Requejo on Povse

Introduction

The accession of the European Union (EU) to the European Convention on Human Rights is proving difficult. PIL has not been spared.

In the field of recognition the biggest concern was not long ago represented by the conflict between the ECtHR decision in *Pellegrini*, and the European will to eliminate the intermediate procedure to declare the enforceability of foreign judgments – replacing the conditions usually required at the State where enforcement is sought by some controls operated in the Member State of origin. If *Pellegrin*i was to be followed, the unconditional system of recognition set in Art. 42 of the Brussels II bis Regulation would be incompatible with the ECHR. That the ECtHR decision in *Pellegrini* has been put forward as an argument against the abolition of the exequatur in the Commission proposal to recast Council Regulation (EC) no 44/2001 does therefore not come as a surprise; nor do the efforts by Member States designed to limit the effects of *Pellegrini* case (for instance by way of considering the decision of the ECtHR limited to cases where the State of origin is not a contracting State of the ECHR).

At first sight, the ECtHR decision to the application nº 3890/11, *Povse v. Austria*, based on the *Bosphorus test*, is the bridge to reconcile the positions.

Bosphorus test as applied to Povse

The so called *Bosphorus* test is based on the following premise: contracting States transferring sovereign powers to an international organization retain responsibility for the acts of their organs, "regardless whether the act or omission was a consequence of domestic law or of the necessity to comply with international obligations". However, in as far as the international organization "is considered to protect fundamental rights (…) in a manner which can be considered at least equivalent to that for which the Convention provides", a presumption that the contracting State has complied with the ECHR enters into play, if he lacked discretion in relation to the obligations derived from his membership to the international organization. Therefore, a three-step exam in needed in order to determine whether there is equivalence between the protection offered by the Convention and the international organization at stake

(step 1), and the degree of freedom of the concerned State (step 2); finally, the arguments against the presumption of equivalence in the specific case must be discarded (step 3).

Step1 in Povse: *Whether the relevant organization is considered to protect fundamental rights*. In the *Povse* decision this point is dealt with exclusively in par. 77, in such a manner that it is not only superficial, but inexistent (see the *Bosphorus* decision, num. 159-165, remitting to 73-81). This is not only striking, but disappointing. First, because as of today, i.e. at the relevant time of the analysis, the existence of truly "substantive guarantees" offered by the EU as a unit (instead of as a bunch of diverse systems striving for coherence), is not self-evident. Second, because the real issue at stake is precisely that of the compatibility between the ECHR and the guarantee's system provided by the EU in Regulation Brussels II bis: a system where the protection of the fundamental rights rests exclusively on the Member State of origin. By considering the ECJ as single key element of the control mechanism, the ECtHR avoids the issue; at the same time, it narrows the reach of its pronouncement. The ECtHR's approach may be explained in different ways, starting with the actual submission of the applicants: they contested the "equivalent protection" only by reference to the role of the ECJ in the present case. It should be added that the *Bosphorus* test has been used by the ECtHR on several occasions, in a way that may be considered consistent but not necessarily uniform, precisely because the different degrees of depth of the ECtHR's exam in order to affirm or to deny the equivalence of the protection offered by the international organization under review.

Step2 in Povse: Discretion. There was no discussion as regards Austria's lack of discretion under Art. 42 of the Brussles II bis Regulation.

Step3: Whether the presumption has been rebutted in the present case. In contrasts to step 1, the analysis here was performed extensively. Two elements seem to be essential: the role of the ECJ defining the applicability and interpretation of the relevant legal provisions (par. 85); and the *status quo* before the court of origin (the opportunity open to the applicants to still rely on their Conventions rights there: par. 86). The importance given to those issues legitimates further questions. To start with, what would happen in the absence of consultation of the ECJ? On the one hand, the stress put by the ECtHR in the ECJ's role suggests that the answer would have been different in the absence of a preliminary ruling (or at least, of a referral by the national court, even if rejected

by the ECJ).On the other hand, the ECJ's ruling in the aff. C-211/10, stating that any change in the situation of the abducted child with consequences on the return order must be pleaded before the competent court in the Member State of origin, creates a legal precedent for all member States, therefore exempting them from referring new queries on the same subject.

As for the second element retained by the ECtHR (the *status quo* in Italy), would its decision have been the same had the applicants exhausted their resources before the Italian courts without success? In the light of par. 86, the likely answer is yes. Presumably, this would also be the answer in the case of a complaint addressed, either simultaneously or consecutively, against two respondent States –the State of origin, and the Stated where enforcement is sought-, even if the ECtHR declares the first one in breach of the Convention when applying Art. 11 (8) the Brussels II bis Regulation (which is not a hypothetical situation: see *Sneersone and Kampanella v. Italy*).

Consequences

An interpretation of *Povse* in the sense that it sanctifies the Regulation mechanism of fundamental rights protection would result in the immunity of the State where enforcement is sought. In return, it places the ECtHR applicants in an uncomfortable situation when formulating their complaints: they must be very be cautious and select the correct respondent State. Special care and legal knowledge, improbable in the average individual applicant (representation before the ECtHR is not compulsory), will be required.

Bosphorus+Povse applied to Regulation 44/01 (and Regulation 1215/2012)

What would be the likely outcome of the *Bosphorus* test if applied to other UE PIL instruments, such as the Regulation 44/01 or the Brussels I recast Regulation? According to both instruments (albeit following different ways) the requested State is allowed to refuse the declaration of enforceability if specific, restricted grounds provided by the Regulations themselves are present; in particular, if such declaration is manifestly contrary to public policy. Thus at first glance, the answer is that these cases are not eligible for the *Bosphorus* presumption (However, it is so to the extent that the States have discretion when implementing the legal obligations steaming from their membership; whether this is the case as regards

public policy may be discussed in the light of *Krombach* and *Gambazzi*).

UE accession to ECHR

EU accession to the ECHR means the end of the *Bosphorus* test. Admittedly, the equivalence presumption in favor of the EU itself is no longer justified. However, it is worth considering whether it should not survive in the context of the analysis of a Member State compliance with the Convention, if he had to blindly obey a mandate of the EU; indeed, the presumption of equivalence makes more sense because the UE accession to the ECHR. In this context, provided that no ECtHR's decision has yet been pronounced against the EU, maintaining a rebuttable presumption of equivalence would simplify the applicant's choice of the correct respondent (see 3).

Online Symposium: Abolition of Exequatur and Human Rights

In June, the European Court of Human Rights ruled in *Povse v. Austria* that the abolition of exequatur was compatible with the European Convention of Human Rights, and that the mechanism introduced by the Brussels IIa Regulation was not dysfunctional from the perspective of the Convention.

In December 2010, the Court of Justice of the European Union had also ruled in *Joseba Andoni Aguirre Zarraga v. Simone Pelz* that the allegation of violation of fundamental rights should not prevent the free circulation of judgments under the Brussels IIa Regulation.

For several years, European scholars debated whether the project of the European Commission to abolish exequatur and to suppress the public policy exception would comport with Member States ECHR obligations. Many thought that it would not. Member States eventually successfully resisted the project which was not adopted in the Brussels I Recast.

From this week-end onwards, *ConflictofLaws.net* will organize an online symposium on Abolition of Exequatur and Human Rights. Scholars from different jurisdictions will share their first reaction on the *Povse* judgment and on its consequence on the evolution of European civil procedure. Readers interested in participating may either contact directly the editors or use the comment section.

- Requejo on *Povse*
- Muir Watt on Abolition of Exequatur and Human Rights
- Arenas Garcia on *Povse*: Taking Direct Effect Seriously?
- Gascon on *Povse*: a Presumption of ECHR Compliance when Applying the European Civil Procedure Rules?
- van Iterson on *Povse*: a Legislative Perspective

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (4/2013)

Recently, the July/August issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

- ***Bettina Heiderhoff***: "Fictitious service of process and free movement of judgments"

> *When judgments or court orders are to be enforced in other member states, it is an essential prerequisite that the defendant was served with the document which instituted the proceedings in sufficient time (Article 34 Nr. 2 Brussels I Regulation).*
>
> *When the service was conducted in a fictitious manner, the issue of service "in sufficient time" causes friction. It is acknowledged that the measure for timeliness – or, in such a case, more accurately for rightfulness – is not set by the state of origin, but by the recognising state. However, if the criteria are*

taken from the autonomous procedural rules of the recognising state, as has occasionally happened, minor differences between national laws can cause unreasonable obstacles to the recognition of titles.

In order to fulfill the aim of the Brussels I Regulation, to improve the free movement of judgments and strengthen mutual trust, the criteria must, therefore, not be taken from the national rules of the recognising state, but ought rather to resemble the standards valid for breaches of public policy. Only such a "mildly Europeanized" standard for fictitious services may avoid a trapping of the claimant who, trusting in the decision of the court of origin, is then surprised by the differing measures of the recognising state.

- ***Haimo Schack***: "What remains of the renvoi?"

The renvoi is one of the main principles of classic private international law. The renvoi doctrine aims for the conformity of decisions in different jurisdictions, which may also facilitate the recognition of the decision abroad. With this goal in mind the following article gives an overview of the acceptance of renvoi in different national jurisdictions. In addition, the article evaluates and criticizes the tendency to push back the doctrine of renvoi in international treaties and in EU private international law. Especially in the former domain of renvoi, i.e. the law of personal status, family and inheritance law, the European conflict rules are dominating more and more and preventing the conformity of decisions in relation to third countries. As a means to achieve this decisional harmony the renvoi remains useful, it shows the cosmopolitan attitude of classic private international law.

- ***Hannes Wais***: "Hospital contracts and Place of Performance Jurisdiction under § 29 ZPO (German Code of Civil Procedure)"

This article comments on a recent decision of the German Federal Supreme Court, in which the court ruled that, for payment claims from a hospital contract, § 29 ZPO conferred jurisdiction upon the courts in the locality of the hospital. The Court decided that, not only for the purposes of § 29 ZPO, the place of performance of the monetary obligation from a hospital contract is the creditor's seat and not that of the debtor (in contrast to what is generally accepted for monetary obligations). This article will discuss the implications of

this decision, and will consider the possibility of a conceptual "reversal" of § 29 ZPO.

- ***Markus Würdinger***: "Der ordre public-Vorbehalt bei Verzugsaufschlägen im niederländischen Arbeitsrecht" – the English abstract reads as follows:

The substantive ordre public rarely plays a role when it comes to recognition and enforcement of foreign legal decisions. This article deals with such a case. It is about the declaration of enforceability of a Dutch court decision in Germany. The judgment in question decided the applicant's claim for unpaid wages plus a statutory increase of 50% as a penalty for late payment in his favour. The Higher Regional Court of Düsseldorf (OLG) rightly interpreted Art. 34 EuGVVO (Regulation (EC) No 44/2001) narrowly and refused to consider this decision as being comparable to an award of punitive damages.

- ***Urs Peter Gruber***: "Die Vollstreckbarkeit ausländischer Unterhaltstitel – altes und neues Recht" – the English abstract reads as follows:

For a maintenance creditor, the swift and efficient recovery of a maintenance obligation is of paramount importance. In the Brussels I Regulation – which until recently was also applicable with regard to maintenance obligations – and in various conventions there are procedures for the declaration of enforceability of decisions. In these procedures, the courts have to ascertain whether there is a maintenance claim covered by the Regulation or the convention and whether there are reasons to refuse recognition of the foreign decision. In the new Regulation (EC) No 4/2009 on maintenance obligations however, a declaration of enforceability of decisions is no longer required, provided that the decision was given in a Member State bound by the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations. In this case, a decision on maintenance obligations given in a Member State is automatically enforceable in another Member State. The article discusses recent court decisions on the declaration of enforceability in maintenance obligations. It then examines the changes brought about by the Regulation (EC) No 4/2009 on maintenance obligations. Weighing the interests of both the creditor and the debtor, it comes to the conclusion that the abolition of the above-mentioned procedures is fully justified.

- ***Wolf-Georg Ringe***: "Secondary proceedings, forum shopping and the European Insolvency Regulation"

The German Federal Supreme Court held in a recent decision that secondary proceedings according to Article 3(2) of the European Insolvency Regulation cannot be initiated where the debtor only has assets in a particular country. The requirements for an "establishment" go beyond this and require an economic activity with a "minimum of organisation and certain stability". This decision stands in conformity with the leading academic comment and other case-law. Nevertheless, the decision is a good opportunity to stress the importance of secondary proceedings and their function to protect local creditors. This is particularly true where the secondary proceedings are initiated (as here) in the context of a cross-border transfer of the "centre of main interests" (COMI) of the debtor. The ongoing review of the European Insolvency Regulation should respond to this problem in one of the regulatory options provided.

- ***Moritz Brinkmann***: "Ausländische Insolvenzverfahren und deutscher Grundbuchverkehr" – the English abstract reads as follows:

Art. 16 EIR provides for the automatic recognition of insolvency proceedings which have been commenced in another member state. The recognition of insolvency proceedings pertains not only to the debtor's power with respect to the estate, but also to his procedural position as well as to questions regarding company law or the law of land registries. The decision rendered by the OLG Düsseldorf (March 2, 2012) illustrates that these consequences are easily ignored in the routine of everyday legal life as long as courts and parties have difficulties in accessing reliable information as to the status of foreign proceedings. The existing deficits in terms of access to information regarding foreign insolvency proceedings may thwart the concept of automatic recognition. Hopefully, the coming reform of the EIR will address this issue (see proposed Art. 22 EIR in COM (2012) 744 final).

- ***Kurt Siehr***: "Equal Treatment of Children of Unmarried Parents and the Law of Nationality"

A child of unmarried parents acquires nationality of Malta only if the child is

recognized by the Maltese father and legitimized by marriage or court decision. The European Court of Human Rights decided that this provision violates the European Convention of Human Rights, especially Article 8 on the right of family life and Article 14 on non-discrimination. There are doubts whether the decision is correct. A more careful phrasing of Maltese law could avoid the violation of the Convention. Or is the decision of the European Court of Human Rights its step further towards a human right for nationality?

- ***Fritz Sturm***: "Forfeiture of the choice of surname: The European Court of Human Rights compels the Swiss Federal Court to set aside its former judgment"

The Swiss Federal Court, 24 May 2005, did not authorize foreign husbands to have their surname governed by their national law (s. 37 ss. 2 Swiss Private International Law Act) when they have previously chosen to take the wife's surname as the family name, situation which could not have occured if the sexes had been reversed. In fact, in this case the husband's surname would automatically become the family name and the wife could choose to have her surname governed by her national law. For the Court of Strasburg this difference in treatment is discriminatory (violation of art. 14 in conjunction with art. 8 ECHR). The Swiss Federal Court has therefore been compelled to set aside its former judgment.

- ***Dirk Looschelders:*** "Jurisdiction of the Courts for the Place of Accident in case of a Recourse Direct Action by a Social Insurance Institution against the Liability Insurer of the Tortfeasor"

In the present judgement the Austrian High Court (OGH) deals with the question whether a social insurance institution can sue the liability insurer of the tortfeasor in the courts for the place where the harmful event occurred. The OGH comes to the conclusion that such a jurisdiction is granted at least by Article 5 no 3 Brussels I Regulation. The problematic issue whether the priority provision of Article 11 (2) read together with Article 10 s. 1 Brussels I-Regulation applies, is left undecided. In the decision Vorarlberger Gebietskrankenkasse the European Court of Justice has held that the social insurance institution cannot take a recourse direct action against the liability

insurer under Article 11 (2) read together with Article 9 (1) (b) Brussels I Regulation. According to the opinion of the author, jurisdiction in such cases shall generally not be determined by Chapter II Section 3 of the Brussels I Regulation. Therefore, Article 11 (2) read together with Article 10 s. 1 Brussels I Regulation is inapplicable, too. In consequence, contrary to the opinion of the OGH, the social insurance institution cannot be regarded as an injured party in terms of Article 11 (2) Brussels I-Regulation.

- ***Michael Wietzorek***: "On the Recognition of German Decisions in Albania"

There is still no established opinion as to whether the reciprocity requirement of § 328 Sec. 1 No. 5 German Civil Procedure Code is fulfilled with regard to Albania. A decision of the High Court of the Republic of Albania dated 19 February 2009 documents that the Court of Appeals of Durr?s, on 5 December 2005, recognized two default judgments by which the Regional Court of Bamberg had ordered an Albanian company to pay two amounts of money to a German transport insurance company. One single court decision may not be sufficient to substantiate that there is an established judicial practice. Yet the reported decision appears to be the only one available in the publicly accessible database of the High Court dealing with the recognition of such foreign default judgments by which one of the parties was ordered to pay an amount of money.

- ***Chris Thomale***: "Conflicts of Austrian individual labour law and the German law of the works council – intertemporal dimensions of foreign overriding mandatory provisions"

The Austrian Supreme Court (Oberster Gerichtshof) recently held that the cancellation of an individual employment contract between a German employer and an Austrian employee posted in Austria was valid despite the fact that the employer failed to hear his German works council properly beforehand. The case raises prominent issues of intertemporal conflicts of laws, characterization of the mentioned hearing requirement and the applicability of foreign overriding mandatory provisions, which are discussed in this article.

- ***Sabine Corneloup: "***Application of the escape clause to a contract of

guarantee”

The French Cour de cassation specifies how to apply the escape clause of Art. 4 n° 5 of the Rome Convention to a contract of guarantee. The ancillary nature of guarantees leads national courts often to the application of the law governing the main contract, on the basis of a tacit choice of law or on the basis of the escape clause. The latter is to be used very restrictively, according to the Cour de cassation. It is necessary to establish first that the ordinary connecting factor, designating the law of the habitual residence of the guarantor, is of no relevance in the examined case. Only after this step, the courts can examine the connections existing with another State. This restrictive interpretation adds a condition to the text that seems neither necessary nor appropriate.

- ***Oliver Heinrich/Erik Pellander***: “Das Berliner Weltraumprotokoll zum Kapstadt-Übereinkommen über Internationale Sicherungsrechte an beweglicher Ausrüstung”
- ***Stefan Leible***: “Hannes Unberath † (23.6.1973–28.1.2013)”

First Issue of 2013’s Rivista di diritto internazionale privato e processuale

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

The first issue of 2013 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features two

articles and two comments.

In her article *Costanza Honorati*, Professor of European Union Law at the University of Milano-Bicocca, addresses the issue of International Child Abduction and Fundamental Rights ("Sottrazione internazionale dei minori e diritti fondamentali"; in Italian).

> *In several recent decisions on cases concerning the international abduction of minors the European Court of Human Rights set the requirement of an "in-depth examination of the entire family situation" in order to comply with Article 8 ECHR. The present article considers the effects of such principle on the role and on the proceedings of both the court of the State of the child's habitual residence and of the court of the State of his refuge after abduction, especially when acting in the frame of Brussels II Regulation. While the requirement of «in-depth examination» seems overall synergetic to the role of the court of habitual residence, also when such court is judging on the return of the abducted minor pursuant to Article 11(8) Reg. 2201/2003, deeper concerns arise with reference to the role of the court of the State of refuge. When such a court is asked to enforce a decision for the return of the abducted child, the possible violation of the child's fundamental right in the State of origin might raise the question of opposition to recognition and enforcement. The article thus endeavours to find a solution balancing the child's fundamental rights and EU general finality to strengthen the area of freedom, security and justice.*

In their article *Paolo Bertoli* and *Zeno Crespi Reghizzi*, respectively Associate Professor at the University of Insubria and Associate Professor at University of Milan, provide an assessment of "Regulatory Measures, Standards of Treatment and the Law Applicable to Investment Disputes" (in English).

> *The relationship between State regulatory measures and the international standards of protection for foreign investments has proved to be a critical issue in investor-State arbitration. Normally, two legal systems are involved: the legal order of the State hosting the investment is competent to govern economic activities (including those of foreign investors) carried out on its territory, and the international legal order sets forth the duties of States in respect of foreign investors. After having discussed the basis for, and the law applicable to, investment claims (both in treaty and in contract claims), this article examines*

the interplay between regulatory measures and the international standards of protection for foreign investments, i.e., indirect expropriation and fair and equitable treatment. The authors also analyse the influence on the arbitrator's evaluation of the presence of a stabilization clause in the agreement between the State and the investor.

In addition to the foregoing, the following comments are also featured:

Fabrizio Vismara (Associate Professor at the University of Insubria), "Assistenza amministrativa tra Stati membri dell'Unione europea e titolo esecutivo in materia fiscale" (Administrative Assistance between EU Member States and Enforcement Order in Fiscal Matters; in Italian)

The Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, issued under Articles 113 and 115 of the TFEU, was implemented in Italy by Legislative Decree No 149 of 14 August 2012. The Directive introduces a uniform instrument to be used for enforcement measures to recover claims in another Member State, and realizes a system of implementing decisions in tax matters typically excluded from judicial cooperation on civil matters. Directive 2010/24/EU provides that enforcement in other Member States is permitted by means of a uniform instrument which is automatically valid in the requested Member State. The automatic recognition provided for by Directive 2010/24/EU is different from the abolition of exequatur in the field of judicial cooperation in civil matters provided by, respectively, Regulation No 805/2004, Regulation No 1896/2006, Regulation No 861/2007, and Regulation No 1215/2012. Directive 2010/24/EU sets out a new instrument, named uniform instrument, which is subject to automatic recognition and it is formally distinct from the initial instrument permitting enforcement issued in the applicant Member State.

Lidia Sandrini (Researcher at the University of Milan), "La compatibilità del regolamento (CE) n. 261/2004 con la convenzione di Montreal del 1999 in una recente pronuncia della Corte di giustizia" (Compatibility of Regulation (EC) No 261/2004 with the 1999 Montreal Convention in a Recent Judgment by the Court of Justice of the European Union; in Italian)

This article addresses Regulation (EC) No 261/2004 in so far as it deals with

delay in the carriage of passengers by air, as interpreted by the Court of Justice of the European Union in the joined cases Nelson and TUI Travel. It considers whether this recent judgment is consistent with the Montreal Convention of 1999 reaching the overall conclusion that it is not. This unsatisfactory result is due to purpose of ensuring a level of protection for passenger higher than that provided by the international uniform rules. This aim has been achieved affirming the interpretation of the Regulation provided in the Sturgeon case, in which the Court went far beyond the wording of the Regulation, and in the IATA case, in which the Court advanced an untenable and ambiguous construction of the relationship between the Montreal Convention and Regulation No 261/2004. Conversely, in deciding the joined cases, the Court neglected its duty to interpret according to the proper criteria provided by international law the treaties ratified by the EU, and failed to ensure that the EU respect its duty as contracting party.

Indexes and archives of the RDIPP since its establishment (1965) are available on the website of the Department of Italian and Supranational Public Law of the University of Milan.

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (3/2013)

Recently, the May/June issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

- ***Christopher Selke***: "Die Anknüpfung der rechtsgeschäftlichen Vertragsübernahme" – the English abstract reads as follows:

More than fifty years after Konrad Zweigert's essay on the applicable law to the assignment of contracts, some issues are still unsettled. The following

article gives an overview of previous comments and focuses on the scope of application. It further emphasizes the crucial question, how to determine the applicable law in the case of a cross-border assignment of a contract. In this connection, the role of the principle of party autonomy shall be challenged more carefully than it has been in the past – which does not inevitably mean that it has to be completely dismissed. There just has to exist a subsidiary objective international private law rule in the case that the parties' choice of law leads to difficulties. Therefore, this article concludes with a proposal for such a rule.

- ***Wulf-Henning Roth:*** "Jurisdiction and Applicable Law in Cross-Border Defamation and Breach of Personality Rights"

The article discusses the judgment of 25 October 2011, C-509/09 and C-161/10, eDate Advertising, in which the European Court of Justice clarifies two important issues of European private international law concerning cross-border injunctions and damages claims with regard to defamation and breach of personality rights on the internet. The first issue concerns the interpretation of Article 5 no. 3 of the Brussels I Regulation 44/2001/EC which establishes a special concurrent jurisdiction of the courts of the Member States in matters of tort liability. According to the Court, an applicant may bring an action before the court where the publisher is domiciled or before the courts of all Member States where the internet information is accessible, however restricted to the infringement of the personality rights in the relevant territory ("mosaic principle"). Alternatively, the applicant may also bring an action for an injunction or for all damages, incurred worldwide, before the court where he or she has his or her centre of interests. As for the applicable law concerning tort liability, the Court clarifies the intensely discussed meaning of Article 3 (1) and (2) of the e-commerce Directive 2000/31/EC. The Court holds that both provisions do not contain conflict of law rules. Rather, Article 3 (1) contains an obligation of the Member State where the internet provider has its seat of business to ensure that the internet provider complies with the national provisions applicable in that Member State. And Article 3 (2) allows that the Member States where the internet information is accessed may apply their own substantive law applicable to the infringement of personality rights, but not in such a way that the interstate provision of internet services is restricted.

- ***Karl-Nikolaus Peifer:*** *"*International Jurisdiction and Applicable Law in Trademark Infringment Cases"

The German Federal Court had to deal with questions of international jurisdiction and applicable law in a trademark infringement case based upon the broadcasting of an Italian game show which was available in Germany. The Court found that German courts had jurisdiction upon the case and might apply national trademark law because trademark interests were affected in Germany. The result is arguable. However, it demonstrates that even codified rules in IP-Law leave substantial insecurities with regard to international harmony as long as IP-laws have territorial reach only.

- ***Oliver L. Knöfel***: "The European Evidence Regulation: First Resort or Last?"

In Continental Europe, treaties and other devices of judicial assistance in the obtaining of evidence abroad have traditionally been understood as tools to prevent intrusions into another State's authority and territory. Today, there are diverging views as to whether or not the relevant legal instruments designed for civil and commercial matters, such as the Hague Evidence Convention and the European Evidence Regulation (Council Regulation [EC] No 1206/2001), have the quality of being exclusive, that is, the effect of barring any other means of gathering evidence abroad. The article reviews a judgment of the European Court of Justice (First Chamber) of 6 September 2012 (C-170/11), dealing with the mandatory or non-mandatory character of the European Evidence Regulation. The question at stake is whether a judge in a Member State must have recourse to the Regulation on each occasion that she wishes to take evidence that is situated in another Member State. The ECJ declared a Member State's court free to summon a witness resident in another Member State to appear before it in accordance with the lex fori processus, that is, without recourse to the Evidence Regulation. The author analyses the relevant comity issues, explores the decision's background in international law and in international procedural law, and discusses its consequences for the relationship to Third States, as well as for the traditional concept of judicial sovereignty.

- ***Gerald Mäsch:*** "The "Equitable Life" 2002 Scheme of Arrangement in

the German Federal Court of Justice”

The German Federal Court of Justice’s IVth Senate, in its decision of 15 February 2012, took the view that the High Court sanction of the English Insurance Company Equitable Life’s 2002 voluntary solvent scheme of arrangement has no binding effect on a dissenting policy holder residing in Germany on the ground that art. 35 (1) and 12 of the Brussels I Regulation prevent its recognition. In this article, the author argues that, based on the European Court of Justice’s ruling in “Group Josi Reinsurance”, the Brussels I Regulation pro-visions on insurance contracts should instead be interpreted as not applying to collective procedures aiming at the financial redress of an insurance company where the individual policy holder’s inferior knowledge of insurance issues is irrelevant. The same interpretation applies – mutatis mutandis – for the consumer contract provisions (art. 35 (1), 15 Brussels I Regulation), whereas the position of the IVth Senate would make the restructuring of any English company by way of voluntary agreements under English law nearly impossible if a significant number of dissenting private investors from Germany is involved. The author calls upon German courts confronted with the issue of recognition of English solvent scheme of arrangements not to follow the IVth Senate but rather to seek a preliminary ruling by the ECJ.

- ***Herbert Roth***: “Problems concerning the certification as a European Enforcement Order under the regulation (EC) No 805/2004”

The reviewed order of the German Federal Supreme Court (BGH) is dealing with the revocation of a German decision fixing costs of an interim prohibition procedure, which was certified as an European Enforcement Order by German authorities. Both the result as well as the legal reasoning must be criticized for the excessive requirements concerning the information on legal remedies and the wrongfully denied cure of non-compliance with minimum standards. On the other hand the order of the local Augsburg trial court (Amtsgericht) is rightfully based on prevailing opinion of scholars and courts demanding only the formal service of the foreign judgement to the debtor in accordance with § 750 German Civil Procedure Code as a prerequisite of the execution of an European Enforcement Order. By contrast the formal service of the certification as an

European Enforcement Order itself is no mandatory requirement of the later execution.

- ***Kurt Siehr:*** "Foreign Certificate of Succession for Estate in Germany?"

A Turkish citizen passed away in Turkey. The deceased had a bank account with a German bank in Munich. The plaintiff, a son adopted by the deceased, presented to the bank a Turkish certificate of succession and asked for payment of the account. The certificate of succession mentioned the plaintiff as the only heir. The defendant bank declined to pay and asked for a German certificate of succession (§ 2369 BGB) which may be granted for that part of the estate which is located in Germany. The County Court of Munich gave judgment for the plaintiff. The Turkish certificate of succession has to be recognized under § 17 of the German-Turkish Succession Treaty of 1929 and the defendant is not allowed under principles of good faith to insist on the presentation of a German certificate of succession by the plaintiff.

The County Court decision has to be criticized. Certificates of succession in continental European law are quite different. The most advanced certificate is the German one which also served as a model for the European certificate of succession as adopted by the European Union in Articles 62 et seq. of the Succession Regulation of 2012. The Turkish certificate, as the Swiss one (as the model for the Turkish Civil Code), are not very well regulated and many questions are left open and have not yet been settled by the courts of these countries. Open is still the question whether a debtor of the estate can validly pay his debt to the person mentioned as heir in the Turkish certificate. This is different according to German law. The German certificate is issued by the probate court after diligent examination of the facts and, if issued, guaranties that the debtor may validly pay his debt to the person mentioned in the German certificate [§ 2367 BGB; similar Article 69 (3) Succession Regulation]. If it is not established without any doubt that a foreign certificate of succession has the same effect of a German one, the debtor in Germany of any claim of the estate of a foreigner may insist that a German limited certificate of succession (§ 2369 BGB) be presented by the collecting heir.

- ***Götz Schulze/Henry Stieglmeier***: "The State's Right to succeed in shares of the inheritance – Qualification, Subrogation and ordre public"

The State's Right to succeed to shares of the inheritance asserted by the KG in the context of Russo-German relations has already been the subject of comment by Dörner (see: IPRax 2012, 235–238). As an additional point of analysis, in question here is the qualification of an undivided joint-inheritance of co-heirs (Miterbgemeinschaft) of an estate. It is our opinion that the portion of the estate subject to co-inheritance should share the conflict-of-law judgement applied to the whole estate. In the case of sale, this also applies to the subrogation of revenues accruing on the estate. Otherwise, the choice-of-law decision depends upon chance factors such as the number of heirs or the date of alienation of the estate. The portion of the estate subject to co-inheritance is therefore to be considered immovable property, which in the case of the KG would have led to a partial renvoi to German law. Furthermore, the KG's judgement leads to the strange outcome that the USSR's legal successor can exercise a State's Right to succeed that it would not enjoy in either of the present-day jurisdictions. A nephew's subjective right of inheritance, as that of an heir of the third order, is eliminated by an intertemporal referral to an earlier and then already controversial legal situation in the USSR. Ordre public can be set against an entrenchment of outdated judgements and ensure application of laws governing relatives' inheritance rights in line with all the legal jurisdictions involved at the time of judgement.

- ***Arkadiusz Wudarski/Michael Stürner***: "Unconstitutional EU Secondary Legislation?"

For the first time the Polish Constitutional Court had to decide whether it is competent to hear a complaint based on the alleged unconstitutionality of a provision of European secondary legislation. The claimant had contested as unconstitutional the procedure of exequatur in which a Polish court had declared enforceable a Belgian judgment in ex parte proceedings pursuant to Article 41 Brussels I Regulation. The Constitutional Court admitted the request in principle, but held that in the present case there was no violation of the relevant provisions of the Polish Constitution. The article explores whether there are other examples where EU secondary legislation in the field of international civil procedure might conflict with national constitutional law.

- ***Brigitta Lurger:*** "The Austrian choice of law rules in cases of surrogate

motherhood abroad – the best interest of the child between recognition, European human rights and the Autrian pro-hibition of surrogate motherhood”

In the first decision reviewed in this article the Austrian Constitutional Court (VfGH) held that a child born by a surrogate mother in Georgia/USA after the implantation of the ovum and sperm (embryo) of the intentional parents, an Austro-Italian couple living in Vienna, was the legal child of the intentional parents and not of the surrogate mother. The same result was achieved by the second VfGH decision reviewed here, in the case of a surrogate motherhood in the Ukraine. The intentional and genetic parents of the twins born by the Ukrainian surrogate mother were Austrians living in Austria.

This outcome is surprising, considering the Austrian legal provisions which forbid surrogate motherhood and determine that the legal mother is always the woman who gives birth to the child. In the first decision, the reasoning of the court focusses on the supposedly limited competence/scope of the Austrian rules which could not apply to “foreign” artificial procreation cases, the internationally mandatory character of the laws of Georgia and on the best interest of the child. In the second case, the court recognizes the Ukrainian birth certificate of the twins which was purportedly based on Ukrainian family law and argues that the application of Austrian substantive law to this case would violate Art. 8 ECHR and the principle of protection of the best interest of the child. In both cases, the Austrian Constitutional Court unjustifiedly avoids addressing the issue of non-conformity of the Austrian substantive rules on motherhood with Art. 8 ECHR.

The article tries to show that the result achieved by both decisions is correct, albeit the reasoning is flawed in many respects. It analyzes the conflict of laws problems arising in cases of Austrian intentional parents causing foreign surrogate motherhood on a general basis, and discusses the implications of European primary law (Art. 21 TFEU) and European human rights (Art. 8 ECHR). Even though present Austrian choice of law rules lead in most cases to the application of the Austrian “birth-motherhood rule”, the constitutional protection of private and family life by Art. 8 ECHR requires Austrian authorities to somehow “recognize” the legal family status acquired by a child and its intentional Austrian parents under the law of Georgia or the Ukraine where surrogate motherhood is legally permissible. The conformity of the birth-

motherhood rule in domestic cases of surrogate motherhood (or in international cases where no "real" conflict of laws is present) with Art. 8 ECHR is questionable and should be re-viewed thoroughly by national courts and the ECHR.

- ***Yuko Nishitani:*** "International Jurisdiction of Japanese Courts in Civil and Commercial Matters"

This paper examines the 2011 reform of the Japanese Code of Civil Procedure (CCP), which introduced new provisions on international adjudicatory jurisdiction. After considering the salient features of major jurisdiction rules in the CCP, the author analyzes the regulation of international parallel litigations. The relevant rules of the Brussels I Regulation (Recast) are taken into consideration from a comparative perspective. In conclusion, the author points out that the basic structure of Japanese jurisdiction rules is in line with that of the Brussels I Regulation (Recast), whereas some important jurisdictional grounds clearly deviate from the latter.

- ***Erik Jayme***: "Glückwünsche für Fritz Schwind – Der Schöpfer des österreichischen Internationalen Privatrechts wird 100 Jahre alt"
- ***Simon Laimer***: "Richterliche Eingriffe in den Vertrag/L'intervention du juge dans le contrat"

French Supreme Court Upholds Argentina's Immunity despite Waiver

Last week, the French Supreme Court for private and criminal matters (*Cour de*

cassation) set aside three series of enforcement measures carried out by NML Capital Ltd against the Republic of Argentina in three judgments dated 28 March 2013 (see here, here and here).

Readers will recall that NML Capital Ltd was the beneficial owner of bonds issued by Argentina in year 2000. As the relevant financial contracts contained a clause granting jurisdiction to New York courts, the creditor sued Argentina before a U.S. federal court, and obtained in 2006 a judgment for USD 284 million. In the summer 2009, NML Capital initiated enforcement proceedings in Europe.

The contracts also contained a waiver of immunity from enforcement. NML Capital first attached assets covered by diplomatic immunity. In a judgment of 28 September 2011, the *Cour de cassation* ruled that the waiver did not cover diplomatic assets. This was because, the Court explained, diplomatic immunity is governed by special rules which require a waiver to be both express and specific, i.e. provide specifically that it covers diplomatic assets. As the Court was aware that the 1961 Vienna Convention only provides that waiver of diplomatic immunity should be express, the Court ruled that the special rules governing diplomatic immunity were to be found in customary international law.

This time, NML Capital focused on non diplomatic assets. It attached monies owed by French companies to Argentina through their local branches (and could thus be attached from France). The assets were public, however: they were tax and social security claims. But, at first sight, they fell within the scope of the waiver. Indeed, I understand that the Republic of Argentina had waived immunity "for the Republic, or any of its revenues, assets or property".

Requirements for Waiving Sovereign Immunity

International law is changing really fast in Paris, however. The *Cour de cassation* decided to extend its new doctrine that waiver of immunity of enforcement should be both express and specific to public assets. The new rule is that waivers should specifically mention the assets or categories of assets to which they apply. As a consequence, as the waiver did not specifically mention, the Court found, tax and social revenues, it did not apply to them.

The judgments also explain that the new rule originates from customary public international law, as reflected in the 2004 UN Convention on Jurisdictional Immunities of States and Their Property. This is clearly the most creative part of

the judgments.

Article 19 of the 2004 Convention reads:

> *Article 19*
> *State immunity from post-judgment measures of constraint*
> *No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:*
> *(a) the State has expressly consented to the taking of such measures as indicated:*
> *(i) by international agreement;*
> *(ii) by an arbitration agreement or in a written contract; or*

I am not sure where the requirement that the waiver be asset specific appears.

Furthermore, when Germany argued that Article 19 reflected customary international law in the *Jurisdictional Immunities of the State* case, the International Court of Justice responded:

> *117. When the United Nations Convention was being drafted, these provisions gave rise to long and difficult discussions. The Court considers that it is unnecessary for purposes of the present case for it to decide whether all aspects of Article 19 reflect current customary international law.*

Human Rights

Interestingly enough, the *Cour de cassation* also refers to several judgments of the European Court of Human Rights which held that rules on sovereign immunities necessarily comply with the ECHR as long as they reflect international law.

In other words, the French court recognizes that should it grant a wider immunity to foreign states than the one recognized by international law, it might infringe the European Convention. The ECHR also considers that the 2004 UN Convention reflects customary international law, but would it read Article 19 as liberally as the *Cour de cassation*?

Excessive English Costs Orders and Greek Public Policy

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Two recent Court of Appeal rulings in Greece have demonstrated the significance of the public policy clause in international litigation and arbitration. Both judgments are dealing with the problem of recognition and enforcement of ”excessive” costs awarded by English courts and arbitration panels. The issue has been brought several times before Greek courts within the last decade. What follows, is a brief presentation of the findings, and some concluding remarks of the author.

I.a. In the first case, the Corfu CoA refused to grant enforceability to a costs order and a default costs certificate of the York County Court on the grounds that Greek courts wouldn’t have imposed such an excessive amount as costs of the proceedings for a similar case in Greece. In particular, the court found that, granting costs of more than £ 80,000 for a case, where the amount in dispute was £ 17,000, contravenes Greek public policy perceptions. Thus, the amount of £ 45,000 + 38,251.47 was considered as manifestly disproportionate and excessive for the case at hand. Consequently, the CoA granted exequatur for the remaining sums, and refused recognition for the above costs, which could not be tolerated by a court of law in Greece.

I.b. In the second case, the Piraeus CoA recognized an English arbitral award despite allegations made by the appellant, that the award’s order for costs contravened public policy. In this case the amount in dispute was in the altitude of nearly $ 3 million, whereas the costs granted did not exceed £ 100,000. The court applied the same rule as in the previous case, and found that the costs were not disproportionate to the case at stake.

II. As already mentioned above, those decisions are the last part on a sequence of

judgments since 2005. Free circulation of English judgments is generally guaranteed in Greece; the problem starts when English creditors seek to enforce the pertinent costs orders. For Greek legal views, it is sheer impossible that costs exceed the actual amount in dispute in the main proceedings. This was reason enough for the Supreme Court (Areios Pagos = AP) to establish the doctrine of public policy violation, on the occasion of an appeal against a judgment of the Athens CoA back in 2006 [AP 1829/2006, Private Law Chronicles 2007, p. 635 et seq.]. The Supreme Court held, that granting enforceability to similar orders would violate the principle of proportionality, which is embedded both in the Greek Constitution and the ECHR. At the same time, it emphasized that the excessive character of costs impedes access to Justice for Greek citizens, invoking again provisions from the Greek Constitution (Art. 20.1) and the Human Rights Convention (Art. 6.1). The reasoning of the Supreme Court is followed by later case law: In an earlier judgment of the Corfu CoA [Nr. 193/2007, Legal Tribunal 2009, p. 557 et seq.] the court reiterated the line of argumentation stated by the Supreme Court, and refused to grant exequatur (again) to an English order for costs. Two years later, the Larissa CoA [Nr. 484/2011, unreported], followed the opposite direction, based on the fact that costs were far lower than the amount in dispute.

In regards to foreign arbitral awards, mention needs to be made to two earlier Supreme Court judgments, both of which granted enforceability and at the same time rejected the opposite grounds for refusal on the basis of Art. V 2 b NYC. In the first case [AP 1066/2007, unreported], the Supreme Court found no violation of public policy by recognizing an English award, which awarded costs equivalent to half of the subject matter. A later ruling [AP 2273/2009, Civil Law Review 2010, p. 1273 et seq.] reached the same result, by making reference to the previous exchange of bill of costs particulars, for which none of the parties expressed any complaints during the hearing of the case before the Panel.

In conclusion, it is obvious that Greek courts are showing reservation towards those foreign costs orders, which are perceived as excessive according to domestic legal standards. This stance is not unique, taking into account pertinent case law reported in France and Argentina [for the former, see Cour de Cassation 1re Chambre civil, 16.3.1999, Clunet 1999, p. 773; for the latter see Kronke / Nacimento / Otto / Port (ed.), Recognition and enforcement of foreign arbitral awards – A global commentary on the New York Convention (2010), p. 397, note

245]. The decisive element in the courts' view is the interrelation between the subject matter and the costs: If the latter is higher than the former, no expectations of recognition and enforcement should be nourished. If however the latter is lower than the former, public policy considerations do not usually prevail.

Final point: As evidenced by the case law above, it is clear that the Greek jurisprudence is applying the same criteria for foreign judgments and arbitral awards alike, irrespective of their country of origin. As far as the latter is concerned, no objections could or should be raised. However, making absolute no distinction between foreign judgments emanating from EU – Member States and non-Member States courts seems to defy the recent vivid discussion that predominated during the Brussels I recast preparation phase (2009-2012). Fact is, that public policy survived in the European context, and will continue playing a significant role in the new era (Regulation 1215/2012). Still, what is missing from Greek case law is an effort to somehow soften the intensity of public policy control in the EU landscape. Whatever the reason might be, a clear conclusion may be reached: Greek case law gives back to public policy a Raison d'être, demonstrating the importance of its existence, even when judicial cooperation and free circulation of judgments are the rules of the game.

Ubertazzi on Kate Provence Pictures

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The publication of topless photographs of Britain's likely future queen Catherine Elizabeth Middleton, the Duchess of Cambridge (hereinafter: Kate Middleton or the Duchess), by certain newspapers in several EU countries – such as France, Italy, Sweden, Denmark and Ireland – demonstrates once more the need to strike a fair balance between the protection of the right to respect for private life

guaranteed by Art. 8 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter: ECHR) and the right to freedom of expression granted under Art. 10 of the same Convention.

The Kate Middleton photo case is reminiscent of the very recent and famous judgments of the European Court of Human Rights (hereafter: ECtHR) in the cases von Hannover v. Germany of February the 7th 2012 (Grand Chamber, applications nos. 40660/08 and 60641/08: hereinafter: von Hannover judgment 2) and of June the 24th 2004 respectively (Third Section, application no. 59320/00: hereinafter: von Hannover judgment 1). In both these cases, the elder daughter of the late Prince Rainier III of Monaco, Princess Caroline von Hannover, lodged applications before the ECtHR against the Federal Republic of Germany alleging that the refusal by the German courts to grant injunctions to prevent further publications of different sets of photos of her infringed her right to respect for her private life as guaranteed by Article 8 ECHR.

The ECtHR maintained that under Articles 8 and 10 ECHR States are obliged to balance the protection of the fundamental human right to respect for private life, which comprises the right to control the use of one's image, on the one hand, and the fundamental human right of freedom of expression respectively, which extends to the publication of the relevant photos by the press under a commercial interest, on the other hand. To strike this balance member States typically insert specific domestic provisions in their copyright acts, prohibiting the dissemination of an image without the express approval of the person concerned, except where this image portrays an aspect of contemporary society, on the condition that its publication does not interfere with a legitimate interest of the person concerned (see Sections 22(1) and 23(1) of the German Copyright Arts Domain under which the German courts refused to grant the injunction required by Princess Caroline). These provisions are interpreted so as to distinguish between private individuals unknown to the public and public or political figures, affording the former a wider right to control the use of their images, whereas the latter a very limited protection of their right to respect for private life: then, public figures have to accept that they "might be photographed at almost any time, systematically, and that the photos are then widely disseminated even if […] the photos and accompanying articles relate exclusively to details of their private life" [para 74 Hannover I]. However, under this interpretation the balance between the right to respect for private life and the right to freedom of expression struck by the

provisions at stake is too much in favour of the latter, but insufficient to effectively protect the private life of public figures, since even where a person is known to the general public he or she may rely on a legitimate expectation of protection of and respect for his/her private life. Thus, these provisions should preferably be understood narrowly, namely as allowing the publication of the pictures not merely when the interested person is a public figure, but rather when the published photos contribute to a debate of general interest.

To establish if the relevant pictures satisfy this last requirement, according to the ECtHR regard must be given to different factors (von Hannover judgment 2, para 109-113): whether the person at stake is not only well known to the public, but also exercises official functions; whether the pictures relate exclusively to details of his/her private life and have the sole scope of satisfying public curiosity in that respect, or rather concern facts capable of contributing to a general debate in a democratic society; whether the pictures have been taken in a secluded and isolated place out of the public eyes or even in a public place but by subterfuge or other illicit means, or rather in a public place in conditions not unfavourable to the interested person; whether the publication of the photos constitutes a serious intrusion with grave consequences for the person concerned, or rather has no such effects; and whether the pictures are disseminated to a broad section of the public around the word, or rather are published in a national and local newspaper with limited circulation.

Under these conditions, in the von Hannover judgment 1 the ECtHR held that the German courts refusal to grant injunctions against the further publications of certain photos of Princess Caroline von Hannover had infringed her right to respect for private life ex Art. 8 ECHR: in fact, despite the applicant being well known to the public, she exercised no official function within or on behalf of the State of Monaco or any of its institutions, but rather limited herself to represent the Prince’s Monaco family as a member of it; furthermore, the photos related exclusively to details of her private life and as such aimed at satisfying a mere public curiosity; finally these photos where shot in isolated places or in public places but by subterfuge. In contrast, in the von Hannover judgment 2 the ECtHR reached the opposite conclusion, namely holding that there had been no violation of Article 8 of the ECHR: in fact, despite Princess Caroline exercising no official functions, she was undeniably well known to the public and could therefore not be considered an ordinary private individual; furthermore, some of the photos at

stake supported and illustrated the information on the illness affecting Prince Rainer III that was being conveyed – reporting on how the Prince's children, including Princess Caroline, reconciled their obligation of family solidarity with the legitimate needs of their private life, among which was the desire to go on holiday – and as such were related to an event of contemporary society; moreover, despite the photos having been shot without the applicant's knowledge, they were taken in the middle of a street in St. Moritz in winter not surreptitiously or in conditions unfavourable to the applicant.

In light of these conclusions, if the courts of the EU States where the topless pictures are being published refused to grant injunctions to prevent further publications, at least in their respective territories, Kate Middleton -after having exhausted the internal procedural remedies in the States at stake – could lodge applications against these same States before the ECtHR for the infringement of their positive obligations to protect her private life guaranteed by Article 8 ECHR. In such circumstances, the ECtHR would most probably conclude that there have been violations of this Article by the States involved.

In fact, despite the Duchess exercising official functions by performing senior Royal duties since her first trip to Canada and US in July 2011 (see The Telegraph), the pictures at stake relate exclusively to details of her private life and have the sole scope of satisfying public curiosity in that respect, but do not concern facts capable of contributing to a general debate over Kate Middleton's official role. Furthermore, the pictures were taken by subterfuge while the couple were on a private property at a luxury holiday chateau owned by the Queen of England's nephew – who promised absolute privacy to the Duchess -, by means of a photographer equipped with a high powered lens from a distance of over half a mile away from the chateau (see The Daily Mail ; P A Clarke). Also, the publication of the photos constitutes a serious intrusion with grave consequences for the couple, evinced by their official statement, according to which "the Royal Highnesses have been hugely saddened to learn that" the publication of the pictures at stake has "invaded their privacy in such a grotesque and totally unjustifiable manner. […] The incident is reminiscent of the worst excesses of the press and paparazzi during the life of Diana, Princess of Wales, and all the more upsetting to the Duke and Duchess for being so" (see The Huffington Post). Finally, despite the pictures having been disseminated by local newspapers with apparently limited national circulation, the original publications have initiated the

immediate distribution of the images “over the internet like wild-fire”, with the result of reaching a broad section of the public around the world (see SeeClouds).

Muir Watt on Kate Provence Pictures

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*Cachez ce sein…*It seems to me that this case – which is perhaps less intrinsically interesting, even from a conflict of laws perspective, than other recent instances in which the cross-border exercise of the freedom of press is challenged in the name of competing values, such as *Charlie Hebdo* and the satirical caricatures of Mahomet, or *The Guardian* and the *Trasfigura* super-injunction – serves to illustrate the relative indifference of the content of the relevant choice of law rules when fundamental rights are in balance. As so much has already been written about possible additions to Rome II in privacy or defamation cases, I shall concentrate on what could be called the *Duchess of Cambridge hypothesis:* whatever the applicable rules, the only real constraint on adjudication in such an instance, and the only real arbiter of outcomes, is the duty of the court (assumed to be bound, whatever its constitutional duties, by the European Convention on Human Rights, or indeed the Charter if Rome II were in the end to cover censorship issues) to carry out a proportionality test in context.

One might start with a few thoughts about the balance of equities in this case. Back at the *café du commerce* (or the ranch, or the street, or indeed anywhere where conventional wisdom takes shape), the debate is usually framed in moral terms, but remains inconclusive, neither side inspiring unmitigated sympathy. On the one hand, invasion of privacy of public figures by the gutter press (however glossy) can on no account be condoned. If the royal couple were stalked in a private place by prying *paparazzi*, then the immediate judicial confiscation of the pictures by the *juge des référés* was more than justified. Of course, there is clearly a regrettable voyeur-ism among the general public that supports a market

for pictures of intimate royal doings. The real responsibility may lie therefore with those governments which have failed adequately to regulate journalistic practices. On the other hand (so the debate goes), the main source of legitimacy of devoting large amounts of public resources to fund the essentially decorative or representational activities of national figures abroad (whether royals, ambassadors or others) lies in the reassuring, inspiring or otherwise positive image thus projected, which in turn serves to divert attention from domestic difficulties, to smooth angles in foreign policy etc. Surely the Duchess of Cambridge, who appears to have been driven from the start by a compelling desire to enter into this role, should have taken particular care to refrain from endangering the public image of niceness of which the British royal family places its hope for survival? Moreover, she can hardly claim not to be accustomed to the prying of the gutter press at home – although of course, in England, the medias may be more easily gagged (see *Trasfigura*), and have apparently agreed in this instance to remain sober, in the wake of last year's hacking scandals and in the shadow of pending regulation. And so on…

The circularity of this imagined exchange is not unlinked to the well-known difficulties encountered in the thinner air of legal argument. The conflict involving the invasion of privacy of public figures (including those who otherwise capitalize on publicity), and claims to journalistic freedom of expression (albeit by paparazzi whose profits rise in direct proportion to the extent to which they expose the intimacy of the rich and famous), is both a *hard case* (in terms of adjudication of rights) and a *true conflict* (in terms of the conflict of laws). As to the former, of course, there is no more an easy answer in this particular case than an adequate way of formulating general legal principle. If these unfortunate photographs do not provide a convincing enough example, the (less trivial?) *Charlie Hebdo* case reveals a conflict of values and rights which is equally divisive and ultimately insoluble from "above", that is, in terms of an overarching, impartial determination of rights and duties. Take Duncan Kennedy's *A Semiotics of Legal Argument* (Academy of European Law (ed.),?*Collected Courses of the Academy of European Law*, Volume Ill. Book 2, 309-365): all the oppositional pairs of conventional argument-bites can be found here, within the common clusters of substantive or systemic legal arguments (morality, rights, utility or expectations, on the one hand; administrability and institutional competence, in the other), as well as all the various "operations" which they instantiate. Thus, when challenged with invasion of privacy, *Closer* responds, predictably, by denial ("no, we did not

cross the bounds, the royals were visible through a telescopic lense"); counter-argument ("well, we merely made use of our fundamental freedom in the public interest"); the formulation of an exception to an otherwise accepted principle ("yes, we admit that the pictures were unauthorized, but these were public figures whose deeds are traditionally of public interest"); then finally by "shifting levels" from the fault/not fault to the terrain of the reality of injury. How could anyone possibly complain about pictures which were both esthetic and modern, and which will undeniably contribute to bring glamour to the somewhat fuddy-duddy, or goody-goody, royal style?

What does all this tell us about the conflict of laws issue? Potentially, the choice of connecting factor entails significant distributional consequences in such a case. At present, outside the sway of Rome II, each forum makes its own policy choices in respect of conflict of law outcomes, and these probably balance each other out across the board in terms of winners and losers – at the price of transnational havoc on the way (through the risk of parallel proceedings and conflicting decisions, which Brussels I has encouraged with *Fiona Shevill*, although *Martinez* may be a significant improvement in this respect). If it were to be decided at some point that Rome II should cover privacy and personality issues, whatever consequences result from the choice of any given connecting factor would obviously be amplified through generalization; the risk of one-sidedness would then have to be dealt with. However, as illustrated by the continued failures of attempts to design an adequate regime in Rome II, any such scheme is highly complex. One might initially assume, say, that editors generally choose to set up in more permissive jurisdictions, whereas victims of alleged violations might more frequently issue from more protective cultures, which encourage higher expectations as to the protection of privacy or personality rights. Any clear-cut rule would therefore be likely to favor either the freedom of the press (country of origin principle, constantly lobbied by the medias from the outset), or conversely the right to privacy (place of harm or victim's habitual residence). However (and allowing for the switch from privacy to defamation), while the *Charlie Hebdo* case may conform to this pattern, the *Duchess of Cambridge* affair turns out to be (more or less) the reverse. To establish a better balance, therefore, exceptions must be carved out, whichever principle is chosen as a starting point. The place of injury might be said to be paramount, unless there are good reasons to derogate from it under, say, a foreseeability exception in the interest of the defendant newspaper. Alternatively, the country of origin principle may carry the day (as in

the E-commerce directive and *Edate Advertising*), but then the public policy of the (more protective) forum may interfere to trump all. In terms of the semiotics of legal argument, this endless to-and-fro illustrates the phenomenon of "nesting" (Kennedy *op cit*, p357). Each argument carries with it its own oppositional twin. Chase a contrary principle out of the door in a hard case and inevitably, at some point in the course of implementation of its opposite, it will reappear through the window.

Of course, even if one settles for the inevitable impact of public policy as a matter of private international law, this is not the end of the story. Because the public policy exception itself will have to mirror the balance of fundamental rights to which the Member States are ultimately held (under the ECHR or, if Rome II is extended to cover such issues, under the Charter). Consider the case of unauthorized pictures of Caroline of Hannover, which had given rise to judicial division within Germany over the respective weight to be given to freedom of press and privacy of the royal couple. In 2004, the ECtHR observed (Grand Chamber, case of VON HANNOVER v. GERMANY (no. 2), Applications nos. 40660/08 and 60641/08):

> *§124. … the national courts carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life. In doing so, they attached fundamental importance to the question whether the photos, considered in the light of the accompanying articles, had contributed to a debate of general interest. They also examined the circumstances in which the photos had been taken…§126. In those circumstances, and having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the latter have not failed to comply with their positive obligations under Article 8 of the Convention. Accordingly, there has not been a violation of that provision.*

Outside the German domestic context, whatever the legal basis supporting the competing interests here, it would be difficult to imagine a very different outcome. My point, therefore, is merely that given the conflict of values involved, the choice of conflict rule – national or European, general principle or special rule, bright-line or flexible, with foreseeability clause or public policy – is for a significant part, indifferent in the end. The forum will be bound ultimately to

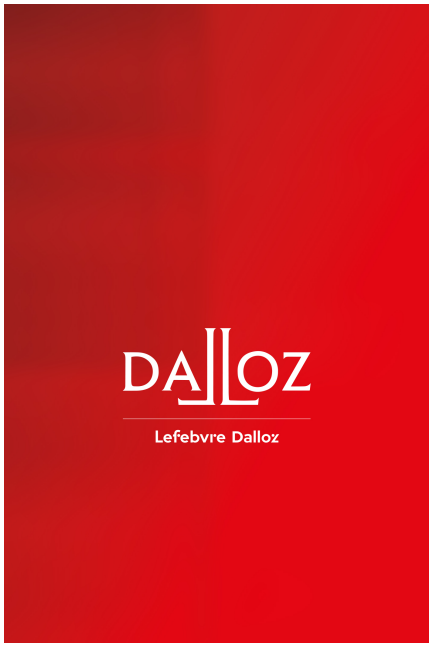
a proportionality test, whatever the starting point. And in the end, no doubt, the way in which it implements such a test will depend on its own view of the equities in a specific case. Human rights law indubitably places constraints on adjudication, but it is of course largely context-sensitive and does not mandate one right answer. The economy of any choice of law rule, along with its exceptions, special refinements or escape clauses, is likely to reflect similar constraints – no more, no less.

It may be that the unfortunate saga of the Duchess of Cambridge's topless pictures will begin and end on a purely jurisdictional note, with the interim measures already obtained. These gave the claimants partial satisfaction, at least on French soil and for the existing digital versions of the pictures. At the time of writing, we do not know if further legal action is to be taken with a view to monetary compensation (nor where), and whether the issue of applicable law will arise. We know that the French provisional measures have not entirely prevented copies from circulating on the Internet, nor the medias in other countries (including of course some which would not be bound by Rome II in any event) from publishing or intending to publish them. This raises the additional and much discussed issue (or "can of worms" to borrow Andrew Dickinson's term) of the adequate treatment of cross-border cyber-torts (whether or not linked to the invasion of personality rights). As apparent already in the Duchess of Cambridge case, cyber-privacy conflicts will usually comprise a significant jurisdictional dimension, frequently debated in terms of the lack of effectiveness of traditional measures (such as seizure of the unauthorized pictures), which are usually territorial in scope (not cross-border), and merely geographical (no effect in virtual space). The first deficiency might be overcome through injunctive relief, but the second requires specifically regulatory technology (as opposed to merely legal or normative: see for example, on the regulatory tools available, Roger Brownsword's excellent *Rights, Regulation and the Technological Revolution*, Oxford, OUP, 2008). However, given the inevitable conflicts of values in all cases and the variable balance of equities as between any given instances, it is not necessarily desirable that any such measure should actually achieve universal water-tightness. Look at the *Trafigura* case, after all (a saga involving the silencing of journalists relating to a case involving the international dumping of toxic waste: see, on the extraordinary judicial journey of the *Probo Koala*, *Revue critique DIP 2010.495*). Was it not lucky that the super-injunction which purported to gag *The Guardian* newspaper to the extent allowed by the most

sophisticated judicial technology, did not succeed in preventing an unauthorized twit (but that's also a sore point in French politics at the moment!)?

First Issue of 2012's Revue Critique de Droit International Privé

The last issue of the *Revue critique de droit international privé* was just released. It contains four articles and several casenotes.



The first article is a survey of the 2011 Polish law of private international law by the late Tomasz Pajor, who was a professor at Lodz University (*La nouvelle loi polonaise de droit international privé*).

The second article is authored by Isabelle Veillard and explores the scope of res judicata of arbitral awards (*Le domaine de l'autorité de la chose arbitrée*). It is this only one to include an English abstract:

> *Expanding from specific arguments to the cause of action itself, the requirement that the dispute be concentrated may, in the field of arbitral res judicata, be beneficial from the standpoint of procedural speed and fairplay, but*

it threatens the adversarial principle all the more so that there is a presumption in favour of renunciation of the right to appeal ; this is why the non-concentration of the legal grounds of action should not be sanctioned unless it is the fruit of gross negligence or abuse in the exercise of the right to bring suit. The distrust of French law towards res judicata could be mitigated in respect of arbitral awards given the contractual nature of arbitration, by the adoption as between the parties of a mechanism of collateral estoppel, along with safeguards designed to guarantee both efficiency and fairplay with the requirements of a fair trial ; the distinction between res judicata and third party effects suffices no doubt to protect the latter.

In the third article, Aline Tenenbaum, who lectures at Paris Est Creteil University, discusses the issue of the localization of financial loss for jurisdictional purposes in the light of the Madoff case (*Retombées de l'affaire Madoff sur la Convention de Lugano. La localisation du dommage financier*).

Finally, in the last article, Fabien Marchadier, who is a professor at Poitiers University, explores the consequences of the ECHR case *Genovese v. Malta* as far as awarding citizenship is concerned (*L'attribution de la nationalité à l'épreuve de la Covnentino européenne des droits de l'homme. Réflexion à partir de l'arrêt* Genovese c. Malte).