Kate Provence Pictures: Online Symposium

Two weeks ago, French tabloid *Closer* published photos of Prince William and his wife Kate Middleton taking the sun on the terrasse of a Chateau in Provence this summer, including pictures of the latter appearing topless.

The Royal couple has since then initiated proceedings in France, both civil and criminal against the publisher of the tabloid. A French court has issued an injunction ordering the publisher to hand over all digital forms of the pictures and enjoining it from assigning them to any third party. However, pictures had already circulated and were published in Italy and Ireland. They have now been offered to Scandinavian tabloids which have announced that they will soon publish them. A Danish newspaper has announced a 16-page "topless Kate" supplement.

What does this case reveal about the private international law of privacy in Europe? Was the Duchess of Cambridge appropriately protected? Will she have to sue separately publishers in all European jurisdictions where the publication will occur? Should she have access to a global injunction allowing her to litigate in one single forum? At a time when the European lawmaker is considering adopting a European choice of law rule for violations of privacy and rights relating to personality, what does this case teach us?

In the days to come, several scholars will comment and share their views on the implications of the case.

- Muir Watt on Kate Provence Pictures
- Ubertazzi on Kate Provence Pictures
- Cordero on Kate Provence Pictures
- Von Hein on Kate Provence Pictures
- Dickinson on Kate Provence Pictures

Grusic on the Territorial Scope of Employment Legislation and Choice of Law

Ugljesa Grusic, Lecturer at University of Nottingham – School of Law and PhD Candidate at London School of Economics & Political Science (LSE), has posted an article on SSRN that deals with the Territorial Scope of Employment Legislation and Choice of Law. It has recently been published in the Modern Law Review and can be downloaded here. The abstract reads as follows:

> *Traditionally, the determination of the territorial scope of the statutory rights conferred by employment legislation forming part of English law has been regarded as an issue entirely disconnected from the choice of law process. Indeed, this view formed the basis of the key decision addressing the problem of territoriality, Lawson v Serco, decided by the House of Lords in 2006. After presenting the current state of the law with regard to the territorial scope of employment legislation, this article takes a critical look at Lawson v Serco. It is argued that the 'European' choice of law rules must have a greater importance for determining the territorial scope of employment legislation and, consequently, that the approach pursued in Lawson v Serco is no longer correct, if it ever was, and should not be followed in the future.*

Lüttringhaus on Uniform Terminology in European Private International Law

Jan D. Lüttringhaus, Senior Research Fellow at the Max Planck Institute for Comparative and International Private Law in Hamburg, has posted an article on

SSRN that deals with the uniform interpretation of the Rome I, Rome II and Brussels I Regulations ("Übergreifende Begrifflichkeiten im europäischen Zivilverfahrens- und Kollisionsrecht – Grund und Grenzen der rechtsaktsübergreifenden Auslegung dargestellt am Beispiel vertraglicher und außervertraglicher Schuldverhältnisse". The article is forthcoming in RabelsZ and can be downloaded here. The English abstract reads as follows:

> *Autonomous and interdependent interpretation is a valuable tool for completing and systematising the growing body of European private international law. Yet, the general presumption in favour of uniform interpretation of similar notions in the various European Regulations as set out in Recital (7) of both Rome I and Rome II is overly simplistic. Total uniformity cannot be achieved because provisions governing conflict of laws and jurisdiction often differ in both function and substance.*
>
> *Against this background, this paper analyses the rationale as well as the limits of autonomous and inter-instrumental interpretation. It demonstrates that uniform concepts may be developed in areas where the underlying motives behind European provisions on conflict of laws and jurisdiction coincide, e.g. in the context of consumer and employment contracts or direct claims under Rome II and Brussels I. These parallels pave the way for an autonomous understanding of the various notions used in the respective Regulations. However, interdependent interpretation finds its limits in teleological considerations as well as in the persisting functional differences between European instruments on conflict of laws and jurisdiction.*

Optional Common European Sales

Law, Private International Law and Uniform Sales Law (article)

Maud Piers (Professor at the Civil Law department, Ghent University), and Cedric Vanleenhove (Assistant and Ph.D Researcher at the Private International Law department, Ghent University), have published *Another Step Towards Harmonization in EU Contract Law: the Common European Sales Law* on SSRN. The article has also been published in *Contratto e Impresa / Europa* (Italy) 2012/1, 427-453 and the *Revista Trimestral de Direito Civil* (Brazil) 2012, 191-218. The abstract reads as follows:

> A Common European Contract Law has been in the pipeline for some time now and recently, another step in that direction was taken. On 11 October 2011, the European Commission issued a proposal for a Regulation that would establish such a European instrument. This Regulation aims to remedy a series of legal impediments that sellers and buyers face in their cross-border trade. With the 'Optional Common European Sales Law', the European Commission opts for a secondary regime that the Member States should adopt as part of their national law. This Common European Sales Law will not replace the existing national sales laws, but will exist autonomously, together with and next to the 27 national contract law systems already in place. This is the solution the Commission selected from the seven options listed in its Green Paper of 2010. In the 'Explanatory Memorandum' to the Proposal for a Regulation, the Commission explains that this was considered the most optimal route to achieve the intended objectives while still respecting the principles of subsidiarity and proportionality.

> The goal of this article is three-fold. First, to inform the reader of the Proposal for a Regulation on a Common European Sales Law and introduce its objective and applicability. Second, to examine whether the Optional Common European Sales Law, and the regime that the Proposal for a Regulation introduces, would create a legal environment that stimulates the intra-Community, cross-border trade in the most adequate manner. Third, to assess

the position of the Optional Common European Sales Law vis-à-vis the existing framework of private international law and uniform sales law.

This article consists of six parts. Under Title 1, the authors provide a brief introduction on the background and operation of the Common European Sales Law.

The authors then scrutinize this instrument more critically by raising a number of questions. A first question relates to the scope of this instrument (Title 2). A second question deals with the way in which parties may or should express their choice for the application of the Common European Sales Law (Title 3). A third question they briefly touch upon concerns the way in which the uniform application of the instrument will be safeguarded (Title 4).

The authors also examine how this new and unique instrument may coexist with the already established framework of private international law and uniform sales law. Under Title 5, they will more specifically reflect upon the position of the Common European Sales Law in relation to the regime of the Rome I Regulation. Under Title 6, they also look at how the proposed instrument corresponds with the rules of the CISG.

The authors conclude with a number of observations and recommendations with which they hope and intend to facilitate the drafting proceedings of the European legislators.

Download here.

Foreign State Immunity in Australia

The High Court of Australia has rejected Garuda's appeal against the finding that it was not immune from Australian jurisdiction as a "separate entity" of a foreign

state, namely Indonesia. The case arose from a proceeding brought by the Australian competition regulator (the ACCC) over alleged price-fixing in the air freight market to and from Australia. Our earlier posts on the case are here and here.

The decision turned on the meaning of the "commercial transaction" exception to state immunity in s 11 of the Foreign States Immunities Act 1985 (Cth), which may be of interest to British readers given the similar (but not identical) wording of s 3 of the State Immunity Act 1978 (UK).

Garuda argued that it did not fall within the "commercial transaction" exception either because the proceedings were not brought against it by a party to the transaction seeking private law relief; or because the transaction (the alleged price-fixing) was not contractual in nature.

The High Court rejected those arguments. The joint judgment of French CJ, Gummow, Hayne and Crennan JJ held that:

> *"The definition of "commercial transaction" fixes upon entry and engagement by the foreign State. It does not have any limiting terms which would restrict the immunity conferred by s 9 and s 22 to a proceeding instituted against the foreign State by a party to the commercial transaction in question. Further, it should be emphasised that the definition does not require that the activity be of a nature which the common law of Australia would characterise as contractual. The arrangements and understandings into which the ACCC alleges Garuda entered were dealings of a commercial, trading and business character, respecting the conduct of commercial airline freight services to Australia. The definition of a "commercial transaction" is satisfied." [at [42]]*

Heydon J agreed, and emphasised that the individual contracts with air freight clients were sufficient to engage the "commercial transaction" exception. "If a contract in contravention of [competition law] is capable of being a commercial transaction, non-contractual arrangements or understandings are capable of being "a commercial, trading … transaction … or a like activity"' within the meaning of s 11 [at [74].

P.T. Garuda Indonesia Ltd v Australian Competition & Consumer Commission [2012] HCA 33 (7 September 2012)

Teaching Private International Law On-Line: The Millenium Platform

The so-called Bologna Process has brought important adjustments to the Spanish universities (for the better?). Among the most visible changes we find a dramatic increase in the number of teaching hours, to the clear detriment of research; and the requirement to introduce methodological developments in the way we teach. We are witnessing a widespread use of "virtual classrooms", reconverting classroom teaching in on-line teaching. For those who have been trained, both as students and as teachers, in lectures with physical class attendance, managing the virtual resources and new technologies is not always evident. In the specific field of Private International Law guidance may be found in the teaching platform *Millenium*, an initiative originating in coordinated teaching innovation projects of the Universities of Zaragoza and Murcia. The platform has been designed exclusively for teaching Private International Law as a pioneering project in legal education, led and coordinated by professors Javier Carrascosa (University of Murcia) and Mª Pilar Diago (University of Zaragoza). *Millennium* is offered in open source in levels one and two, and it also has coverage in social networks like Twitter and Facebook. All those interested to participate in the fascinating world of legal education in private international law through new technologies are invited; the activities for this academic year (2012-2013) have already started.

For further information please contact:

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10th Jubilee PIL Conference in the Southeast Europe

The series of regional Southeast European private international law conferences is celebrating its 10th jubilee this year. There are four topics under the general conference title "**A Decade in the Development of Private International Law: 2003-2012**":

> *1. Private International Law of the European Union (rapporteur: Prof. Dr. Michael Bogdan, Faculty of Law Lund, Sweden);*
>
> *2. National Systems of Private International Law and Regional Cooperation (rapporteur: Prof. Dr. Christa Jessel-Holst, Max-Planck Institute of Comparative and International Private Law, Hamburg, Germany);*
>
> *3. The Hague Conventions on Private International Law (rapporteur: Mr. Hans van Loon, Secretary General of the Hague Conference on Private International Law, Netherlands);*
>
> *4. Comparative Private International Law (rapporteur: Prof. Dr. Kurt Siehr, Professor Emeritus at the Faculty of Law, Zürich, Switzerland, Free Research Associate at the Max-Planck Institute of Comparative and International Private Law, Hamburg, Germany).*

The conference will take place on 4th and 5th October 2012. Appropriately so, the hosting institution is the same one which hosted the first conference in the series, the Faculty of Law of the University of Nis in Serbia. Further details concerning the conference are accessible at the official conference website.

The conference preceding this one was announced here.

Deemed Service and the Hague Service Convention under German Law

See this post of Peter Bert on The Hague Service Convention, Default Judgments, and Deemed Service under German Law over at *Letters Blogatory*.

> *In a series of judgments on July 3 and July 17, 2012, the Federal Supreme Court (Bundesgerichtshof) has ruled on the compatibility of deemed service under German law with the Hague Service Convention. The Court held that only the first court document in a dispute must be served pursuant to the Hague Service Convention. Any subsequent service of court documents can be by post, in accordance with the provisions of domestic German law. Section 184 of the German Civil Code (ZPO), according to which "two weeks after it has been mailed, the document shall be deemed served," applies to service of such documents. In the cases before the Federal Supreme Court, default judgments were served by post, and the time period for filing a protest (Einspruch) was determined on the basis of deemed service.*

The rest of the post is here, including references to US cases and opinions on the issue.

ACT now?

The Attorney-General's Department of the Australian Government is currently advertising a number of vacancies for Legal Officers and Policy Officers, based in Canberra. These include one post at Legal Officer level in the Access to Justice

Division, responsible for legal and policy advice on family law, administrative law and civil procedure.

It is understood that the successful candidate will work in the Private International Law Section of the Division. The Section acts as the Central Authority for certain of the Hague Conventions, and carries out policy and case work in relation to cross-border family and civil law matters. Current projects include an assessment of the need for further harmonisation and development of rules of jurisdiction and applicable law in Australia, aimed at reducing the complexities of cross-border transactions and disputes . (Further details on this, and a link to the project website, will shortly be posted here.)

The closing date for applications is 28 September 2012.

Recognition of Chinese Arbitral Award in Finland

I've read this morning the post I reproduce below. I was wondering, do Finnish practitioners agree with the last comment?

Background

A Chinese construction company and a Finnish governmental entity were involved in arbitral proceedings in China. The proceedings were held under the applicable CIETAC rules in the Chinese language and the case was tried in accordance with the material laws of China as set forth in the contract between the parties. The award was rendered in December 2010 in favour of the Chinese company. However, the Finnish party refused to adhere to the award and the Chinese company was forced to commence a recognition and enforcement process in Finland. The Chinese company filed its application for recognition and enforcement of the arbitral award in October 2011 with the competent Finnish court. The Finnish party disputed the application and demanded its dismissal.

Helsinki District Court rendered a decision concerning the recognition and enforcement of the arbitral award in June 2012. The arbitral award was ordered to be recognised and enforced in Finland as requested by the Chinese company. As a result, the Finnish party was also found liable to compensate the Chinese company for all of its legal costs accrued in the Finnish recognition process.

The Finnish law concerning recognition and enforcement of arbitral awards is based on the New York Convention of 1958. Article V(2)(b) of the Convention concerning public policy as a ground for refusal of recognition has been implemented with only minor amendments in the Finnish Arbitration Act. Other impediments for recognition listed in the Convention are also adopted in the Finnish Act with only some slight differences. Therefore, international case law can be used as guidance in Finland and any Finnish cases can be exploited internationally.

Grounds for Objecting the Recognition and Enforcement

In the proceedings, the Finnish party pleaded that the arbitral tribunal was partial and neglected the Finnish entity's procedural rights. The Finnish party claimed that the arbitrators had unfairly advised the Chinese company during the proceedings and that the Finnish party's right and chance to present both oral and written evidence were, in certain respect, completely ignored. Furthermore, it was claimed that the award was based on wrong application of the Chinese law, both in material and procedural respect.

Accordingly, the Finnish party claimed that its right to due process was violated and therefore the arbitral award, was against the Finnish ordre public.
The Finnish party demanded an oral hearing at the Finnish court in order to prove its claims and appointed several witnesses to witness about the arbitral proceedings.

The Court Decision

The District Court of Helsinki dismissed the Finnish party's request for an oral hearing and rendered its decision in written proceedings. The court reasoned

that the award rendered by the arbitral tribunal was final and it would be inappropriate as well as against the Finnish Arbitration Act, CIETAC rules and the Convention of New York to organise an oral hearing. The court reasoned that an oral hearing would mean that the case would be retried in practice although there already was a final decision.

The court also reasoned that Article 8 of CIETAC rules (2005) requires a party to submit its objection promptly when it holds that the CIETAC rules have not been complied with or the party shall be deemed to have waived its right to object. As the Finnish party had not submitted any objections during the arbitral proceedings, the court reasoned that it had waived its right to do so later. The court also stated that an arbitral award can be deemed invalid only extraordinarily.

After rejecting the Finnish party's request for an oral hearing, the court briefly ruled that no grounds had been presented not to recognise and enforce the arbitral award in Finland. Therefore the court decided to accept the Chinese company's application and ordered the arbitral award to be recognised and enforced in Finland.

In conclusion, the recognition process of arbitral awards in Finland is very summary and despite a party's request, the courts are reluctant to organise any oral hearings. As a result, challenging an arbitral award in Finland is at least for the moment quite difficult.