D.C. Circuit Splits with Second… and is supported by Seventh

Boimah Flomo, et al v. Firestone Natural Rubber Co., LLC, an ATS suit concerning hazardous child labor on a plantation in violation of customary international law, was decided last Monday (July 11, 2011). Although the suit failed – the court was not satisfied that she had been given an adequate basis for inferring a violation of customary international law- some of the statements are worth reproducing. I quote:

> "The principal issues presented by the appeal are whether a corporation or any other entity that is not a natural person (the defendant is a limited liability company rather than a conventional business corporation) can be liable under the Alien Tort Statute, and, if so, whether the evidence presented by the plaintiffs created a triable issue of whether the defendant has violated *customary international law*.
>
> The issue of corporate liability under the Alien Tort Statute seems to have been left open in an enigmatic footnote in Sosa, 542 U.S. at 732 n. 20 (but since it's a Supreme Court footnote, the parties haggle over its meaning, albeit to no avail). All but one of the cases at our level hold or assume (mainly the latter) that corporations can be liable (…). The outlier is the split decision in Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), which indeed held that because corporations have never been prosecuted, whether criminally or civilly, for violating customary international law, there can't be said to be a principle of customary international law that binds a corporation.
>
> The factual premise of the majority opinion in the Kiobel case is incorrect. (…)
>
> And suppose no corporation had ever been punished for violating customary international law. There is always a first time for litigation to enforce a norm; there has to be. (…)
>
> We have to consider why corporations have rarely been prosecuted criminally or civilly for violating customary international law; maybe there's a compelling reason. But it seems not (…)

> The court is satisfied that corporate liability is possible under the Alien Tort Statute".

Hague Prize Awarded to Paul Lagarde

The Hague Conference has announced that the Hague Prize for International Law 2011 will be awarded to Professor Paul Lagarde "in view of [his] outstanding contribution to the study and promotion of private international law".

> *The **Hague Prize for International Law 2011** will be awarded to Professor Paul Lagarde, expert, delegate, chairman and reporter for the Hague Conference, "in view of [his] outstanding contribution to the study and promotion of private international law".*
>
> *This prestigious prize was established in 2002 by the municipality of The Hague and is awarded by an independent foundation, the Hague Prize Foundation, "to physical persons and/or legal persons who – through publications or achievements in the practice of law – have made a special contribution to the development of public international law and/or private international law or to the advancement of the rule of law in the world". The prize consists of a medal of honour, a certificate and a monetary amount of € 50,000.*
>
> *The first recipient of the prize was Professor Shabtai Rosenne (2004), Professor M. Cherif Bassiouni received the prize in 2007 and in 2009 the prize was awarded to Dame Rosalyn Higgins.*
>
> *The ceremony will take place on 21 September 2011 at the Peace Palace in The Hague.*

Paul Lagarde taught at the university of Paris I (Panthéon-Sorbonne) from 1971 to 2001. He is the co-author of a leading treaty of French private international law (with Henri Batiffol).

Australian article round-up 2011: Arbitration

Continuing the Australian article round-up, readers may be interested in the following two articles raising points about arbitration:

- **Andrew Bell, 'Dispute Resolution and Applicable Law Clauses in International Sports Arbitration' (2010) 84 *Australian Law Journal* 116:**

Choice of law clauses and jurisdiction or arbitration agreements play a critical role in international commerce. They also play an increasingly important role in sporting disputes by reason of the ever-growing internationalisation and commercialisation of sport. The presence of such clauses does not, however, guarantee the elimination of interlocutory or adjectival contests concerning the law which will govern, and the forum or mode of dispute resolution that will apply, to the determination of an international sporting dispute. This article examines standard sports-related choice of law clauses and arbitration agreements, and considers the emerging jurisprudence in this field.

- **Geoffrey Fisher, 'Anti-Suit Injunctions to Restrain Foreign Proceedings in Breach of an Arbitration Agreement' (2010) 22 *Bond Law Review* 1:**

The anti-suit injunction is the remedial device available in common law systems to restrain a party from instituting or continuing with proceedings in a foreign court. … [A] recognised category for the issue of an anti-suit injunction is where a plaintiff has commenced proceedings in a foreign court in breach of a contractual promise, for example, in breach of an exclusive jurisdiction clause or an arbitration agreement. In this type of case there is a tension between the interests of comity on the one hand and the policy of upholding contractual undertakings on the other. The English Court of Appeal in Aggeliki Charis Campania Maritima SpA v Pagnan SpA (The Angelic Grace) can be regarded as

having inaugurated a more liberal approach to the jurisdiction to grant an anti-suit injunction restraining breach of an arbitration agreement. The tension between comity and contractual bargain was largely resolved in favour of the latter. This paper examines the nature and extent of the liberalisation worked by The Angelic Grace and subsequent English decisions.

Joslin on Same-Sex Couples and Divorce Jurisdiction

Courtney G. Joslin (University of California, Davis – School of Law) has posted Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts on SSRN. Here is the abstract:

There are tens of thousands of same-sex married couples in the United States. A significant number of these couples, however, cannot divorce. First, many same-sex spouses cannot divorce in their home states because the relevant state law precludes recognition of same-sex marriages. Second, an anomalous jurisdictional rule makes it difficult for these spouses to divorce elsewhere. In contrast to the rules governing other civil actions, one of the spouses must be domiciled in the forum for a court to have jurisdiction over a divorce.

This Article considers the second hurdle – the domicile rule. Previously, divorce jurisdiction was a subject of intense interest to the Court and to legal scholars. But despite an ever increasing disjunction between divorce jurisdiction and general principles of state court jurisdiction, critical examination of the domicile rule has largely disappeared.

This Article responds to recent calls to challenge the myth of family law exceptionalism by critically analyzing the domicile rule. After considering the domicile requirement in the context of state court jurisdiction doctrine more generally, this Article contends the time has come to abandon the domicile rule. Abandonment of the rule alone, however, does not fully resolve the problem.

> *Accordingly, this Article advances a set of normative proposals to ensure that all spouses have a forum in which to divorce.*

The article is forthcoming in the *Boston University Law Review*. The author has also written a post here on the same topic.

On the ATS: D.C. Circuit Splits with Second

For another twist of American courts on the Alien Tort Statute (this time, in favour of its applicability to corporations), I suggest reading the D.C. Circuit decision of July, the 8th, *John Doe VIII v. Exxon Mobil Corp* (see here). Also, the recent post of K. Anderson in Opinio Juris, where he speaks his opinion against the majority in John Doe VIII. He concludes that "the corporate liability issue is so fundamental to contemporary ATS litigation – preceding, in a logical sense, the standards found in Sosa – and the split among circuits now so stark, that the [Supreme] Court cannot simply avoid resolving it." (But, as he says himself, such a conclusion might be naive…)

Quintanilla and Whytock on the New Multipolarity in Transnational Litigation

Marcus S. Quintanilla (O'Melveny & Myers LLP) and Christopher A. Whytock (UC Irvine) have posted The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law on SSRN. The abstract reads:

Conventional wisdom suggests that the transnational litigation system is essentially unipolar, or perhaps bipolar, with the United States and the United Kingdom acting as the leading providers of courts and law for transnational disputes. Our overarching conjecture is that this unipolar (or bipolar) era – if it ever existed at all – has passed, and that transnational litigation is entering an era of ever increasing multipolarity. If this intuition is correct, then it will be increasingly important for U.S. judges and lawyers to be comfortable handling a wide range of conflict-of-laws problems, and prepared to consult closely with their colleagues abroad.

In this Article – based on our remarks at the International Law Weekend-West Conference held at Southwestern Law School in February 2011 – we develop three aspects of this conjecture, corresponding to three dimensions of the new multipolarity in transnational litigation. In Part I, we discuss the growing relative importance of non-U.S. forums for transnational litigation. In Part II, we highlight the potential proliferation of foreign judgments brought to the United States for recognition or enforcement. And in Part III, we consider the pervasiveness of foreign law issues that are likely to confront U.S. judges and lawyers, and the accompanying challenges of making determinations of foreign law in the wake of the Seventh Circuit Court of Appeals' recent decision in Bodum USA, Inc. v. La Cafetière, Inc.

The paper is forthcoming in the *Southwestern Journal of International Law*.

Publication: Biagioni, "La connessione attributiva di giurisdizione nel regolamento CE

n. 44/2001”

Giacomo Biagioni (Univ. of Cagliari) has recently published “La connessione attributiva di giurisdizione nel regolamento CE n. 44/2001” (CEDAM, 2011). The volume is the latest in the series “Studi di diritto internazionale – Studies in international law“, focused on international procedural law and international civil procedure law, promoted by the Fondazione Gaetano Morelli, a foundation dedicated to the memory of one of the most influential Italian international law scholars of the past century.

An abstract has been kindly provided by the author (the complete table of contents is available on the publisher’s website):

> *Both in civil law and in common law systems, reference is made to connexity when it is deemed advisable to defer to one court related claims so that they may be jointly examined and adjudicated. Connexity can also work as a head of jurisdiction: in those cases a State is conferred jurisdiction on one claim («related claim») since it is connected to another claim («main claim») that falls already under the jurisdiction of that State.*
> *The book addresses that category of provisions as enshrined in the EC regulation No 44/2001, evaluating their scope of application, their conditions of application and their effects. Those heads of jurisdiction fit especially well into the EC regulation No 44/2001. The book emphasises that the principle of free circulation of judgments is the main objective pursued by the regulation and that even the system of provisions about jurisdictional competence must be interpreted in the light of that aim.*
> *In the regulation No 44/2001 the notion of “related actions” may then have two different meanings: some provisions (mainly article 6) recall the connectedness between two claims as a ground for conferring jurisdiction to one court over both claims; article 28 enables the court second seised to stay proceedings while the proceedings in the State first seised come to an end. Even though those provisions operate differently, they pursue two common purposes, namely they aim at preventing the risk of irreconcilable judgments and contribute to procedural economy. The book argues for a broad interpretation of heads of jurisdiction based on connexity, insofar they can lead to improve the sound administration of justice and to avoid conflicting judgments.*
> *However, it must be borne in mind that the regulation No 44/2001 does not*

consider connexity a general head of jurisdiction. It contains some special provisions about connected claims; those provisions differ from each other for their scope of application ratione materiae and for their procedural requirements. Even the notion of connectedness does not have a uniform meaning in the regulation: every single provision emphasises different functions of the jurisdiction on the ground of connexity. Some provisions are especially aimed at preventing irreconcilable judgments, like article 6(1) of the regulation; others have a wider scope and pursue procedural economy, like article 6(2). However, those heads of jurisdiction are subject to some limits. In particular, the jurisdiction should not be conferred on the ground of connexity, whenever a provision of the regulation inspired by more prominent values (like the protection of the weaker party, the sovereignty of Member States in some matters and the principle of party autonomy) is applicable.

Title: "La connessione attributiva di giurisdizione nel regolamento CE n. 44/2001", by *Giacomo Biagioni*, CEDAM (Padova), 2011, XIV – 268 pages.

ISBN: 978-88-13-30763-9. Price: EUR 27. Available at CEDAM.

European Parliament's Draft Report on the Brussels I Review

A Draft Report of the Committee of Legal Affairs of the European Parliament on the *proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (Brussels I Review) is available here.

H/T: Marie-Elodie Ancel.

Ribstein on NY and the Market for Marriage Law

Readers interested in whether the decision of the state of New York to legalize gay marriage shows that a market for marriage law exists in the United States should see this post of Larry Ribstein over at *Truth on the Market*.

European Parliament's Working Document on the Amendment of the Rome II Regulation

On May 25, 2011, the Committee of Legal Affairs (Rapporteur: Diane Wallis) of the European Parliament has issued a Working Document on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II). The Working Paper discusses the desirability to fill the gap in the Regulation on the applicable law to non-contractual obligations arising out of violations of privacy and rights relating to personality.

Readers will recall that *Conflictoflaws.Net* had organized an online symposium on this topic last summer. We are delighted that the Rapporteur found the contributions "thoughtful and thought-provoking", although the range of views expressed had made her task no easier. The Rapporteur made particular mention of the proposal of Professor Jan von Hein, indicating that she found his approach "balanced and reasonable".