Robertson on Transnational Litigation and Institutional Choice

Cassandra Burke Robertson, who is an associate professor at Case Western University School of Law, has published *Transnational Litigation and Institutional Choice* in the last issue of the Boston Law Review. The abstract reads:

> *When U.S. corporations cause harm abroad, should foreign plaintiffs be allowed to sue in the United States? Federal courts are in-creasingly saying no. The courts have expanded the doctrines of forum non conveniens and prudential standing to dismiss a growing number of transnational cases. This restriction of court access has sparked considerable tension in international relations, as a number of other nations view such dismissals as an attempt to insulate U.S. corporations from liability. A growing number of countries have responded by enacting retaliatory leg-islation that may ultimately harm U.S. interests. This Article argues that the judiciary's restriction of access to federal courts ignores important foreign relations, trade, and regulatory considerations. The Article applies institutional choice theory to recommend a process by which the three branches of government can work together to establish a more coherent court-access policy for transnational cases.*

It can be freely downloaded here.

The United States Supreme Court to Take a Fresh Look at Personal Jurisdiction

Today, the United States Supreme Court granted certiorari in two cases that involve the so-called "stream-of-commerce" theory of personal jurisdiction. Under

that theory, a United States court may assert personal jurisdicition over a foreign company defendant when that company's products find their way into U.S. markets, even though the foreign company has not targeted that specific market for commerce. Many non-U.S. readers will find such a theory of personal jurisdiction startling, especially given that recent advances in the law of jurisdiction in Europe in particular have favored the place of a defendant's domicile (or place of incorporation) as the key principle in asserting jurisdiction. It will be interesting to see if the United States Supreme Court resolves these cases in favor of a bright-line rule or a more flexible approach to personal jurisdiction.

The first case, *Goodyear Luxembourg Tires, et al., v. Brown, et al.* (10-76), involves the death of two North Carolina youths in France when a tire made overseas failed and the bus in which they were riding crashed and rolled over. The tire was made in Turkey, but the Luxembourg branch of Goodyear and branches in Turkey and France were sued in a North Carolina court over the tire's failure. The actions sued upon had no contact with North Carolina and the defendants had never taken purposeful action to cause tires which they had manufactured to be shipped into North Carolina. Notwithstanding these facts, the North Carolina Court of Appeals held that because (1) defendants did not purposefully limit their distribution to exclude their tires from North Carolina, (2) defendants did business generally with the United States and (3) North Carolina had a strong interest in providing a forum for its citizens to seek redress for their claims, the assertion of general personal jurisdiction over the defendants was proper. The second case, *J. McIntyre Machinery Ltd. v. Nicastro, et al.* (09-1343), involves an accident in a New Jersey scrap metal facility on a machine made by McIntyre, a British company that sold the machine through an unaffiliated distributor. That lawsuit was pursued in state court in New Jersey. On appeal, the Supreme Court of New Jersey found that because the defendant targeted the United States market generally and its products ended up in the state of New Jersey the assertion of personal jurisdiction by the New Jersey courts was reasonable, especially considering the radical transformations in international commerce which makes the whole world a market.

The Supreme Court's resolution of these cases should do much to correct the confusion that still exists in American courts over the doctrine of personal jurisdiction under the stream of commerce theory, especially when applied to

foreign defendants.

Conference on State Insolvency and Sovereign Debts

Mathias Audit, who is a professor of law at the University of Paris Ouest – Nanterre La Défense, will organise a conference in Paris on November 10th, 2010, on State Insolvency and Sovereign Debts.

Here is the programme:

Colloque, le 10 novembre 2010
Palais du Luxembourg – Salle Monnerville

Insolvabilité des Etats et dettes souveraines

Programme

8h30 : Accueil des participants

9h : Ouverture du colloque par M. le sénateur Philippe MARINI

9h15 : Introduction générale aux travaux

Matinée placée sous la présidence de M. Hubert DE VAUPLANE, *Directeur juridique et Conformité au Crédit agricole et professeur associé à l'Université Paris II – Panthéon Assas*

- 9h30 : **Un Etat peut-il faire faillite ? – Le point de vue économique**
  par M. Jérôme SGARD, *directeur de recherches à Sciences Po/CERI et professeur associé à l'Université Paris-Dauphine*
  10h : **Un Etat peut-il faire faillite ? – Le point de vue juridique**

par M. Michael WAIBEL, *British Academy Postdoctoral Fellow, Lauterpacht Centre for International Law and Downing College, University of Cambridge*

10h30 : Pause

- 11h : **La dette souveraine appelle-t-elle un statut juridique particulier ?**
  par M. Mathias AUDIT, *professeur de droit à l'Université Paris Ouest – Nanterre La Défense*
- 11h30 : **Incidence des Credit Default Swaps sur les dettes des Etats : bilan et prospective**
  par Me Jérôme DA ROS, *avocat à la cour*
- 12h : **Les « fonds vautours » sont-ils des créanciers comme les autres ?**
  par M. Patrick WAUTELET, *professeur à l'Université de Liège*
- 12h30 : Discussion générale

13h : Déjeuner libre

Débats placés sous la présidence de M. Christian DE BOISSIEU, *professeur d'économie à l'Université Paris I – Panthéon-Sorbonne*

- 14h30 : **Agence de notation : responsabilité, régulation ou *laissez-faire* ?**
  par M. Norbert GAILLARD, *docteur en économie (Sciences Po/Princeton), consultant auprès de la Banque mondiale*
- 15 h : **La régulation de l'information sur le marché des dettes souveraines**
  par M. Alain BERNARD, *professeur à l'Université de Pau et des Pays de l'Adour*

15h30 : Pause

Débats placés sous la présidence de M. Jean-Bernard AUBY, professeur des universités à l'Ecole de Droit de SciencesPo, directeur de la chaire « Mutations de l'Action Publique et du Droit Public » (MADP)

- 16 h : **Les instruments de droit international public pour remédier à l'insolvabilité des Etats**

par M. Mathias FORTEAU, *professeur à l'Université Paris Ouest – Nanterre La Défense*

- 16h30 : **Les instruments de droit de l'Union européenne pour remédier à l'insolvabilité des Etats**
  par M. Francesco MARTUCCI, *professeur à l'Université de Strasbourg*
- 17h : Discussion générale
- 17h30 : **Conclusion générale**
  par Mme Horatia MUIR WATT, *professeur des universités à l'Ecole de Droit de SciencesPo*

It is free of charge. Registration, however, is compulsory (michele.dreyfus@u-paris10.fr).

Gerrit Betlem

Professor Gerrit Betlem, a close friend and colleague to many of us and a leading scholar in European Private Law, passed away on 26th July 2010. There is an obituary on Southampton's website.

Conference Announcement: Extraterritoriality in US Law

Beyond Borders: Extraterritoriality in American Law

Southwestern Law School, Nov. 12, 2010

On Friday, November 12, 2010, Southwestern Law School in Los Angeles, California is hosting a symposium titled *Beyond Borders: Extraterritoriality in American Law*.

This one-day symposium will bring together leading legal figures from throughout the country to analyze critical issues related to transnational litigation and extraterritorial regulation. Do U.S. law stop at the border? If not, when do they – or when should they – govern the conduct of people abroad? From the controversial extraterritorial application of U.S. domestic law, to the contentious uses of universal jurisdiction in the human rights context, to debates over the extent to which the U.S. Constitution applies outside U.S. territory, a flurry of recent scholarship has involved disputes over the geographic reach of domestic law.

The symposium will bring together leading scholars to discuss the history, doctrine, and current issues related to extraterritoriality. The proceedings will be published in the *Southwestern Law Review* and distributed widely. The following professors are participating in the symposium (listed alphabetically):

- Jeffery Atik, Professor of Law, Loyola Law School, Los Angeles
- Hannah Buxbaum, Professor of Law, Indiana Univ. Maurer School of Law
- Lea Brilmayer, Professor of Law, Yale Law School
- William Dodge, Professor of Law, University of California, Hastings College of the Law
- Stephen Gardbaum, Professor of Law, UCLA School of Law
- Andrew Guzman, Professor of Law, University of California, Berkeley School of Law
- Max Huffman, Associate Professor of Law, Indiana Univ. School of Law
- Chimene Keitner, Associate Professor of Law, University of California, Hastings College of the Law
- John Knox, Professor of Law, Wake Forest Univ. School of Law
- Caleb Mason, Professor of Law, Southwestern Law School
- Daniel Margolies, Professor of History, Virginia Wesleyan College
- Jeff Meyer, Professor of Law, Quinnipiac Univ. School of Law
- Trevor Morrison, Professor of Law, Columbia Law School
- Austen Parrish, Professor of Law, Southwestern Law School
- Tonya Putnam, Assistant Professor of Political Science, Columbia University
- Kal Raustiala, Professor of Law, UCLA School of Law
- Bartholomew Sparrow, Professor of Government, University of Texas at Austin

- Peter Spiro, Professor of Law, Temple Univ. Beasley School of Law
- Christopher Whytock, Acting Professor of Law, University of California, Irvine School of Law

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Roosevelt on Choice of Law in US Courts

Kermit Roosevelt III, who is a professor of law at the University of Pennsylsvania Law School, had posted Choice of Law in Federal Courts: from Erie and Klaxon to Cafa and Shaddy Grove on SSRN.

> *The article offers a new perspective on choice of law in federal courts. I have argued in a series of articles that ordinary choice of law problems are best understood through application of a particular conceptual framework, which I call the two-step model. Rather than thinking of choice of law as some sort of meta-procedure, this model takes it to address two substantive questions: what are the scope of the competing states' laws, and which should be given priority if they conflict?*
>
> *My previous articles have explored the utility of this framework for tackling some perennial problems in choice of law. This one moves to a different context: choice of law in federal courts under the Erie doctrine. It argues that Erie is best understood as a straightforward application of this two-step model and that the model consequently offers a useful guide for Erie analysis. It shows how thinking about the Erie question in this way offers novel and satisfying solutions to a number of puzzles that have troubled courts and commentators in the wake of Erie. These puzzles include the effect that federal courts must give to state choice of law rules (the Klaxon issue), how Klaxon should interact with the Class Action Fairness Act of 2005, and the Court's most recent venture into the Erie arena, Shady Grove v. Allstate. These issues have received substantial attention in the scholarly literature, but never from the two-step perspective.*

Keitner on Kiobel and the future of the Alien Tort Statute

The following post, cross-posted on Opinio Juris, continues to analyze the import of the Second Circuit's recent decision in Kiobel v. Royal Dutch Petroleum, holding that corporations may not be sued under the Alien Tort Statute for violations of customary international law. Our thanks to Professor Keitner for sharing her thoughts.

Not Dead Yet: Some Thoughts on *Kiobel*
Chimène I. Keitner, UC Hastings College of the Law

The Second Circuit's recent panel opinion in *Kiobel v. Royal Dutch Petroleum* has justifiably spurred much talk in the blogosphere, including posts by Trey Childress https://conflictoflaws.de/2010/is-it-the-end-of-the-alien-tort-statute/, Ken Anderson http://opiniojuris.org/2010/09/17/extra-thoughts-on-todays-2nd-circuit-ats-decision/, Julian Ku http://opiniojuris.org/2010/09/17/goodbye-to-ats-litigation-second-circuit-rejects-corporate-liability-for-violations-of-customary-international-law/, and Kevin Jon Heller http://opiniojuris.org/2010/09/18/a-tentative-thought-on-kiobel/. Here are my preliminary thoughts.

First, it is premature to hail the "end of the ATS." It may be true that some plaintiffs have sought to hold corporations accountable for their complicity in human rights abuses under the ATS's jurisdictional grant. But not all ATS litigation is about corporate liability. To the contrary, the Second Circuit's landmark opinion in *Filartiga v. Pena-Irala* involved an individual human rights violator, and cases against individuals continue to be filed under the ATS and the Torture Victim Protection Act of 1991. It is important not to lose sight of these cases, which the Supreme Court explicitly approved in *Sosa v. Alvarez-Machain* (2004).

Second, whether or not the ATS is good policy, the jurisdictional grant it

embodies must be interpreted within the context of U.S. law. This does not mean that U.S. law governs all aspects of ATS litigation—in my 2008 article on *Conceptualizing Complicity in Alien Tort Cases* http://uchastings.edu/hlj/archive/vol60/Keitner_60-HLJ-61.pdf, I argued that international law provides the "conduct-regulating" rules applied under the ATS, whereas U.S. law governs other aspects of ATS litigation. Although I focused on the standard for aiding and abetting, I also suggested that "the most coherent approach would look to U.S. law on the question of personal jurisdiction, including the type of entity against which a claim can be asserted, [while] international law would supply the substantive, conduct-regulating rules that apply to private actors" (p. 72).

Kiobel misconstrues language in *Sosa* about whether private actors can violate international law to conclude that corporations cannot be held liable for certain conduct in U.S. courts. In terms of my proposed framework, *Kiobel* miscategorizes the question of whether corporations can be named as defendants as a conduct-regulating rule akin to aiding and abetting. This is wrong because aiding and abetting liability, unlike corporate liability, does not involve the attribution of the principal's conduct to the accomplice by virtue of a preexisting legal relationship. Rather, it prohibits the *accomplice's conduct* in providing substantial assistance to the principal. Consequently, under the ATS, the accomplice's (and the principal's) conduct is governed by international law. By contrast, whether or not the accomplice's (or the principal's) conduct can be attributed to a corporate entity is governed by U.S. law. Corporate liability is thus possible under the ATS whether or not corporate entities have themselves been subject to the jurisdiction of international tribunals or found liable for international law violations by such tribunals.

Kiobel indicates that "[t]he singular achievement of international law since the Second World War has come in the area of human rights, where the subjects of customary international law—*i.e.*, those with international rights, duties, and liabilities—now include not merely *states*, but also *individuals*" (p. 7). In fact, this is not such a novel development: the paradigm violations of piracy, violations of safe conducts, and offenses against ambassadors identified in *Sosa* also would typically have been committed by private actors, rather than by states (see Conceptualizing Complicity http://uchastings.edu/hlj/archive/vol60/Keitner_60-HLJ-61.pdf, p. 70). The ATS's

jurisdictional grant should be understood in this context. In an *amicus* brief filed on behalf of professors of federal jurisdiction and legal history in Balintulo v. Daimler AG (2d Cir., No. 09-2778-cv), my colleague William Dodge documents that "[l]egal actions for violations of the law of nations were not limited to natural persons in the late-eighteenth and early-nineteenth centuries" (p. 15), and that "no distinction would have been drawn between individual and corporate defendants" (p. 14) in these early cases. Any serious consideration of jurisdiction under the ATS needs to grapple with these historical foundations, and with the relationship between the law of nations and U.S. law, not simply "international law" in the abstract.

Looking at the big picture, there certainly need to be—and are—robust mechanisms to contain cases that are non-meritorious or vexatious, that impinge excessively on the Executive's conduct of foreign relations, or that should be heard in a non-U.S. forum that is willing and able to provide redress. At the front end, I would hazard that, although the increasing involvement of plaintiffs' law firms (as opposed to human rights lawyers associated with non-profits, or attorneys working strictly *pro bono*) in bringing ATS cases may have some benefits in terms of reaching a greater swath of deleterious conduct, it may foster less coherence and restraint in case selection. At the back end, certain judges may be tempted to overcompensate by creating doctrinal barriers to entire categories of cases. This impulse might be understandable, but it does not justify judicial rewriting of the ATS.

A Study on the Private International Law Aspects of International Surrogacy

Agreements

A message from Paul Beaumont and Katarina Trimmings:

In July 2010, the Nuffield Foundation awarded a grant of £112.000 to Professor Paul Beaumont and Katarina Trimmings to conduct a study into private international law aspects of international surrogacy arrangements. The work on the project commenced on 1 August and the award is tenable for two years. The ultimate goal of the research is to explore possible types of international regulation of surrogacy arrangements, and to prepare a document that would serve as a basis for a future international Convention on aspects of surrogacy arrangements. The project is carried out in collaboration with the Hague Conference. A website detailing the project will be set up in the near future, and a note with the link to the website will then be posted. The research team is very much interested in getting input from interested parties. Therefore, if you have any relevant information about international surrogacy, please do not hesitate to contact the research team (see contact details below). Your assistance will be very much appreciated!

Summary

Recent developments and research in the area of reproductive medicine have resulted in various treatment options becoming available to infertile couples. One of them is the use of a surrogate mother in cases where the female partner of a couple is unable to carry a child. National laws governing surrogacy differ widely between jurisdictions. The variety of domestic responses to surrogacy has led to a situation where infertile couples seeking to have a child through surrogacy travel from one country to another, purposely choosing "surrogacy – friendly" jurisdictions as their destinations. In doing so, they effectively avoid restrictions imposed on surrogacy in their jurisdiction. Cross-border travel for the purpose of hiring a surrogate mother has been termed as "procreative tourism". By and large, the majority of "procreative tourists" are childless Western couples attracted by "low-cost" surrogacy services and a ready availability of surrogate mothers in places like India, Eastern Europe and South America.

It is usually the case that the law lags behind medical advances and corresponding social developments. Unfortunately, international surrogacy is not

an exception. Indeed, there is a complete void in the international regulation of surrogacy arrangements, as none of the existing international instruments contains specific provisions designed to regulate this emerging area of international family law. In the absence of a global legislative response, highly complex legal problems arise from international surrogacy arrangements. Among these problems, the most prevalent are the question of legal parenthood and the nationality of the child. Classic practical examples are cases such as in re X and another (Children) (Parental Order:Foreign Surrogacy) [2009] Fam. 71; CA Paris, 25 October 2007 (France); and RDGRN 2575/2008, 18 February 2009 (Spain).

Another great worry springing from the unregulated character of "procreative tourism" is the potential for a "black market" preying on peoples' emotional or economic needs.

It has been widely recognised that there is an urgent need for legal regulation of surrogacy agreements at the international level. The problem was identified as an emerging international family law issue that requires further study and discussion in August 2009 at the International Family Justice Judicial Conference for Common Law and Commonwealth Jurisdictions. Thus far, however, no study has been conducted to assess the practical aspects of legal regulation of international surrogacy arrangements but this project will do so. ((It is recognised that some commentators have questioned whether, given ethical questions surrounding surrogacy, regulation is the right way forward, as it might have the unintended consequence of encouraging more international surrogacy arrangements. It is, however, submitted that in the increasingly globalised world, all attempts to impose a complete prohibition on cross-border surrogacy arrangements are doomed to failure. The only way forward is to regulate international surrogacy, especially for the sake of children born through these arrangements.))

The research will take the form of a combined empirical and library-based study. The empirical part will involve a statistical survey of international surrogacy arrangements. The aim of the survey is to map the magnitude of the problem and current patterns in international surrogacy. The empirical element of the research will also include personal interviews with surrogacy specialists from selected jurisdictions. ((Jurisdictions selected for the purposes of the empirical part of the project are India, Ukraine and the US state of California. The main reason for choosing these particular jurisdictions is their liberal approach to surrogacy. As a result of this approach, these jurisdictions have become highly popular

destinations of “procreative tourists”. This in turn guarantees availability of large amounts of empirical data.)) The interviews will examine practical private international law problems arising in cases of international surrogacy arrangements.

Contact details: Katarina Trimmings, e-mail: law553@abdn.ac.uk

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Third Preliminary Draft of the CLIP Principles

The European Max-Planck Group for Conflict of Laws in Intellectual Property has recently published the Third Drat of their Principles for Conflict of Laws in Intellectual Property, which is available for download here. This version contains amended and supplemented rules contained in the First Draft of April 2009 (reported here), and the Second Draft of June 2009. The initial rules were exposed to the scrutiny of the scholars and practitioners outside the Group and the Third Draft is partially the result thereof.

Compared to the Second Draft, the Third Draft introduces changes, some just redrafts and some more substantial modifications, with respect to following issues:

Scope
General jurisdiction
Jurisdiction for infringements
Jurisdiction for multiple defendants
Jurisdiction for declaratory actions
Jurisdiction for preliminary and protective measures
General provisions on jurisdiction
Scope of injunction
Cooperation in multistate proceedings
Congruent and preliminary proceedings
Law applicable in the absence of choice
Law applicable to security interests in IP

Law applicable to ubiquitous infringements
General rule on recognition and enforcement

It is interesting to note that the Group is having profound doubts as to the choice of the choice-of-law rules for security interests in IPRs, and three versions are currently being considered.

The CLIP website still contains the invitation for all to make suggestions or advance critical remarks to the members of the Group. However, any such comments wishing to have an effect on the text of the Principles would probably be appreciated sooner rather than later since the Group has announced the plan to publish the final version of the Principles together with comments in 2011.

Surrogate motherhood and Spanish homosexual couple (III)

You might remember my last post on surrogate pregnancy, where I informed about a 2009 decision of the Spanish Dirección General de los Registros y el Notariado ordering registration of a birth certificate issued in the USA. The document concerned the parenthood of two children born in San Diego to a surrogate mother and a homosexual Spanish couple; the entry listed the couple as father of the twins. The saga goes on: on Friday, the Tribunal de Primera Instancia No. 15 of Valencia, at the request of the Public Prosecutor, declared the entry null.

In its ruling, the judge states that children are the result of a pregnancy by substitution, which is not allowed by Spanish law; and that their filiation has to be determined by birth. In what is quoted as his own words, «La ley española prohíbe expresamente que la filiación en estos casos no se inscriba a favor de la persona que los ha parido».

With regard to the discrimination statement put forward by the lawyer of the couple, the judge points out that the children can not be registered as hers not

because both parents are men, but because they were born to another person: “This legal consequence would equally apply to a homosexual- male and female-couple, man or woman alone, or a heterosexual couple, because the law does not distinguish gender in such cases”. From the Spanish legal point of view, the crucial fact in order to determine filiation is the giving of birth.

As for the argument that registration must be allowed in the best interests of the children, the court admits it is not irrelevant, but states that “the end does not justify the means, and the Spanish legal system has sufficient instruments to achieve consistency”.

The couple has decided to appeal the ruling before the Audiencia Provincial.