in the disputes of the e-commerce : the European Court of Justice in B2C conflicts, the commercial chamber of the Cour de cassation in two recent eBay affairs. A comparison of these decisions shows however certain ambiguities relating to the method employed, in particular its subjective dimension. Some gaps concerning the probatory status of the listed indications remain also to be fulfilled.

Finally, Eric Loquin discusses in the last article an important French case of 2010 ruling on the arbitrability of international administrative contracts (*Retour dépassionné sur l'arrêt INSERM c/ Fondation Letten F. Saugstad* . - (Tribunal des conflits, 17 mai 2010)). No English abstract is provided.

U.S. Court Rules (e)Mail Interception Order Violates Public Policy

On July 22, 2011, the U.S. Bankruptcy Court for the Southern District of New York held in *In re Dr. Jürgen Toft, Debtor in a Foreign Proceeding* that a German Mail Interception Order issued in the context of German insolvency proceedings violates U.S. public policy and would thus be denied recognition.

Dr. Jürgen Toft is an orthopedic surgeon who assertedly has debts exceeding 5.6 million euros (\$7.6 million) owed to approximately 110 creditors. Insolvency proceedings were initiated against him in Munich on June 10, 2010, but Toft refused to cooperate with the German trustee and allegedly secreted his assets outside of Europe. On July 8, 2010, the German Court entered a “Mail Interception Order” authorizing the German trustee to intercept Toft’s postal and electronic mail.

London

Having received information that Toft might have relocated to London, the trustee initiated a proceeding on January 28, 2011 in England. The English High Court of Justice issued an ex parte order on February 16, 2011, which granted recognition and enforcement to the German Mail Interception Order. It seems that a public policy defense was rejected on the grounds that Toft could have appealed the July order in Germany, but had not, and that § 371 of the 1986 English Insolvency Act provided a similar remedy.

New York

The German trustee then sought to enforce ex parte both the German and the English orders in the United States. The trustee requested that no notice be given to the debtor both before and after the U.S. court would agree to enforce the foreign orders so that the trustee could continue to investigate the affairs of a debtor whose intransigence, obstructionism, and evasive tactics have allegedly thwarted the German insolvency proceeding.

The point of the enforcement proceedings was to access servers located in the United States. The trustee requested that the US court compel the ISPs, AOL, Inc. and 1 & 1 Mail & Media, Inc., to disclose to the trustee all of the debtor's e-mails currently stored on their servers and to deliver to the trustee copies of all e-mails received by the debtor in the future.

The United States has adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2005 as the Chapter 15 of its Bankruptcy Code, including its article 6 providing for a public policy exception (§ 1506 of the Bankruptcy Code). The Court denied recognition to the foreign orders as manifestly contrary to U.S. public policy.

The U.S. Court first examined U.S. privacy law and concluded:

the relief sought by the Foreign Representative is banned under U.S. law, and it would seemingly result in criminal liability under the Wiretap Act and the Privacy Act for those who carried it out. The relief sought would directly compromise privacy rights subject to a comprehensive scheme of statutory protection, available to aliens, built on constitutional safeguards incorporated in the Fourth Amendment as well as the constitutions of many States. Such relief "would impinge severely a U.S. constitutional or statutory right."

The Court then insisted that, contrary to the allegation of the German trustee, a U.S. trustee would not enjoy such power in U.S. insolvency proceedings.

The Court finally concluded:

This is one of the rare cases in which an order of recognition on the terms requested would be manifestly contrary to U.S. public policy, reflected in rights that are based on fundamental principles of protecting the secrecy of electronic communications, limiting the powers of an estate representative, and providing notice to parties whose rights are affected by a court order. The motion of the Foreign Representative for ex parte relief is therefore denied.