French Court Issues Injunction over Kate Topless Photos

Couvrez ce sein que je ne saurais voir
Par de pareils objets les âmes sont blessées …

A French court in Nanterrre has issued an injunction earlier today over Kate Middleton topless photos in the interim proceedings initiated by Mr Mounbatten-Windsor and his wife.

French tabloid *Closer* published last week photos of Kate Middleton appearing topless on the terrasse of a Chateau in Provence this summer. While the English press refused to publish the photos, Italian and Irish tabloids already have.

The Nanterre court ordered *Closer* to "hand over all digital forms of the pictures" to the plaintiffs and enjoined the defendant from assigning or forwarding them to any third party. Any breach of the injunction would be sanctioned by a Euro 10,000 civil penalty, payable to the plaintiffs. Finally, the plaintiffs were awarded a generous Euro 2,000 towards their legal costs.

By contrast, the Court ruled that it did not have the power to enjoin *Closer* from publishing the photos again, as there was no evidence that the tabloid intended to do so.

It is interesting to see that the consequence of the judgment is to create a distinction between photos published on the internet and photos published in the hard copy of the magazine. The international dimension of the case lies essentially in the potential for these photos to circulate on the internet, and to be assigned electronically to other tabloids. The mere publication in France is arguably much less of an issue.

Of course, it remains to be seen whether the fine distinction of the court will lead to the desired outcome, and whether the penalty will deter *Closer* from selling the pictures.

Conference on EU Class Actions at European Parliament

Registration is now open for a conference on E.U. class actions: 'Increasing Access to Justice Through Class Actions: A Conference for Litigators & Policy Makers'. It will take place in Brussels within the committee rooms of the European Parliament on November 12 – 13, 2012. Seating within the European Parliament is limited so spaces should be reserved now.

The list of speakers is extraordinary and includes a lawyer who drafted Poland's law on opt-in class actions; the former Minister of Justice and Attorney General of Ireland Michael McDowell; former vice president of the European Parliament Diana Wallis; Boston lawyer Jan Schlichtmann who was portrayed by John Travolta in the film "A Civil Action"; Prof. Rachael Mulheron of Queen Mary University, London; Prof. Laura Carballo of Spain; Michele Carpagnano, co-author of a recent report on class actions for the European Parliament's Economic & Monetary Affairs Committee; and many others.

The location is the European Parliament with a few of its committee rooms, graciously hosted by Members of European Parliament McGuinness, Gallagher, Harkin, and Van der Stoep.

The topics that will be discussed include Access to Justice as a Human Right; How to Prosecute a Class Action; How to Defend a Class Action; The New Paternalism in Europe: Why Some Prefer Governments and NGOs Over Private Plaintiffs; the Opt-Out Mechanism versus the Opt-in Mechanism; and numerous other topics. The conference will provide a balanced look at some of the critical issues that Brussels is thinking about in deciding whether to design a system of collective redress for the entire E.U. The speakers will discuss class action mechanisms that already exist in certain Member States such as Sweden and Italy as well as any lessons to be learned form the United States experience with class actions.

To register, please go to this link as soon as possible to save your space, since seating in the European Parliament is limited. You can book a room at the nearby

Renaissance Hotel at a reduced rate.

Numerous organizations are jointly presenting the conference including the Netherlands Bar Association, the French-speaking Brussels Bar Association, Union Internationale des Avocats, AIJA (International Association of Young Lawyers); National University of Ireland Maynooth Department of Law; New York State Bar Association International Section; Catholic University of Lyon Department of Law; PEOPIL (Pan-European Organisation of Personal Injury Lawyers); American Bar Association Section of International Law; and others. You can view the complete list of cooperating entities at this link.

For more information, please check the link above or feel free to contact Robert J. Gaudet, Jr.

Thanks to Laura Carballo Piñeiro (University of Santiago de Compostela) for providing this announcement.

Hague Conference Seeks New Secretary General

The Hague Conference is seeking to recruit its next Secretary General.

> *The Hague Conference on Private International Law, the world's leading organisation for the progressive unification of the rules of private international law based in The Hague, the Netherlands, is looking for an outstanding lawyer to fill on 1 July 2013, the post of*
>
> ***Secretary General***
>
> *In addition to a distinguished career in his/her field (intergovernmental, governmental, academic, legal practice or other), the ideal candidate has excellent knowledge of private international law, good knowledge of comparative private law, a sound understanding of public international law, extensive experience in the practice of law including international negotiations,*

a creative mind and a vision of the future role of the Hague Conference in the context of an increasingly complex and globalising legal environment.

A national of a Member State of the Hague Conference, he/she should be able to foster excellent working relationships with Member States' Governments, authorities and diplomatic representatives as well as Member Organisations and to lead an international highly qualified team of legal professionals and administrative support staff. Broad management experience including strategic and financial planning, fund-raising ability as well as excellent communication and interpersonal relations skills are essential prerequisites.

Fluency in English and French is required. Working knowledge of other major languages, such as Spanish, is an asset.

Duties and responsibilities

The Secretary General is in charge of:

- *preparation and organisation of the Diplomatic Sessions of the Conference, Council meetings and Special Commissions;*
- *implementing the work programme in conformity with the priorities and policies established by the Council on General Affairs and Policy;*
- *managing the human and financial resources of the Hague Conference;*
- *reporting to the Council on General Affairs and Policy and to Diplomatic Conferences (on the implementation of the work programme) and to the Council of Diplomatic Representatives (on financial matters); and*
- *representing the Hague Conference in its relations with the host Government and its authorities, other Governments and their agencies as well as intergovernmental and non-governmental Organisations.*

***Duration of the appointment**: 5 years (renewable subject to satisfactory performance).*

***Salary**: A7.1 (Scales of the Co-ordinated Organisations).*

Applications should be submitted by e-mail no later than 14 September 2012 to the

Chairman of the Council on General Affairs and Policy
E-mail: DJZ-CR@minbuza.nl

> *The applications should include a CV, list of publications and a letter setting forth the candidate's vision of his/her role as Secretary General.*
>
> *Please note that only the candidates selected for interviews will be contacted.*

The current Secretary General is Hans Van Loon, who has held this position since 1996 and worked at the Permanent Bureau in other capacities since 1978.

Implied Choice of Law in International Contracts

Manuel Penadés Fons has just published a new book on the implied choice of law in international contracts, entitled *Elección tácita de ley en los contratos internacionales* (Thomson Reuters Aranzadi).

Abstract provided by the author:

> The autonomy of the parties to choose the law applicable to their international commercial contracts does not always manifest through an express clause in the agreement. This silence leads occasionally to litigation over the possibility that the parties exercised such freedom, even though it was not explicitly reflected in the contract. Despite the harmonised solution provided to this issue by the European legislation, practice shows that the answer given by the courts of different Member States is substantially divergent. This reality makes the question highly controversial and unpredictable in the context of international commercial litigation. The book at hand studies the theoretical underpinnings of the institution and explores the criteria used by European caselaw under the Rome Convention and the Rome I Regulation, offering valuable professional guidance to deal with the question of implied choice of law before national and arbitral tribunals.

Summary (click here for whole table of contents)

I.- Introduction: Party autonomy under the Rome I Regulation

II.- Conceptual delimitation: Implied choice of law

III.- Practical delimitation: Implications of the study

IV.- The History and *Status Quo* of Implied Choice of Law in the European Union

V.- The Search for the Real Intention of the Parties

VI.- Conclusions

Manuel Penadés Fons, LLM London School of Economics, teaches Private International Law at the University of Valencia.

The Court of Justice – holiday over

Amidst a raft of judgments and opinions handed down by the CJEU on 6 September 2012, are several of note which relate to the EU private international law instruments, as follows:

Brussels I Regulation

1. Judgment: Case C-619/10, Trade Agency Ltd v Seramico Investments – application of Arts. 34(1) and (2) to the enforcement of an English default judgment, including an assessment as to whether the enforcement of a judgment given in default of appearance, without reasons, may be opposed on public policy grounds (answer: it depends).
2. Judgment: Case C-190/11, Mühlleitner v Yusufi – the consumer contract provisions (Art. 15) may apply to a contract arising from directed activities of the kind referred to in Art. 15(1)(c) even if it has not been concluded at a distance.
3. Opinion: Case C-456/11, Gothaer Allgemeine Versicherung AG v Samskip GmbH – a preliminary judgment on a question of jurisdiction (as to the

validity and effectiveness of a choice of court agreement in favour of the courts of Iceland) is a "judgment" which must be recognised under the Regulation, and findings as to the validity and scope of the agreement are binding on the court addressed regardless of its status as res judicata in the Member State of origin or the Member State addressed.

Evidence Regulation

1. Judgment: Case C-170/11, Lippens v Kortekaas – the Regulation does not preclude a Member State court, acting under its own procedural rules, from summoning a party to appear as a witness before it.
2. Opinion: Case C-332/11, ProRail NV v Xpedys NV – the Regulation does not preclude a Member State court, acting under its own procedural rules, from ordering the taking of expert evidence, partly in another Member State, provided that the performance of that part of the investigation does not require the cooperation of the authorities of that Member State.

It looks like it's time to shake off the holiday season, and prepare for another year on the EU private international law rollercoaster.

Shill on Judgment Arbitrage in the United States

Gregory H. Shill, who is visiting assistant professor at Hofstra law school, has posted Ending Judgment Arbitrage: Jurisdictional Competition and the Enforcement of Foreign Money Judgments in the United States on SSRN.

> *Recent multi-billion-dollar damage awards issued by foreign courts against large American companies have focused attention on the once-obscure, patchwork system of enforcing foreign-country judgments in the United States. That system's structural problems are even more serious than its critics have charged. However, the leading proposals for reform overlook the positive*

potential embedded in its design.

In the United States, no treaty or federal law controls the domestication of foreign judgments; the process is instead governed by state law. Although they are often conflated in practice, the procedure consists of two formally and conceptually distinct stages: foreign judgments must first be recognized and then enforced. Standards on recognition differ widely from state to state, but under current law once plaintiffs have secured a recognition judgment all American courts must enforce it. Thus, plaintiffs can enforce in states that would have rejected the foreign judgment in the first place.

This extreme form of forum shopping, which I call "judgment arbitrage," creates a fundamental structural problem that has thus far escaped scholarly attention: it undermines the power of individual American states to determine whether foreign-country judgments are enforced in their territory and against their citizens. It also suggests a powerful, if implied, conflict of recognition laws among sister U.S. states that precedes and often determines the outcome of what scholars currently consider the primary conflict, between American and foreign law. Finally, this system impedes the development of state law and weakens practical constraints on the application of foreign nations' laws in the United States.

This Article constructs a novel framework for conceptualizing these problems, and addresses them by proposing a federal statute that would allow states to capture the benefits — and require them to internalize the costs — of their own recognition rules. Rather than scrap the current state-law regime in favor of a single federal rule, as the ALI and leading scholars call for, the statute proposed in this Article would provide incentives for competition among states for recognition law. The Article argues that sharpening jurisdictional competition would encourage experimentation, the development of superior law, and, eventually, greater uniformity in an area where scholars agree uniformity is desirable. The proposal may also suggest ways to manage other sister-state conflicts of law in an age when horizontal conflicts are proliferating.

The paper is forthcoming in the *Harvard International Law Journal*.

Marshall on the Proper Law of the Contract

Brooke Adele Marshall, who is an associate to the Chief Justice of the Federal Court of Australia, has published Reconsidering the Proper Law of the Contract in the last issue of the *Melbourne Journal of International Law*.

This article appraises the choice of law rule that applies where parties have either impliedly chosen, or failed to choose, the law governing their contract. It reconsiders the problems besetting the common law rule, known as the proper law of the contract, that were identified by Australia's Law Reform Commission twenty years ago. While the choice of law rule in Australia remains unchanged, it has undergone significant reform in the European Community and is now the subject of reform at the Hague Conference on Private International Law. Despite these reforms, a comparative analysis reveals that several of the common law problems persist. This article proffers a proposal for Australian legislatures based on the author's refined version of the Draft Hague Principles and the Rome I Regulation. It also suggests that the Hague Conference adopt these refinements. Under this proposal, tacit choice of law is absorbed as a subset of express choice and must be clearly established by the terms of the contract or the circumstances of the case. The probative value of an exclusive jurisdiction agreement will be made apparent in the drafting of the clause on tacit choice of law itself. It is further proposed that, in the absence of choice, the closest connection test be reduced to an escape clause applicable in default of fixed rules tailored to the exigencies of commercial contracting. The reformulated test will be used to ascertain the law of the country most appropriate for determining the issues arising in the case.

French Conference on the Future of European Insolvency Law

The Law Faculty of Rouen will host a conference on the Future of European Insolvency Law on September 21st, 2012. The speeches will be delivered in French.

Le droit européen des procédures d'insolvabilité à la croisée des chemins

9 h : Rapport introductif (Michel Menjucq, Ecole de droit de la Sorbonne)

1ère séance : L'affinement des règles initiales
Présidence : Jocelyne Vallansan, Université de Caen – Basse Normandie

9 h 30 : *Les procédures entrant dans le champ d'application du Règlement* (Gilles Podeur, Clifford Chance Europe LLP)

9 h 50 : *Les notions de centre des intérêts principaux et d'établissement* (Maud Laroche, Université de Rouen)

10 h 10 : *L'articulation entre la procédure principale et les procédures secondaires* (Laurence-Caroline Henry, Université de Bourgogne)

10 h 30 : Débat
Pause

11 h 30 : *L'égalité entre créanciers* (David Robine, Université de Rouen)

11 h 50 : *La garantie des créances salariales, influences et conséquences des procédures d'insolvabilité transfrontalières* (Isabelle Didier, Smith-Violet)

12 h 10 : *Les défaillances bancaires et financières* (Frédéric Leplat, Université de Rouen)

12 h 30: Débat

Déjeuner

2ème séance : L'adoption de règles nouvelles

Présidence : Paul Le Cannu, Ecole de droit de la Sorbonne

14 h 30 : *Les groupes de sociétés* (Michel Menjucq, Ecole de droit de la Sorbonne)

14 h 50 : *Les relations avec les Etats tiers* (Fabienne Jault-Seseke, Université de Versailles Saint-Quentin en Yvelines)

15 h 10 : *Les actions annexes* (Cécile Legros, Université de Rouen)

15 h 30 : Débat
Pause

3ème séance : Le regard des autres Etats membres sur la réforme du Règlement
Présidence : Gilles Cuniberti, Université de Luxembourg

16 h 15 : *Le regard italien* (Stefania Bariatti, Universita degli studi di Milano)

16 h 45 : *Le regard belge* (Yves Brulard, DBBLaw)

17 h 15 : *Rapport de synthèse* (Jean-Luc Vallens, Magistrat, Université de Strasbourg)

More details on the conference are available here.

Contact: evelyne.depierrefeu@univ-rouen.fr

Second Issue of 2012's Journal of Private International Law

The second issue of the Journal of Private International Law has recently been released. The table of contents reads as follows:

- *Hill, Jonathan*, **The Significance of Foreign Judgments Relating to an Arbitral Award in the Context of an Application to Enforce the Award in England,** pp. 159-193

- *Elbalti, Beligh,* **The Jurisdiction of Foreign Courts and the Enforcement of their Judgments in Tunisia: A Need for Reconsideration**, pp. 195-224
- *Kuipers, Jan-Jaap,* **Schemes of Arrangement and Voluntary Collective Redress: A Gap in the Brussels I Regulation**, pp. 225-249
- *Nagy, Csongor István,* **The Word is a Dangerous Weapon: Jurisdiction, Applicable Law and Personality Rights in EU Law – Missed and New Opportunities**, pp. 251-296
- *Papettas, Jenny,* **Direct Actions Against Insurers of Intra-community Cross-Border Traffic Accidents: Rome II and the Motor Insurance Directives**, pp. 297-321
- *Fitchen, Jonathan***, "Recognition", Acceptance and Enforcement of Authentic Instruments in the Succession Regulation**, pp. 323-358
- *Borg-Barthet, Justin,* **The Principled Imperative to Recognise Same-Sex Unions in the EU**, pp. 359-388
- *Smith, Peter De Verneuil; Lasserson, Ben; Rymkiewicz, Ross,* **Reflections on Owusu: The Radical Decision in Ferrexpo**, pp. 389-405
- *Hartley, Trevor,* **Private International Law by AE Anton, Third Edition by PR Beaumont and PE McEleavy** ,pp. 407-410

ATS Suit Dismissed

On September 4, Judge Naomi Buchwald of the Southern District of New York dismissed an Alien Tort Statute suit against President Mahinda Rajapaksa of Sri Lanka, on the basis of a Suggestion of Immunity filed by the Justice Department, at the request of the State Department Legal Adviser. Under customary international law and longstanding U.S. practice, sitting heads of state or government are considered to have immunity from civil suits in U.S. courts.

Judge Buchwald's decision is also notable for her rejection of the plaintiff's argument that head of state immunity should not shield officials accused of *jus*

cogens violations.

Source: J. B. Bellinger, Lawfare blog (click to see the whole post and for a link to the decision)