The “Conflicts Revolution”

With thanks to one of our readers, here is a decision that may be of interest. The New York Court of Appeals recently decided a case that adresses many of the basic tort fact patterns that that started the way to the “conflicts revolution” in the 1950s and
1960s. Interestingly, the court is split on how to decide some of these issues, even after all these years.

New Workshop on PIL as Global Governance at Sciences Po

Horatia Muir Watt and Diego Fernandez Arroyo are establishing a workshop on « Private International Law as Global Governance » at the Law School of the Paris Institute of Political Science (*Sciences Po*). The group will meet regularly over the year ; the first meeting is on October 21st.

Private International Law as Global Governance : from Closet to Planet

> *Despite the contemporary turn to law within the global governance debate, private international law remains remarkably silent before the increasingly unequal distribution of wealth and power in the world. By leaving such matters to its public international counterpart, it leaves largely untended the private causes of crisis and injustice affecting such areas as financial markets, levels of environmental pollution, the status of sovereign debt, the confiscation of natural resources, the use and misuse of development aid, the plight of migrating populations, and many more. This impotency to rise to the private challenges of economic globalisation, is all the more curious that public international law itself, on the tide of managerialism and fragmentation, is now increasingly confronted with conflicts articulated as collisions of jurisdiction and applicable law, among which private or hybrid authorities and regimes now occupy a significant place. The explanation seems to lie in the development,*

under the aegis of the liberal separation of law and politics and of the public and the private spheres, of an « epistemology of the closet », a refusal to see that to unleash powerful private interests in the name of individual autonomy and to allow them to accede to market authority was to construct the legal foundations of informal empire and establish gaping holes in global governance. It is now more than time to de-closet private international law and excavate the means with which, in its own right, it may impact on the balance of informal power in the global economy. Adopting a planetary perspective means reaching beyond the schism and connecting up with the politics of public international law, while contributing its own specific savoir-faire acquired over many centuries in the recognition of alterity and the responsible management of pluralism.

Contact horatia.muirwatt@sciences-po.org or diego.fernandezarroyo@sciences-po.org if you wish to participate.

Recognition and proprietary consequences of a UK civil partnership in South Africa

The decision in AC v CS 2011 2 SA 360 (WCC) (Western Cape High Court, Cape Town) deals with the recognition in South Africa of a civil partnership registered in the United Kingdom under the Civil Partnership Act, 2004. Gamble J obiter referred to the proprietary consequences of such partnership in South Africa.

The South African Civil Union Act 17 of 2006 makes provision for civil unions between couples of the same or different sex. The parties may choose whether their civil union must be known as a marriage or a civil partnership (section 11 of the act). The UK Civil Partnership Act, 2004, makes provision for same-sex couples only and a civil partnership is not known as a marriage. Notwithstanding these differences, the court recognises the UK civil partnership as a civil union for

the purposes of South African (private international) law. Although the court does not refer to the process of classification, the decision attests to an enlightened lex fori approach to characterisation. (On classification in South(ern) African private international law, see Forsyth Private International Law (2003) 68-81 and Neels "Falconbridge in Africa" 2008 Journal of Private International Law 167.)

In South African private international law, both the formal and the inherent validity of a marriage are governed by the law of the place of the conclusion of the marriage (the lex loci celebrationis). (See Forsyth 263-265.) This decision is the first in South Africa in which the same conflicts rule is applied in respect of the inherent validity of a foreign civil partnership. As the partnership is inherently valid in terms of English law, it is valid for the purposes of South African (private international) law.

The court finds that the grounds for divorce and payment of maintenance inter partes are governed by the relevant provisions in the Civil Union Act, which refer to the arrangements in the Divorce Act 70 of 1979. This is not the position, at least not in the first place, because the word "marriage" in the Divorce Act may be interpreted to include foreign partnerships, as the court implies, but because these issues are governed by the lex fori (namely the Civil Union Act referring to the Divorce Act) (see Forsyth 286).

The parties were probably both domiciled in South Africa at the time that the partnership was registered in the UK (although one party was a UK citizen). As they did not conclude an ante-nuptial contract, the partnership/civil union would according to South African law have been concluded in community of property. It was unnecessary for the court to determine which law applied in respect of the proprietary consequences of the partnership/civil union as the parties concluded a deed of settlement in this regard.

The Roman-Dutch rule referred the proprietary consequences of a marriage to the law of the domicile of the husband at the time of the conclusion of the marriage (see Sperling v Sperling 1975 3 SA 707 (A)). This rule is today unconstitutional on the basis of the equality principle and also because it does not make provision for same-sex marriages/civil unions/civil partnerships. The court in casu comes to the same conclusion but does not refer to other case law where the same point was already made: see Fourie v Minister of Home Affairs 2005 1 All SA 273 (SCA) par 125 n 112; Sadiku v Sadiku case no 30498/06 (26 January 2007) (T) per

www.saflii.org, discussed by Neels and Wethmar-Lemmer "Constitutional values and the proprietary consequences of marriage in private international law – introducing the lex causae proprietatis matrimonii" 2008 TSAR 587.

Gamble J suggests that the legislature address the position in respect of the patrimonial consequences of same-sex marriages/civil unions/partnerships. This does not seem to be necessary. The courts have the inherent power to develop the common law in conformity with constitutional values (sec 8(3)(a), 39(2) and 173 of the Constitution of the Republic of South Africa of 1996). In this regard they should take note of the relevant academic opinion: see Stoll and Visser "Aspects of the reform of German (and South African) private international family law" 1989 De Jure 330; Schoeman "The connecting factor for proprietary consequences of marriage" 2001 TSAR 72; Schoeman "The South African conflict rule for proprietary consequences of marriage: learning from the German experience" 2004 TSAR 115; Schoeman "The South African conflict rule for proprietary consequences of marriages: the need for reform" 2004 IPRax 65; Neels "Revocation of wills in South African private international law" 2007 ICLQ 613; and Neels and Wethmar-Lemmer supra.

We have indicated before that we support the five-step model proposed by Stoll and Visser supra (Neels and Wethmar-Lemmer supra). The proposal ends the infringement of the equality principle and also provides a solution for same-sex marriages/civil unions/partnerships. Here it follows, adapted to make provision for civil unions and similar institutions:

> *In the absence of an express or tacit choice of law in an ante-nuptial contract, the proprietary consequences of a marriage, a civil union or similar institution (eg a civil partnership) must be governed by the law of the country of the common domicile of the parties at the time of the conclusion of the marriage, civil union or similar institution. If they did not have such a common domicile, the law of the country of the common habitual residence of the parties at the time of the conclusion of the marriage, civil union or similar institution must apply. If they did not have such a common habitual residence, the law of the country of the common nationality of the parties at the time of the conclusion of the marriage, civil union or similar institution must apply. If they did not have such a common nationality, the law of the country with which both spouses were most closely connected at the time of the marriage must apply.*

Hoffheimer on Goodyear Dunlop Tires

Michael Hoffheimer, who is a professor of law at the University of Mississippi School of Law, has posted General Personal Jurisdiction after *Goodyear Dunlop Tires Operations, S.A. v. Brown* on SSRN. The asbtract reads:

> *In June 2011 the Supreme Court published its first major decisions on due process limits on personal jurisdiction in decades. Though the cases provided an opportunity to remove longstanding confusion, the decisions expose new divisions on the Court that give rise to new uncertainties.*
>
> *This Article focuses on the less controversial case. Seeming to express an emerging consensus with respect to general jurisdiction, the unanimous opinion in Goodyear Dunlop Tires Operations S.A. v. Brown announces a new, restrictive formula for general jurisdiction: for a state to exercise general personal jurisdiction over a corporation, the corporation must be incorporated in the state, maintain its principal place of business in the state or have such continuous and systematic ties in a forum state that is "at home."*
>
> *Exploring the decision and its early reception by lower courts, this Article contends that the opinion is ambiguous. On the one hand, it can be read to support contacts-based general jurisdiction over foreign corporations that are sufficiently active in the state. On the other hand, it can be read to restrict general jurisdiction to those corporations that maintain a legal home in the state by incorporating under the laws of the state or by engaging in such a level of activity that the state becomes the equivalent of their principal place of business.*
>
> *The different readings produce different results in many routine situations. In fact, the Article shows they produce different answers to the question posed during oral argument as to whether Goodyear USA (which operates a factory in North Carolina) would be subject to general jurisdiction in that state without its consent.*

In addition to explaining divergent positions on the Court, the Article proposes a middle path, a fair reading of the opinion that avoids the most tendentious interpretations and that implements the Court's shared commitment to eliminating general jurisdiction over a broad category of cases.

Finally, the Article identifies specific problem areas that the decision leaves for future judicial elaboration and examines early decisions by lower courts that have begun to grapple with these problems. The Article offers courts and litigants a useful resource for understanding and applying the new doctrine.

Second Issue of 2011's Revue Critique de Droit International Privé

The last issue of the *Revue critique de droit international privé* was just released. It contains three articles and several casenotes. The full table of contents can be found here.

In a first article, Pascal de Vareilles Sommieres, who is a professor of law at Paris I Pantheon Sorbonne University, explores the relationship between international mandatory rules and policy (*Lois de police et politiques legislatives*). The English asbtract reads:

Still somewhat ill-defined the role of legal policy, which is irrelevant in the determination of ordinary private law rules in Savigny's methodology, is of course a decisive element in characterization of mandatory rules, as a definition of their scope. In conflict of laws, policy considerations occupy a more significant place when the mandatory rule emanates from the legal system of the forum then when it is a foreign rule. In conflict of jurisdiction, policy requirements of varying intensity have to compose with other considerations of

judicial administration, so that each mandatory rule exerts its own specific impact, whether on the jurisdiction of the court or on the status of foreign judgments.

In the second article, Petra Hammje, who is a professor of law at the University of Cergy-Pontoise, offers a survey of the new Rome III Regulation (*Le nouveau reglement (UE) no 1259/2010 du Conseil du 20 décembre 2010 mettant en oeuvre une coopération renforcée dans le domaine de la loi applicable au divorce et à la séparation de corps*).

Finally, in the last article, Horatia Muir Watt, who is a professor of law at the Paris Institute of Political Science (*Science Po*) discusses the implications of the Chevron litigation (*Chevron, l'enchevetrement des fors. Un combat sans issue ?*). I am grateful to the author for providing me with the following abstract:

A decade after the dismissal of their claim by US courts for forum non conveniens and the victims' return to Ecuador, a new act of the Chevron (Texaco) drama began when the local court gave judgment in early 2011 against the multinational for its role in the environmental pollution in the Amazon forest region and its harmful consequences for the health of its indigenous population. Various strategies are currently being deployed internationally with a view to resist, neutralise or invalidate this judgment (in the form of a worldwide anti-suit injunction, a RICO action, or the invocation of international investment law) before the US court or in international arbitration. In this complex game where multiple fora make simultaneous claim to autority and engage in its mutual neutralisation, the reassuring traditional liberal model of international legal order is clearly out-of-step. The lesson of Chevron case is that it is time to quit the Westphalian perspective so that private international law may assume a useful role in global governance.

Subscribers of *Dalloz* can download the *Revue* here.

ECJ Rules on Territorial Scope of Prohibitions to Infringe Community Trade Marks and Coercive Measures

On April 12, 2011, the European Court of Justice ruled in DHL Express France SAS v. Chronopost SA on the territorial scope of prohibitions of infringing Community trade marks and of coercive measures ordered for the purpose of enforcing such prohibitions.

Background

European Regulation No 40/94 establishes a Community trade mark. The substantive effects of this trade mark are governed by the rules of the Regulation, but jurisdiction to rule on infringement proceedings was vested to a limited number of national courts in each Member state. Unless otherwise provided by the Regulation, these courts logically apply their own procedure, including the Brussels Convention (as it was then).

The French Judgments

In a nutshell, the dispute arose out of the use by DHL of a trade mark, "webshipping", that French corporation Chronopost had registered both as a French and as a European trademark. Chronopost initiated infringement proceedings in France against DHL. In a judgment of November 9th, 2007, The Paris Court of appeal found that DHL had indeed infringed Chronopost's European trade mark. It thus ordered DHL to stop doing so and issued a prohibition against further infringement. The prohibition was backed with an "astreinte", a periodic penalty payment of € 1,500 per day of non-compliance, to be paid to the plaintiff. The astreinte was not liquidated, i.e. the final amount of the payment was to be determined later by the court, when it could assess whether and when the defendant had complied.

However, the Paris Court refused to rule that the prohibition covered the entirety of the European Union, and limited its territorial scope to France. The court

explained its decisions as follows. From a factual point of view, it found that only French speaking consumers could get confused by the infringement of the trade mark. But it also referred to Article 98 of Regulation No 40/94, which provides:

> ***Article 98 Sanctions***
>
> *1. Where a Community trade mark court finds that the defendant has infringed or threatened to infringe a Community trade mark, it shall, unless there are special reasons for not doing so, issue an order prohibiting the defendant from proceeding with the acts which infringed or would infringe the Community trade mark. It shall also take such measures in accordance with its national law as are aimed at ensuring that this prohibition is complied with.*
>
> *…*

The Court ruled that it could not issue an extraterritorial order without knowledge of the laws of other states offering an equivalent remedy.

Chronopost appealed to the French supreme court on private and criminal matters (*Cour de cassation*), which referred the matter to the ECJ and asked:

> *1. Must Article 98 of … Regulation [No 40/94] be interpreted as meaning that the prohibition issued by a Community trade mark court has effect as a matter of law throughout the entire area of the [European Union]?*
>
> *2. If not, is that court entitled to apply specifically that prohibition to the territories of other States in which the acts of infringement are committed or threatened?*
>
> *3. In either case, are the coercive measures which the court, by application of its national law, has attached to the prohibition issued by it applicable within the territories of the Member States in which that prohibition would have effect?*
>
> *4. In the contrary case, may that court order such a coercive measure, similar to or different from that which it adopts pursuant to its national law, by application of the national laws of the States in which that prohibition would have effect?*

The ECJ Ruling

Territorial Reach of the Prohibition

On the first question, the ECJ considered that, as a matter of principle, Community trade mark courts had jurisdiction over the entire area of the European Union. Its holding is:

> ***1. Article 98(1) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, as amended by Council Regulation (EC) No 3288/94 of 22 December 1994, must be interpreted as meaning that the scope of the prohibition against further infringement or threatened infringement of a Community trade mark, issued by a Community trade mark court whose jurisdiction is based on Articles 93(1) to (4) and 94(1) of that regulation, extends, as a rule, to the entire area of the European Union****.*

However, the Court also underlined that in some circumstances, Community trade mark courts should limit the reach of their decisions to some parts of the EU only.

> *48. Accordingly, if a Community trade mark court hearing a case in circumstances such as those of the main proceedings finds that the acts of infringement or threatened infringement of a Community trade mark are limited to a single Member State or to part of the territory of the European Union, in particular because the applicant for a prohibition order has restricted the territorial scope of its action in exercising its freedom to determine the extent of that action or because the defendant proves that the use of the sign at issue does not affect or is not liable to affect the functions of the trade mark, for example on linguistic grounds, that court must limit the territorial scope of the prohibition which it issues.*

The Court further insisted that, pursuant to Article 33 of the Brussels I Regulation, recognition and enforcement of such prohibitions were mandatory.

Territorial Reach of the Coercive Measure

With regard to the coercive measure, the Court ruled that such measures were governed by the lex fori, and that they should have the same reach as the

prohibitions if they were to achieve their goal. As a consequence, courts of other members states ought to recognize and enforce them, under the Brussels I Regulation.

The Court did not mention Article 49 of the Brussels I Regulation, which only provides for the enforcement of liquidated "astreintes". Is that to say that all "astreintes" ought to be enforced when used for the purpose of enforcing Community trade marks, even when unliquidated as in the present case?

In his opinion, AG Cruz Villalon had said:

> *64. The fact that a Community trade mark court draws up a periodic penalty payment does not necessarily imply that any quantification or enforcement thereof must be carried out by the same court. (…)*
>
> *65. (…) where the prohibition is infringed in a Member State other than the State of the forum, the quantification and enforcement stages must be carried out in the Member State in which that infringement occurred. Thus, whereas the Community trade mark court which heard the substance of the case must, where it finds infringement, impose a penalty payment, the quantification and subsequent enforcement thereof are a matter for the court of the Member State in which the prohibition is infringed, in accordance with the rules on recognition laid down in Regulation No 44/2001.*

His argument was that "astreintes" being punitive in character, they should be quantified and enforced in the Member state of enforcement. This seems to mean that unquantified astreintes may, and indeed must be enforced abroad. I am not sure this is fully in accordance with the Brussels I Regulation.

Finally, my understanding was that "astreinte" is, in Europe, a remedy peculiar to France, Belgium and Luxembourg, but AG Cruz Villalon stated that there are known in most Member States. In any case, an important issue is how to actually enforce a French astreinte in another Member states where it would be an unknown concept. The Court ruled that in the absence of an equivalent measure in the enforcing state, the enforcing court should attain the same objective with its own procedural machinery.

> *56. Where the national law of the Member State in which recognition and*

enforcement of the decision of a Community trade mark court is sought does not provide for a coercive measure similar to that ordered by the Community trade mark court which issued the prohibition against further infringement or threatened infringement (and coupled that prohibition with such a measure in order to ensure compliance with the prohibition), the court seised of the case in that Member State must, as the Advocate General has observed at point 67 of his Opinion, attain the objective pursued by the measure by having recourse to the relevant provisions of its national law which are such as to ensure that the prohibition originally issued is complied with in an equivalent manner.

Final holding of the Court on this second set of questions:

2. ***Article 98(1), second sentence, of Regulation No 40/94, as amended by Regulation No 3288/94, must be interpreted as meaning that a coercive measure, such as a periodic penalty payment, ordered by a Community trade mark court by application of its national law, in order to ensure compliance with a prohibition against further infringement or threatened infringement which it has issued, has effect in Member States to which the territorial scope of such a prohibition extends other than the Member State of that court, under the conditions laid down, in Chapter III of [the Brussels I Regulation], with regard to the recognition and enforcement of judgments. Where the national law of one of those other Member States does not contain a coercive measure similar to that ordered by the Community trade mark court, the objective pursued by that measure must be attained by the competent court of that other Member State by having recourse to the relevant provisions of its national law which are such as to ensure that the prohibition is complied with in an equivalent manner.***

Sanders on Due Process and the Recognition of Same-Sex Marriages

Steve Sanders, who is a Visiting Assistant Professor at the University of Michigan Law School, has posted The Constitutional Right to (Keep Your) Same-sex Marriage: Why the Due Process Clause Protects Marriages that Cross State Lines, Even if Conflict of Laws Cannot on SSRN. Here is the abstract:

Same-sex marriage is legal in six states, and nearly 50,000 same-sex couples have already married. Yet 43 states have adopted statutes or constitutional amendments banning same-sex marriage (typically called mini defense of marriage acts, or "mini-DOMAs"), and the vast majority of these measures not only forbid the creation of same-sex marriages, they also purport to void or deny recognition to the perfectly valid same-sex marriages of couples who migrate from states where such marriages are legal. These non-recognition laws effectively transform the marital parties into complete legal strangers to each other, with none of the customary rights or incidents of marriage.

In this paper I argue that an individual who legally marries in her state of domicile, then migrates to another state, has a significant liberty interest under the 14th Amendment's Due Process Clause in the ongoing existence of her marriage. This liberty interest creates a right of marriage recognition that prevents a mini-DOMA state from effectively divorcing her by operation of law. This right to marriage recognition is conceptually and doctrinally distinguishable from the constitutional "right to marry." It is a neutral principle, grounded in core Due Process Clause values: protection of reasonable expectations and of marital and family privacy; respect for established legal and social practices; and rejection of the idea that a state can sever a legal family relationship merely by operation of law. A mini-DOMA state will, of course, have interests to be considered in refusing to recognize certain marriages. But under the intermediate form of scrutiny I explain is appropriate, those interests do not rise to a sufficiently important level to justify the nullification of a migratory same-sex marriage.

Stefan on the Political Economy of Extraterritoriality

Paul B. Stefan III, who is the John C. Jeffries Jr. Distinguished Professor at the University of Virginia Law School, has posted the Political Economy of Extraterritoriality on SSRN. The asbtract reads:

> *I want to use the occasion of the Morrison decision to consider the interests that produce extraterritorial regulation by the United States. International lawyers for the most part have analyzed state decisions to exercise prescriptive jurisdiction over extraterritorial transactions in terms of a welfare calculus that determines the likely costs and benefits to the state as a whole. Fewer studies have considered the political economy of the decision whether to regulate foreign transactions. No work of which I am aware has considered the political economy of deciding the extraterritorial question through litigation. This paper seeks to fill these gaps by sketching out what political economy suggests both about extraterritoriality and the role of courts as arbiters of regulatory scope.*

Hague Academy, Summer Programme for 2012

Private International Law

* **Inaugural Conference** (30 July)
Conflicts of Laws and Uniform Law In Contemporary Private International Law : Dilemma or Convergence?
Didier OPERTTI BADÁN; Professor at the Catholic University of Montevideo.

General Course (6-17 August)
The Law of the Open Society
Jürgen BASEDOW; Director of the Max Planck Institute for Comparative and International Private Law, Hamburg.

The Private International Law Dimension of the Security Council's Economic Sanctions (30 July-3 August)
Nerina BOSCHIERO; Professor at the University of Milan.

* *The New Codification of Chinese Private International Law* (30 July-3 August)
CHEN Weizuo; Professor at Tsinghua University, Beijing.

Applying Foreign Public Law in Private International Law – A Comparative Approach (30 July-3 August)
Andrey LISITSYN-SVETLANOV; Professor at the Institute of State and Law, Russian Academy of Sciences, Moscow.

* *Party Autonomy in Private International Law: A Universal Principle between Liberalism and Statism* (6-10 August)
Christian KOHLER; Honorary Director-General at the Court of Justice of the European Union, Luxembourg.

Applying the most Favourable Treaty or Domestic Rules to Facilitate Private International Law Co-operation (6-10 August)
Maria Blanca NOODT TAQUELA; Professor at the University of Buenos Aires.

* *Bioethics in Private International Law* (13-17 August)
Mathias AUDIT; Professor at the University of Paris Ouest Nanterre La Défense

Compétence-Compétence in the Face of Illegality in Contracts and Arbitration Agreements (13-17 August)
Richard H. KREINDLER; Professor at the University of Münster

* Lectures delivered in French, simultaneously interpreted into English.

More information is available here.

Long Life ATS

American ATS is far from being dead: that's true both from the standpoint of academics and practitioners. Only two days ago, on Tuesday, Gilles announced a new article on the Statute. Less than a month after a paper of my own called "Responsabilidad civil y derechos humanos en EEUU: el fin del ATS?" was published, I learned about a new title from O. Murray, D. Kinley and C. Pitts: "Exaggerated Rumours of the Death of an Alien Tort? Corporations, Human Rights and the Remarkable Case of Kiobel" (Melbourne Journal of International Law, vol. 52). The summary reads as follows:

> *Over the past 15 years or so, we have become accustomed to assuming that corporations are proper subjects of litigation for alleged infringements of the 'law of nations' under the Alien Tort Statute ('ATS'). But, in a dramatic reversal of this line of reasoning, the United States Court of Appeals for the Second Circuit in Kiobel v Royal Dutch Petroleum ('Kiobel'),2 has dismissed this assumption and concluded that corporations cannot be sued under the ATS. This article explores the Court's reasoning and the ramifications of the decision, highlighting the ways in which the Kiobel judgment departs from both Supreme Court and Second Circuit precedent. The authors take to task the critical failure of the majority in Kiobel to distinguish between the requirements of legal responsibility at international law and that which is necessary to invoke ATS jurisdiction in the US District Courts. In the context of the maturing debates over the human rights responsibilities of corporations, the authors point to the political as well as legal policy implications of Kiobel and underscore the reasons why the case has already attracted such intense interest and will continue to excite attention as a US Supreme Court challenge looms.*

And these are the main issues addressed:

.- the source of law for causes of action under the ATS (does the ATS create a statutory cause of action, does it grant jurisdiction to federal courts to recognise

federal common law causes of action, or does the ATS only permit the recognition of causes of action that exist in international law?); and
.- the debate regarding secondary liability: critics to the adoption by the Second Circuit of international law as the source of law for determining the rules on secondary liability under the ATS, and the conclusion of the majority in Kiobel (there is no norm of corporate liability in customary international law, and therefore there can be no liability of corporations under the ATS).

Kiobel has also been delt with in Spain by professor Zamora Cabot (University of Castellón), an ATS expert: see here his last paper, which will soon be published in English.

As for the judiciary: a petition for writ of certiorari was filed on June, 2011, to review the Kiobel judgment of the United States Court of Appeals for the Second Circuit, entered on September 17, 2010.

I would conclude that the ATS has a "mala salud de hierro" (prognosis: ill, but still a long way to go).