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).

Comity and Overseas Witnesses in Australia

An interesting recent decision of the Full Court of the Federal Court of Australia, *Joyce v Sunland Waterfront (BVI) Ltd* [2011] FCAFC 95, considers the role of comity and the interrelationship of public and private international law in the context of taking testimony from a witness outside the court's territorial jurisdiction.

The issue arose in civil proceedings in the Federal Court of Australia about misrepresentations said to have been made in Australia about the purchase of land in Dubai. Several witnesses (mainly Australian citizens) were located in

Dubai, and although they were willing to testify, they were unable to travel to Australia to give evidence in person.

Under the Federal Court's rules, the two options were either for the judge to travel to Dubai to take evidence on commission, or for the witnesses to give evidence by video link. Approaches through diplomatic channels revealed at best an ambiguous attitude on the part of the UAE government about whether either course would be acceptable to it, but UAE lawyers gave evidence to the Australian court that there were no local statutes prohibiting either means of taking evidence.

The trial judge was concerned, in the light of diplomatic correspondence placed before him, that there was no evidence "that the UAE government would permit the taking of evidence by video link" and that to do so "without that permission, … would be seen to be, or could be seen to be, a subversion of a refusal by a sovereign government to permit the taking of evidence on commission on its soil." *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 9)* [2011] FCA 832 at [40]

Referring to remarks in *Yamouchi v Kishimoto* (2002) 12 NTLR 32 and *Bell Group Ltd (In Liq) v Westpac Banking Corporation* (2004) 208 ALR 491, his Honour considered that to take evidence by video link was, in effect, to exercise the judicial power of the Commonwealth of Australia in the foreign country in which the witness was sitting; and that even if the witness testified voluntarily, the exercise of the Australian court's powers could be viewed as an infringement of that foreign jurisdiction's sovereignty in the absence of clearer consent than was available in the present case. Given the diplomatic involvement of the Australian Department of Foreign Affairs and Trade, his Honour was especially wary of being perceived by a foreign sovereign as having acted unilaterally. In that context, he refused to order that evidence be taken by video link from Dubai.

The Full Court reversed that conclusion. Keane CJ, Dowsett and Greenwood JJ discussed the role of comity when taking evidence from witnesses overseas (whether on commission or by video link). Their Honours quoted a number of sceptical statements about the value of comity as a guiding principle, including the trenchant remark of Perram J in *Habib v Commonwealth* (2010) 183 FCR 62 at [27] that: "No doubt comity between the nations is a fine and proper thing but it provides no basis whatsoever for this Court declining to exercise the

jurisdiction conferred on it by Parliament."

Reviewing the Australian statute on taking evidence by video link, their Honours remarked that it:

> *does not require that the foreign state consent to a person within its borders giving evidence by video link to an Australian court. If the Parliament perceived any problem arising out of the concept of sovereignty or that of comity, then it seems to have overridden any obligation which Australia may have had in that regard. … We see no justification for imposing upon the exercise of the discretion conferred by [the statute] a requirement that the other state consent to the taking of evidence in that way. [at [60]]*

Their Honours concluded that:

> *in exercising the discretion [to take evidence by video link], the Court is not hampered by any need to consider questions of sovereignty or comity between nations, at least absent any law forbidding such conduct, and subject to the question of whether an oath or affirmation should be required. To the extent that his Honour disposed of the matter upon the basis that questions of sovereignty and comity were relevant, he took into account irrelevant considerations. The exercise of the discretion miscarried. [at [62]]*

Australian courts quite regularly take evidence by video link, and it is unusual for a party (in this case, the defendants) to have objected so vehemently, especially as the witnesses were themselves willing to testify. The subtext, it seems, was that one of the unavailable witnesses was the plaintiff himself: the defendants would have benefitted from a permanent stay or non-suit in the event of his inability to testify.

Perhaps of most interest to international readers is the sceptical attitude of the Full Court towards judicial comity in international litigation. This could perhaps be seen as part of a wider trend towards robust individualism on the part of the Australian courts when it comes to the exercise of their jurisdiction in cross-border cases (another example being the remarkable tenacity of Australian courts in *forum non conveniens* cases). It is also an example of the less deferential attitude taken by the Australian courts towards the executive government's

conduct of foreign relations in recent times (*Habib v Commonwealth* (2010) 183 FCR 62 being the most notable example).

Joyce v Sunland Waterfront (BVI) Ltd [2011] FCAFC 95 (19 August 2011)

Strike Out for Breach of Anti-Suit Injunction

What are the options open to a plaintiff where a foreign defendant, who files an appearance and a defence, subsequently commences and continues foreign proceedings in breach of an anti-suit injunction, where the defendant has no assets in the jurisdiction? That was the circumstance that confronted the plaintiffs in the Supreme Court of Victoria in *Cocoon Data Holdings Pty Ltd v K2M3 LLC* [2011] VSC 355. Among the counsel for the plaintiff was my Australian co-editor, Perry Herzfeld.

After filings its unconditional appearance and defence in Victoria, the defendant K2M3 commenced proceedings of its own in the USA, in response to which the Victorian court issued an anti-suit injunction. Significantly, the US court refused K2M3's application for an injunction against Cocoon, and the US proceedings were stayed on *forum non conveniens* grounds. K2M3 appealed against that decision, and it was that act of appealing and continuing to prosecute the appeal in the US that constituted the ongoing breach of the Victorian anti-suit injunction.

In the exercise of the inherent jurisdiction of the Victorian Supreme Court, Ferguson J struck out the defendant's defence and gave judgment for the plaintiffs. Her Honour quoted *Derby & Co Ltd v Weldon* [1990] 1 Ch 65 at 81 (CA), where Lord Donaldson of Lymington MR referred to the possibility of barring the right to defend of a defendant with no assets within the jurisdiction who breaches a *Mareva* injunction freezing those assets. Her Honour concluded (at [21]-[22]):

Non compliance with an anti-suit injunction is a grave matter. There must be compliance with such orders. If there is not, and no proper explanation for their breach is given, then severe sanctions may be warranted. Any such sanctions which are imposed are not aimed at punishing a defaulting party but rather are necessary to safeguard the administration of justice.

Whilst the remedy sought by [the plaintiffs] is drastic, in the circumstances, it is appropriate for orders to be made striking out the defence of K2M3. No practical alternative course is available. Such orders are necessary to maintain the authority of the Court. On the evidence before me, K2M3 has deliberately breached the terms of the orders on multiple occasions without explanation, despite opportunities being given to it to provide an explanation. It did so in circumstances where it had chosen to submit to the jurisdiction of this Court; it had taken steps in this proceeding by filing an unconditional appearance and defence; it had been represented by counsel on the application when the first anti-suit injunction was granted; it did not appeal from any of the orders made in the proceeding; after breaching the orders, it instructed counsel to appear on a further hearing but failed to instruct counsel as to the reason(s) for non-compliance with the orders; it has had notice of this application and chose not to be represented on either this occasion or when the application first came on for hearing.

Bellia & Clark on the Original Meaning of the Alien Tort Statute

Anthony Bellia (Notre Dame Law School) and Bradford Clark (The George Washington University Law School) have published an article on the Alien Tort Statute and The Law of Nations in the last issue of the *Chicago Law Review*. The abstract reads:

Courts and scholars have struggled to identify the original meaning of the Alien Tort Statute (ATS). As enacted in 1789, the ATS provided "[t]hat the district

courts . . . shall . . . have cognizance . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." The statute was rarely invoked for almost two centuries. In the 1980s, lower federal courts began reading the statute expansively to allow foreign citizens to sue other foreign citizens for all violations of modern customary international law that occurred outside the United States. In 2004, the Supreme Court took a more restrictive approach. Seeking to implement the views of the First Congress, the Court determined that Congress wished to grant federal courts jurisdiction only over a narrow category of alien claims "corresponding to Blackstone's three primary [criminal] offenses [against the law of nations]: violation of safe conducts, infringement of the rights of ambassadors, and piracy." In this Article, we argue that neither the broader approach initially endorsed by lower federal courts nor the more restrictive approach subsequently adopted by the Supreme Court fully captures the original meaning and purpose of the ATS. In 1789, the United States was a weak nation seeking to avoid conflict with other nations. Every nation had a duty to redress certain violations of the law of nations committed by its citizens or subjects against other nations or their citizens—from the most serious offenses (such as those against ambassadors) to more commonplace offenses (such as violence against private foreign citizens). If a nation failed to redress such violations, then it became responsible and gave the other nation just cause for war. In the aftermath of the Revolutionary War, Congress could not rely upon states to redress injuries suffered by aliens (especially British subjects) at the hands of Americans. Accordingly, the First Congress enacted the ATS as one of several civil and criminal provisions designed to redress law of nations violations committed by United States citizens. The ATS authorized federal court jurisdiction over claims by foreign citizens against United States citizens for intentional torts to person or personal property. At the time, both the commission of—and the failure to redress—such "torts" violated "the law of nations." The statute thus employed these terms to create a self-executing means for the United States to avoid military reprisals for the misconduct of its citizens. Neither the ATS nor Article III, however, authorized federal court jurisdiction over tort claims between aliens. Indeed, federal court adjudication of at least one subset of such claims—alien–alien claims for acts occurring in another nation's territory—would have contradicted the statute's purpose by putting the United States at risk of foreign conflict. Despite suggestions that the true import of the ATS may never be recovered, the original meaning of the

statute appears relatively clear in historical context: the ATS limited federal court jurisdiction to suits by aliens against United States citizens but broadly encompassed any intentional tort to an alien's person or personal property.

Holbrook on Offers to Sell Inventions and Territoriality of Patent Law

Timothy Holbrook, who is a professor of law at Emory Law School, has posted Territoriality and Tangibility after *Transocean* on SSRN.

Patent law is generally considered the most territorial forms of intellectual property. The extension of infringement to include "offers to sell" inventions opened the door to potential extraterritorial expansion of U.S. patent law. In Transocean Offshore Deepwater Drilling, Inc. v. Maersk Contractors USA, Inc., the U.S. Court of Appeals walked through the door by concluding (1) that the location of the ultimate sale, not the location of the offer, determines whether patent infringement occurred and (2) that there can be infringement by selling or offering to sell an invention based solely on diagrams and schematics. The one-two punch of these holdings works a considerable expansion of the territorial scope of a U.S. patent and of these infringement provisions generally. This essay explores the consequences of these holdings, making the following conclusions. First, the elimination of a tangibility requirement for infringement, while ultimately correct, creates a number of problems when coupled with the court's holding on extraterritoriality. Because the sale need not be consummated for there to be an infringing offer to sell, the court extended infringement to circumstances where no activity has taken place within the United States. Moreover, if this standard is used to inform the scope of the on-sale bar patentability, then the court greatly expanded potential sources of prior art that could be used to invalidate existing U.S. patents. Additionally,

comparing Transocean to the territoriality standards in trademark law demonstrates that the holding of Transocean may not be as extensive if it is limited to offers made abroad by U.S. citizens or corporations. Regardless of the citizenship factor, this comparative analysis also demonstrates that the Federal Circuit should take into account potential conflicts with the law in foreign locations where the negotiations take place.

The paper is forthcoming in the *Emory Law Journal*.

Third Issue of 2011's Journal du Droit International

The third issue of French *Journal du droit international* (*Clunet*) for 2011 was just released.

It includes three articles, two of which might be of interest for readers of this blog.

In the first one, Sabine Corneloup, who is a professor of law at the university of Burgundy, explores how an EU law of nationality is currently developing (*Réflexion sur l'émergence d'un droit de l'Union européenne en matière de nationalité*). The English abstract reads:

The nationality of a Member State is to be determined exclusively on the basis of the national law of that Member State, but each Member State must exercise this competence with due regard to EU law. The ECJ ensures in particular that the legal effects of the possession of the nationality of a Member State are recognized without any restriction. This control affects mainly the national treatment of multiple nationalities. However, the control of the ECJ goes even further and defines also the conditions of loss of the nationality of a Member State. An inventory of the European case law is drawn up. It shows that the ECJ exceeds the Union's competence determined by the treaties. A European

framework for the nationality laws of the Member States requires the adoption of specific legal instruments. Some proposals are specially made to resolve positive conflicts of nationalities which may arise in the application of EU law.

In the second one, Giulio Cesare Giorgini, who lectures at Nice University (that is, the university of the city of Nice), wonders whether the plurality of methods of private international law should be abandoned in international business law (*Les limites des méthodes en droit international des affaires . – Pour dépasser une simple lecture économique*). The English abstract reads:

International business law is a law of pluralism : pluralism of sources, pluralism of actors, pluralisms of goals, pluralism of methods. However, determining and articulating the domain of these methods is difficult. National legal systems have sometimes rules in order to address this issue but their logic – a logic of authority – seems less satisfactory in this specific field. The article examines the possible solutions in order to suggest that usual approaches must be abandoned. Thus measuring the rational coherence of the concurrent norms may reconcile international business law legal pluralism and the uniformity of its purpose.

Parry on Oklahoma's Save our State Amendment

John Parry, who is a professor of law at Lewis and Clark Law School, has posted Oklahoma's Save Our State Amendment and the Conflict of Laws on SSRN.

In November 2010, Oklahoma voters adopted the "Save Our State Amendment," which provides a catalog of legal sources that Oklahoma courts may use when deciding cases, as well as a catalog of forbidden sources, which include "the legal precepts of other nations or cultures," international law, and "Sharia Law." A federal district court has enjoined the entire amendment in

response to establishment and free exercise concerns (and without considering whether the "Sharia Law" portions could be severed from the rest of the amendment).

Much of the reaction to the amendment has focused on these same constitutional issues and related political concerns. This essay, by contrast, approaches the Save Our State Amendment from a conflict of laws perspective, and I treat it primarily as a choice of law statute. Seen in this way, the Save Our State Amendment is a wretched piece of work, at least under the rather formal issue spotting analysis that I present here. If the amendment goes into effect – whether in whole or in part – it will raise a host of questions, some of them difficult, that could take years to work their way through the Oklahoma judicial system.

The first section of this essay addresses the scope of the amendment – the entities to and the situations in which it applies. The second section considers the amendment's impact on Oklahoma choice of law doctrine through its list of approved and forbidden legal sources for Oklahoma courts (and, by extension, federal district courts in Oklahoma when hearing diversity cases). The final section is a brief conclusion that assesses the larger impact of the issues I identify in this essay.

I do not claim to have identified or fully addressed every issue that the amendment raises or every problem that it creates, and I have largely left discussion of the religion clauses issues to other writers, but I trust that this essay says enough to convince even those who support the amendment's political goals that this is an irresponsible way to make law.