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.

Third Issue of 2011's ICLQ

The last issue (July 2011) of the *International and Comparative Law Quarterly* was just released. It offers two articles discussing private international law issues.

The first is authored by Sirko Harder, who is a Senior Lecturer at Monash Law School: Statutes of Limitations Between Classification and Renvoi – Australian and South African Approaches Compared.

This article compares the ways in which Australian and South African courts have approached issues of classification and renvoi where a defendant argues that the action is time-barred. There are two differences in approach. First,

Australian courts classify all statutes of limitation as substantive, whereas South African courts distinguish between right-extinguishing statutes (substantive) and merely remedy-barring statutes (procedural). Second, the High Court of Australia has used renvoi in the context of the limitation of actions whereas South African courts have yet to decide on whether to use renvoi. This article assesses the impact of those differences in various situations.

The second article is authored by Gerard McCormack, who is Professor of International Business Law at the University of Leeds: American Private Law Writ Large? The UNCITRAL Secured Transactions Guide.

This article provides a critical evaluation of the main provisions of the UNCITRAL Legislative Guide on Secured Transactions. It examines the Guide in the context of other international and national secured transactions instruments including article 9 of the United States Uniform Commercial Code. The clear objective of the Guide is to facilitate secured financing. It is very facilitating and enabling, and permits the creation of security in all sorts of situations. Security is seen as a good thing, through enhancing the availability of lower-cost credit. The paper suggests that this closeness in approach to article 9 is likely to militate against the prospects of the Guide gaining widespread international acceptance. This is the case for various interlocking reasons including the battering that American legal and financial norms have taken with the global financial crisis.

Zick on Trans-Border Expression

Timothy Zick, who is a professor of law at William and Mary Law School, has posted Falsely Shouting Fire in a Global Theater: Emerging Complexities of Trans-Border Expression on SSRN. The abstract reads:

In Schenck v. United States (1919), Justice Holmes wrote that "the most

stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." Owing to globalization, the digitization of expression, and other modern conditions a metaphorical global theater is emerging. In this theater, speakers' voices and the physical and psychological effects of domestic expressive activities will frequently traverse or transcend territorial borders. This Article draws upon several recent events — the Quran burning in Florida, the international reaction to an Internet posting calling for a "Draw Mohammed Day" event, the criminalization of the provision of expressive assistance to designated foreign terrorist organizations, the posting of potentially inciting speech on the Internet, and the WikiLeaks disclosures — to examine how First Amendment doctrines relating to offensive expression, incitement, hostile audiences, treason, and the distribution of secret or potentially harmful information might apply in the global theater.

The Article makes four general claims or observations regarding these doctrines. First, although in rare instances the government could punish domestic incitement that causes harmful extraterritorial effects, in general expression that breaches global peace or order by producing distant offense and other harms ought to remain fully protected in the global theater. Second, owing to the instantaneous trans-border flow of offensive and incendiary expression, speakers will frequently have to assess in advance whether they are willing to risk the possibility of harm from distant threats, while officials will need to consider whether to offer some protection to domestic speakers in response to explicit threats from foreign hecklers. Third, the expanding category of proscribed enemy-aiding expression, which now includes the provision of "material support" (including otherwise lawful expression) to terrorists and may include a form of cyber-treason, must be defined as narrowly as possible in the global theater. In general, laws ought to be drafted and enforced such that only intentional enemy-aiding conduct, rather than speech or expressive association, is proscribed. Fourth, with regard to the trans-border exposure of governmental secrets, the United States ought to focus primarily upon improving its processes for protecting secrecy rather than on prosecuting the publishers, whether foreign or domestic, of such information.

The Article also draws some broader free speech, association, and press lessons from recent events and controversies in the emerging global theater. Public officials, courts, and commentators must begin to think more systematically

about trans-border speech, association, and press concerns. The First Amendment's trans-border dimension must be defined and incorporated into political, legal, and constitutional discussions regarding global information flow in the twenty-first century. In the global theater, America's exceptional regard for offensive expression will be vigorously challenged both at home and abroad. We must be prepared to explain and defend our exceptional First Amendment norms, principles, and values to both domestic and global audiences. Recent episodes confirm that core First Amendment principles, including marketplace justifications for protecting offensive speech, will retain considerable force in the global theater. The Article also discusses various lessons for the press, as it continues its transformation from a domestic information hub and local watchdog to a loosely bound international distribution network. As this transformation occurs, the press will need to be more circumspect in its reporting on matters of global concern, such as religion, and with regard to the nature and character of its relationships with some foreign sources. Moreover, the press's own commitment to the free flow of information will be tested, as new sources and publishers, operating on different models and in pursuit of different missions, continue to materialize.

Finally, new threats to free speech and information flow will arise in the global theater. We ought to be paying more attention to the influence of private intermediaries on the trans-border flow of information, and to new forms of governmental information control such as prosecution of information distributors and extra-judicial means of punishing speakers (including targeted executions).

The paper is forthcoming in the *Vanderbilt Law Review*.

Jurisdiction Based on a Domain

Name

In *Tucows.Com Co. v. Lojas Renner S.A.*, 2011 ONCA 548 (available here) the Court of Appeal for Ontario considered whether to take jurisdiction in a dispute over the ownership of an internet domain name.

Tucows is a Nova Scotia corporation with its principal office in Ontario. Renner is a Brazilian corporation operating a series of retail department stores. Tucows bought 30,000 domain names from another corporation, and one of the names was renner.com. Tucows is the registrant of that domain name with the internationally-recognized non-profit organization, the Internet Corporation for Assigned Names and Numbers (ICANN). Renner complained to WIPO and in response Tucows sued in Ontario, seeking a declaration that it was the owner of the domain name. Renner objected to Ontario's jurisdiction over the dispute.

The core issue was whether this dispute concerned "personal property in Ontario". An earlier decision of the Ontario Superior Court, *Easthaven Ltd. v. Nutrisystem.com Inc.* (2001), 55 O.R. (3d) 334 (S.C.J.), had concluded that because a domain name lacks a physical existence it was not "property in Ontario" and the mere fact the domain name was registered through a corporation that happened to carry on business in Ontario (the domain name Registrar) did not give it a physical presence here.

The court reviewed several scholarly articles on the issue from around the world and also considered jurisprudence from several other countries, including the United States, the United Kingdom and Australia. It concluded that the emerging consensus appears to be that domain names are a form of property. After a further analysis of the nature of personal property, the court concluded that a domain name is personal property. Further, the connecting factors favouring location of the domain name in Ontario were held to be the location of the registrant of the domain name and the location of the registrar and the servers as intermediaries. On this basis the court found the domain name in issue to be personal property in Ontario, and thus took jurisdiction under the approach in *Van Breda* (discussed in an earlier post).

The case discusses several other issues, including (i) the relationship between the dispute settlement mechanism provided by WIPO and civil litigation and (ii) the

propriety of a claim to obtain a declaration as a remedy.