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Founded in 2010, JIPITEC aims at providing a forum for in-depth legal analysis of current issues of intellectual property, information technology and E-commerce law with the main focus on European law. Its intention is to develop an information platform that allows authors and users to work closer together than is the case in classical law reviews. It has been conceived as an Open Access Journal, i.e., articles are available according to the terms and conditions of the Digital Peer Publishing Licenses, and in addition, authors may permit the use of their articles under a Creative Commons or other license. Its latest issue (2012, 3: click here to download), is devoted to PIL and intellectual property with articles from Paulius Jurcys, Benedetta Ubertazzi, Matulionyté Rita, Pedro de Miguel Asensio, and Axel Metzger.

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Brussels I Recast Set in Stone

At its 3207th meeting held in Brussels, the Council of the European Union has approved the recast of the Brussels I Regulation in the form settled with the European Parliament in a first reading agreement. The accompanying press release announces as follows:

> *The purpose of this regulation is to make the circulation of judgments in civil*

and commercial matters easier and faster within the Union, in line with the principle of mutual recognition and the Stockholm Programme guidelines.

The recast regulation will substantially simplify the system put in place by "Brussels I" as it will abolish exequatur, i.e. the procedure for the declaration of enforceability of a judgment in another member state. According to the new provisions, a judgment given in a member state will be recognised in the other member states without any specific procedure and, if enforceable in the member state of origin, will be enforceable in the other member states without any declaration of enforceability.

The recast regulation will provide that no national rules of jurisdiction may be applied any longer by member states in relation to consumers and employees domiciled outside the EU. Such uniform rules of jurisdiction will also apply in relation to parties domiciled outside the EU in situations where the courts of a member state have exclusive jurisdiction under the recast regulation or where such courts have had jurisdiction conferred on them by an agreement between the parties.

Another important change will be a rule on international lis pendens which will allow the courts of a member state, on a discretionary basis, to stay the proceedings and eventually dismiss the proceedings in situations where a court of a third state has already been seized either of proceedings between the same parties or of a related action at the time the EU court is seized (sic)."

Under Art. 81, the recast Regulation ("Brussels 1a"?) will apply from a date 24 months after its entry into force, being 20 days after its publication in the Official Journal. The new rules will not, therefore, apply until early 2015, by which time their potential impact will likely have been closely scrutinised on this site and elsewhere. The UK and Ireland are taking part in the adoption of the recast Regulation, which will also be applicable to Denmark under the terms of the 2005 Agreement between that country and the EC extending the Brussels I regime.

Russian Move for Keeping Judicial Business at Home

The *Financial Times* has reported yesterday about the willingness of Russian elite to repatriate Russian judicial business back home.

Russian oligarchs have notoriously been litigating essentially Russian cases in London in the last few years. The dispute between Roman Abramovich and Boris Beresovsky heard by the English High Court was the most famous of such cases.

In a recent judgment, one of Russia's supreme court annuled a clause whereby foreign parties could avoid being sued in Russia. It is reported that the clause was a "unilateral option clause". The court stated that it had nothing to do with protectionism, which was a separate issue. It probably is.

More interestingly, Russian higher judges have stated that they were willing to fight against unfair competition from other jurisdictions. They went as far as threatening to retaliate against parties participating to such proceedings abroad, and indeed against lawyers and judges aiding and abetting.

Russian Court Strikes Down Unilateral Option Jurisdiction Clauses

The *Financial Times* has reported yesterday on a recent judgment of the Russian Arbitration Court in *Sony v. RTC* in which the court struck down a unilateral option jurisdiction clause.

The case involved two commercial companies, Sony and Russian Telephone Company (RTC). The contract included a clause which forbad the Russian party to sue in Russia while, it seems, giving much more freedom to Sony

to bring proceedings. The Russian party nevertheless sued in a Russian court, which retained jurisdiction notwithstanding the jurisdiction clause.

The chief of staff of the Russian court is reported to have specifically referred to the judgment of the French supreme court which struck down a one way jurisdiction clause in September.

Update:

- A full report on the case is available here.
- See also the guest post of MM Sullivan and Maynard on the Russian judgment in today's *FT*

The Stream-of-Commerce Doctrine under McIntyre and the First Reactions of U.S. Courts to the U.S. Supreme Court's Ruling

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How the U.S. Supreme Court Has Relinquished Reciprocity in Jurisdiction in Cross-Border Products Liability Cases and Possible Future U.S. Federal Legislation on the Matter

Products liability is the area of law in which manufacturers, distributors, suppliers, retailers, and others who make products available to the public are held accountable for the injuries caused by those products. As Justice Kennedy points out at the outset of his opinion in *J. McIntyre Machinery, Ltd. v. Nicastro et. al.*, 131 S. Ct. 2780 (2011), whether a natural or legal person is subject to jurisdiction in a State is a question that frequently arises in products liability litigation. This question arises even with an out-of-forum defendant, i.e. despite the fact that the

defendant was not present in the State, either at the time of suit or at the time of the alleged injury, and did not consent to the exercise of jurisdiction. Before the U.S. Supreme Court's ruling in *McIntyre*, the issue of specific *in personam* jurisdiction of U.S. courts over out-of-forum defendants in products liability cases was addressed several times by the U.S. Supreme Court, and particularly in *International Shoe Company v. Washington*, 326 U.S. 310 (1945), *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) and *Asahi Metal Industry Co. v. Superior Court of California, Solano Cty*, 480 U.S. 102 (1987). With its decisions, the Court framed the scope of the Fourteenth Amendment's Due Process Clause and introduced the stream-of-commerce doctrine. As the Court held, in products liability cases over an out-of-forum defendant it is the defendant's purposeful availment that makes jurisdiction constitutionally proper and notably consistent with traditional notions of fair play and substantial justice; moreover, the Court held that the transmission of goods permits the exercise of jurisdiction only where the defendant targeted the forum. It is not enough that the defendant might have predicted that its goods would reach the forum State. However, in *Asahi*'s plurality opinion,the Court developed two separate branches in the stream-of-commerce analysis. Holding that in a products liability case, constitutionally proper jurisdiction may only be established over an out-of-forum defendant where the defendant purposefully availed himself of the market in the forum State; merely placing the product or its components into the stream of commerce that swept the products into the forum State was insufficient to meet the minimum contacts requirement. Justice O'Connor, joined by Chief Justice Rehnquist, and Justices Powell and Scalia, drafted what is commonly known as the "foreseeability plus" or "stream-of-commerce plus" theory of minimum contacts. In a concurring opinion Justice Brennan, joined by Justices White, Marshall, and Blackmun, appeared to accept the principle that sales of large quantities of the defendant's product in a U.S. State, even indirectly through the stream of commerce, would support jurisdiction in that State, depending on the nature and the quantity of those sales. However, in Justice Brennan's opinion, even simply placing a product into the stream of commerce with knowledge that the product will eventually be used in the forum State constitutes purposeful availment for jurisdictional purposes. Regardless of the fact that eventually the Justices agreed that a constitutionally proper specific *in personam* jurisdiction could not be established in *Asahi* over the out-of-forum defendant, inconsistency has developed among the lower courts in regards to how the foreseeability test should be applied.

By granting certiorari on the petition from the New Jersey Supreme Court in *J. McIntyre Machinery, Ltd. v. Nicastro et al.* (in which the N.J. Supreme Court found personal jurisdiction over the manufacturer), the U.S. Supreme Court acknowledged the need to tackle the question of the stream-of-commerce doctrine, and particularly the issues left open by the lack of a majority opinion in *Asahi*. Nonetheless, on June 27, 2011, a – once again – deeply divided U.S. Supreme Court handed down its opinion in *McIntyre*, holding that, because a machinery manufacturer never engaged in activities in New Jersey with the intent to invoke or benefit from the protection of the State's laws, New Jersey lacked personal jurisdiction over the company under the Due Process Clause. As the plurality opinion held, a foreign company that markets a product only to the United States generally, but does not purposefully direct its product to an individual State, is not subject to specific jurisdiction in the State where its product causes an injury.

Unfortunately, the *McIntyre* decision failed to provide a comprehensible framework for practitioners and lower courts faced with specific *in personam* jurisdiction questions. In a sharply fragmented plurality opinion – where six Justices voted to overrule the lower court's decision, but only four joined the lead opinion, and a dissenting opinion was filed by Justice Ginsburg, joined by Justices Sotomayor and Kagan – *McIntyre* marks a strong narrowing down of the stream-of-commerce doctrine. Justice Kennedy's plurality made clear that the stream of commerce, per se, does not support personal jurisdiction, and that something more is required. While the concurrence did not fully support Justice Kennedy's opinion, they too apparently rejected Justice Brennan's view in *Asahi* that a product is subject to jurisdiction for a products liability action, so long as the manufacturer can reasonably foresee that the distribution of its products through a nationwide system might lead to those products being sold in any of the fifty States. The U.S. Supreme Court's opinion in *McIntyre* undoubtedly results in a positive development for foreign companies and a truly unfavorable outcome for U.S. plaintiffs in products liability cases.

At the outset of her dissenting opinion in *McIntyre*, Justice Ginsburg provocatively asks:

> *A foreign industrialist seeks to develop a market in the United States for machines it manufactures. It hopes to derive substantial revenue from sales it makes to United States purchasers. Where in the United States buyers reside*

> *does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from the market it wishes to reach. But, all things considered, it prefers to avoid products liability litigation in the United States. To that end, it engages a U.S. distributor to ship its machines stateside. Has it succeeded in escaping personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user? Under this Court's pathmarking precedent in International Shoe Co. v. Washington, and subsequent decisions, one would expect the answer to be unequivocally, 'No.' But instead, six Justices of this Court, in divergent opinions, tell us that the manufacturer has avoided the jurisdiction of our State courts, except perhaps in States where its products are sold in sizeable quantities.*

In her dissent, Justice Ginsburg seems to suggest that under Article 5(3) of the Brussels I Regulation the courts of the United Kingdom would have had no hesitation in asserting their jurisdiction over the case, if J. McIntyre had been a U.S. manufacturer and Nicastro a UK resident and had the accident occurred in the United Kingdom. Based upon the fact that, pursuant to Article 2, the Brussels I Regulation applies to defendants domiciled in the EU and that pursuant to Article 4(1) when "the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State", the argument could be raised that the hypothetical suggested by Justice Ginsburg (where the defendant is a U.S. manufacturer, *i.e*. a non-EU domiciliary), would not fall in the scope of application of the Brussels I Regulation. As for England and Wales, the Civil Procedure Rules of England and Wales would apply, instead, and notably CPR 6.20(8), whereby the courts of England and Wales may assume jurisdiction in tort claims where the damage was sustained in England, or the damage sustained resulted from an act committed within England. Accordingly, the difference in the applicable statute does not weaken the final point made by Justice Ginsburg in her dissent. In the hypothetical put forward by Justice Ginsburg, the courts of England and Wales would indeed have had no hesitation in asserting their jurisdiction over the U.S. manufacturer.

Moreover, the European solution in this area of law goes even further. Article 3(1) and (2) of the EEC Directive 85/374/EEC on Product Liability provides:

> *Article 3*
>
> *1. 'Producer' means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.*
>
> *2. Without prejudice to the liability of the producer, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer.*

As a result of, respectively, Articles 2, 5 and 60 of the Brussels I Regulation, there will always be a defendant domiciled in the Internal Market: the importer deemed to be the producer.

Hence, the conclusion may be drawn that with *McIntyre* the U.S. Supreme Court has relinquished reciprocity in jurisdictional issues in cross-border torts and notably in products liability cases, to the disadvantage of United States plaintiffs who seek to acquire jurisdiction over foreign defendants who caused them an injury in the plaintiffs' home State.

The need for legislation in this area was recognized in 2009 by the U.S. Senate Committee on the Judiciary "Leveling the Playing Field and Protecting Americans," which subsequently introduced the Foreign Manufacturers Legal Accountability Act of 2009 (see here Trey Childress' post on this blog). This bill required foreign manufacturers of products imported into the United States to establish registered agents in the United States who are authorized to accept service of process against such manufacturers, and for other purposes. The Foreign Manufacturers Legal Accountability Act of 2010 was a re-introduction of the 2009 bill; but, again, it was not enacted. In 2011, the bill was re-introduced a third time as the Foreign Manufacturers Legal Accountability Act of 2011. The bill is assigned to a Congressional committee, which will now consider it before possibly sending it on to the House of Representatives and then to the Senate. Hopefully, the uncertainties that stem from the U.S. Supreme Court's ruling in *McIntyre* will be taken into due consideration by the U.S. legislators when addressing the possible enactment of this bill.

The First Reactions of U.S. Courts to McIntyre

As expected, objections and critiques are now being raised by U.S. courts against the U.S. Supreme Court's ruling. In *Weinberg et al. v. Grand Circle Travel LLC*, 2012 WL 4096611 (D.Mass.), the estate of a Florida resident, who died in a hot air balloon crash in the Serengeti, and the deceased's fiancée, who was also a Florida resident and who sustained severe bodily injuries in the crash, brought a negligence action against the travel agent (a Massachusetts company) and the Tanzanian company that operated the hot air balloon. The balloon company moved to dismiss for want of personal jurisdiction. In drawing its conclusions, and regretfully granting the motion to dismiss, the District Court of Massachusetts stated:

> *It seems unfair that the Serengeti defendants can reap the benefits of obtaining American business and not be subject to suit in our country. It is perhaps unfortunate that recent jurisprudence appears to "turn the clock back to the days before modern long-arm statutes when a [business], to avoid being hailed into court where a user is injured, need only Pilate-like wash its hands of a product by having [agents] market it.," Russell J. Weintraub, A Map Out of the Personal Jurisdiction Labyrinth, 28 U.C. Davis L.Rev. 531, 555 (1995), and that, in many circumstances, American consumers "may now have to litigate in distant fora – or abandon their claims altogether," Arthur R. Miller, Inaugural University Professorship Lecture: Are They Closing the Courthouse Doors? 13 (March 19, 2012) (criticizing the plurality opinion in J. McIntyre Mach. v. Nicastro), but this Court must follow the law as authoritatively declared.*

The fact that in *Weinberg* the accident occurred in the defendant's State (unlike in *McIntyre*, where the accident occurred in New Jersey, where the plaintiff was also resident), inevitably weakens the constitutional soundness of the District Court's jurisdictional power over the foreign defendant. Nonetheless, regardless of such a weakened power, it appears that the District Court – siding with Justice Ginsburg's dissent – felt the urge to emphasize the fact that foreign defendants can benefit from American business without the risk of being brought to court in the U.S., and suggested that this issue should be reviewed in order to ensure access to justice to U.S. plaintiffs in cross-border tort claims.

Finally, in *Surefire LLC v. Casual Home Wolrdwide, Inc.*, 2012 WL 2417313

(S.D.Cal.), the U.S. District Court for the Southern District of California refused to apply the U.S. Supreme Court's ruling in *McIntyre* in a patent infringement claim against an out-of-forum defendant, stating that a Supreme Court plurality opinion is not binding law.

One can only hope that it will not take a further quarter of a century for the U.S. Supreme Court to sort out – possibly with a stronger awareness of the ramifications of the assessment of jurisdiction in cross-border matters and especially with a view to international private relations – the confusing picture that the lack of a majority in *McIntyre* has left behind and with which courts and legal practitioners must cope.

My most sincere gratitude goes to Prof. Dr. Burkhard Hess for his very insightful inputs.

My appreciation also goes to Adrienne Lester-Fitje for kindly editing this text.

Any errors are, of course, mine.

Metz Registrar to Grant Apostille on PACS Again

This is the end of a 5 month drama: the registrar of the Court of Appeal of Metz is now granting apostille on PACS again.

The *Pacte Civil de Solidarité* (*PACS*) is the French civil partnership allowing couples, whether same sex or not, to conclude a civil union. It attracts a variety of benefits.

Metz is the capitale of *Lorraine*, and Lorraine benefits from the economy of Luxembourg. 75,000 French citizens commute everyday to Luxembourg, essentially from Lorraine. Some of them have concluded a PACS and are entitled to significant benefits under Luxembourg law if their PACS is recognized in the Grand Duchy. It seems that 150 couples seek recognition of a French PACS in

Luxembourg each year.

Luxembourg has always insisted, however, that it would only recognize French PACS if authentified by an apostille (for German or Belgian civil unions, authentification from the town council of origin is required instead). As a consequence, French potential beneficiaries would go to the Registrar of the Court of Appeal of Metz to receive the precious apostille.

Apostille or not apostille?

But was it right for Luxembourg to require an apostille for recognition purposes?

In France, some argued that the 17th Convention of the International Commission on Civil Status on the Exemption from Legalisation of Certain Records and Documents concluded in Athens in 1977 (convention CIEC n° 17), which is applicable both in France and in Luxembourg, suppressed any need for such authentification.

On July 1st, the Registrar of the Court of Appeal of Metz decided that it would not issue apostille with respect to PACS anymore.

In the five following months, 70 applications for recognition of French PACS were dismissed in Luxembourg for lack of apostille. A number of Luxembourg papers reported on the situation of the French PACS beneficiaries who were denied a variety of benefits.

A member of the Luxembourg parliament brought the issue to the attention of the Luxembourg Minister of Justice in an official question asked in Parliament. The Minister replied that the debate had wrongly focused on the 1977 Convention, while, he explained, the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents clearly applied to PACS and had only suppressed the requirement for legalisation, not for apostille.

Fortunately for PACS beneficiaries, the Metz Registrar resumed issuing apostille a few days ago. An official website of the Luxembourg government reports that the Luxembourg Ministry of Foreign Affairs sent an inquiry to French authorities, and that after communications between the Metz Registrar and the Luxembourg competent administrative authority, the Metz Registrar resumed its

former practice.

General Guidelines for the European Account Preservation Order

As already reported by Pietro Franzina at Aldricus, the Cyprus Presidency has transmitted to the Council of the European Union suggested general guidelines for future work on the European Account Preservation Order.

One of the critical issues raised by the text is the protection of the debtor. On this front, the Presidency proposes the following amendments:

> *(a) The application for a Preservation Order should contain an affirmation that the information provided by the creditor is true and complete, as well as a reminder that any deliberate false statements or omissions may lead to legal consequences under the law applicable.*
>
> *(b) In principle, only a court should be empowered to issue a Preservation Order.*
>
> *(c) The Preservation Order should be revoked without any intervention being required on the part of the debtor if the creditor fails to initiate proceedings on the substance of the matter within the time-limit specified in the proposed Regulation. Further discussions are needed to define the functioning of this mechanism (including the issue of time limits).*

Additionnally, it is suggested to explore further:

> *(a) The creditor should be liable to the debtor for any damage caused by any violation by him of his duties under the proposed Regulation, under circumstances and standards to be agreed later by the Member States.*

(b) When the creditor applies for a Preservation Order before initiating proceedings on the substance of his claim, he should, in principle, have to provide some kind of security to ensure adequate compensation to the debtor for damage caused by any violation by the creditor of his duties under the proposed Regulation. The court should have discretion to dispense with this requirement in situations where the provision of such security would be inappropriate or unnecessary.

Interested readers will find the text of the document here.

Wautelet on Multiple Nationalities and Choice of Law

Patrick Wautelet (Liège University) has posted L'Option de Loi et les Binationaux: Peut-On Dépasser le Conflit de Nationalités?(*Choice of Law in Family Relationships and Multiple Nationalities – A Case for a New Approach?*) on SSRN.

The English abstract reads:

In this paper I analyse the scope of the choice of law offered to parties in various family relationships (such as divorce, matrimonial contracts or alimony). In several jurisdictions and under rules of European private international law, parties may select which law will apply to their relationship. In most cases a choice may be made for the law of the nationality of the persons concerned. The question arises how such choice should be handled when the person concerned possesses several nationalities. After reviewing several possible readings, I suggest that the classical rules dealing with multiples nationalities should not be applied when the conflict of laws rules allow a party to select the applicable law.

Italian Book on Chinese Private International Law

Renzo Cavalieri and Pietro Franzina are the editors of this book on the Reform of Chinese Private International Law (*Il nuovo diritto internazionale privato della Repubblica Popolare cinese*).

The contributors are a number of Chinese and Italian scholars.

- Lu Song (China Foreign Affairs University, Beijing), *L'adozione della Legge cinese sul diritto applicabile ai rapporti civili con elementi di estraneità* [The Drafting Process and the Adoption of the Chinese Statute on the Law Applicable to Foreign-Related Civil Relations]
- Zhang Liying (China University of Political Science and Law, Beijing), *Alcune caratteristiche della legge cinese sul diritto applicabile ai rapporti civili con elementi di estraneità* [Some Features of the Chinese Statute on the Law Applicable to Foreign-Related Civil Relations]
- Pietro Franzina (University of Ferrara), *La codificazione cinese delle norme sui conflitti di leggi: elementi per un'analisi in chiave comparatistica* [The Chinese Codification of Conflict-of-Laws Rules: A Comparative Analysis]
- Long Weidi (Wuhan University and University of Groningen), *L'autonomia privata e le norme imperative nella prima codificazione cinese delle norme sui conflitti di leggi* [Party Autonomy and Mandatory Provisions in the First Chinese Codification of Conflict-of-Laws Rules]
- Renzo Cavalieri (Ca' Foscari University, Venice), *L'applicazione della legge straniera da parte dei tribunali della Repubblica Popolare Cinese* [The Application of Foreign Law by the Courts of the People's Republic of China]
- Sara D'Attoma (Ca' Foscari University, Venice), *Matrimonio e famiglia nel diritto internazionale privato della Repubblica Popolare Cinese* [Marriage and Family Relations in the Private International Law of the People's Republic of China]

- Anna Gardella (Università Cattolica del Sacro Cuore, Milan), *I diritti patrimoniali nella legge cinese di diritto internazionale privato: successioni e diritti reali* [Patrimonial Rights in the Chinese Statute of Private International Law: Successions and Rights In Rem]
- Laura Sempi (University of Salento), *La proprietà intellettuale nella nuova legge cinese sul diritto internazionale privato* [Intellectual Property in the New Chinese Statute on Private International Law].
- Luca G. Radicati di Brozolo (Università Cattolica del Sacro Cuore, Milan), *La legge cinese del 28 ottobre 2010 sui rapporti civili con elementi di estraneità: alcuni rilievi conclusivi* [The Chinese Statute of 28 October 2010 on Foreign-Related Civil Relations: Some Concluding Remarks].

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Kate Provence Pictures: the Remarkable Irish Remedy

In this era of increasing "approximation" of European laws, some readers might sometimes wonder whether choice of law is gradually losing relevance.

Well, it seems that, in the area of privacy and rights relating to personality, it really does not. In France, victims of privacy infringments can get damages and injunctions. In Ireland, these remedies are probably available, but it is also possible to get the editor of the newspaper suspended and indeed to shut down the newspaper all together.

The Irish Daily Star published in September pictures of the Duchess of Cambridge sunbathing in the South of France.

This did not make one of the owners of the Irish Daily Star happy at all, the BBC has just reported:

> *Media tycoon Richard Desmond, whose Northern and Shell group co-owns the*

paper, had threatened to shut it down.

The Dublin-based Irish Daily Star said in a statement: "As a result of the publication on 15 September 2012, issues arose with the shareholders of Independent Star Limited.

"Having considered those issues in tandem with Mr O'Kane, it is Mr O'Kane's decision to resign as editor of the Irish Daily Star, effective immediately."

Northern and Shell group co-owns the newspaper with the Irish-based Independent News and Media.

Independent News and Media said Mr O'Kane acted at all times in a highly professional and appropriate manner and in the best interests of the newspaper.

He followed all editorial policies and guidelines, it added.

Both co-owners had criticised the decision of Mr O'Kane to publish the pictures, although Independent News and Media said closing down the title would be disproportionate.

One wonders whether other Member states have even more spectacular remedies. Rumour has it that a cell in the Tower of London is being currently prepared in case a member of the English press might be tempted to follow a similar path. The English press being notoriously well behaved, however, it seems unlikely that this new Nuclear Weapon would ever be used.