What will the Supreme Court do with the Alien Tort Statute?

What a strange day at the Supreme Court. If you didn't know you were before a court of law, you might have thought you were a fly on the wall at a legislative bill drafting commission. Indeed, as the oral argument in the *Kiobel* case developed, it was pretty clear that the Court was focused on two choices. First, it could hold that the ATS does not apply extraterritorially and thus encourage Congressional action—as the Court did in the *Morrison v. National Australia Bank* case. Second, it could undertake some saving construction of the ATS and thus encourage another several years of ATS litigation and academic commentary. Whatever the Court decides, it is likely to encourage what I am calling in a current work in process (which I hope to have done in the next month or so) a "brave new world of transnational litigation" where federal, state, and foreign courts compete through their courts and law to adjudicate transnational cases.

To me, one of the most intriguing aspects of the oral argument was the focus on the interest of the United States in adjudicating the case. In the first couple of minutes, Justice Kennedy asked: "What effects that commenced in the United States or that are closely related to the United States exist between what happened here and what happened in Nigeria?" Why did he ask this? Because he, and others, are concerned that allowing a U.S. court to hear a case where there is little or no nexus to this country potentially allows the courts of other countries to hear cases against U.S. corporations where they too have little nexus to the case at bar. So, one series of concerns is directed at reciprocity—if the Court permits U.S. courts to hear these cases against foreign corporations, then foreign courts may hear these cases against U.S. corporations. The question is how might the Court leave open the ATS without subjecting U.S. corporations to expansive jurisdiction in other countries?

Another concern is foreign affairs, and there were a series of questions directed at whether the State Department could sort out some of these issues by requesting dismissal. I have looked at this issue in some detail in the context of international comity. It is not clear to me, however, based on the oral argument that this approach can get a majority.

So, if the Court is not inclined to apply the presumption against extraterritoriality in a robust way but is concerned about a broad construction of the ATS, what might it do? Justice Sotomayor took up the suggestion of an amicus brief filed by the European Commission to lay the ground work for a compromise position. As it had in *Sosa*, the Commission argued that ATS cases should be permitted only where the plaintiff has exhausted local and international legal remedies, or demonstrates that such remedies are unavailable or futile. The Commission defines "local" as "those states with a traditional jurisdictional nexus to the conduct," which would mean, I think, those jurisdictions where the conduct or injury occurred and the home jurisdiction of the defendant. It might also include the home jurisdiction of the plaintiff, if the plaintiff were not a domiciliary of any of these other places.

The key for this exhaustion requirement, as explored by Justice Kagan, is that it not only requires exhaustion of local remedies at the place of conduct or injury, as does the Torture Victims Protection Act, but also other potential fora that may have a closer connection to the case. So, in this case, exhaustion of remedies in at least Nigeria, the Netherlands, and the U.K. would be required before a U.S. court could hear the case. Armed with such an exhaustion requirement, a defendant could argue for dismissal in favor of various foreign fora.

Note, however, that exhaustion of remedies is generally an affirmative defense. Thus, if a defendant forgets to plead it or makes the decision to waive it, then the U.S. court would hear the case, as many TVPA cases illustrate. A defendant might make this tactical decision to waive where it determines that the U.S. court has the best law and procedure to litigate the case. So, the Court may need a secondary fix for these cases—perhaps forum non conveniens? Furthermore, requiring exhaustion means that many ATS-like cases will be filed in foreign courts, proceed to judgment, and then return as enforcement actions in the United States. So, there is some potential that these cases will return to U.S. courts, albeit under a constrained standard of review, down the road. As I examine in a forthcoming piece in the *Virginia Journal of International Law*, if there is a strong likelihood that the foreign judgment will be enforced in the United States, why should the U.S. court dismiss the case outright and tie its hands when the later enforcement proceeding is brought?

At bottom, a rewrite of the ATS by the Court has the potential to open up a Pandora's box of new issues for courts and commentators to deal with. Here is

just a taste of what the future may bring.

Kiobel Before the Supreme Court

Click here for the transcript of the oral argument.

Spanish Articles on Rome III and the Succession Regulation

Two Spanish Articles on Rome III and the Succession Regulation have recently been published in Diario La Ley:

- **La nueva regulación de la ley aplicable a la separación judicial y al divorcio: aplicación del Reglamento Roma III en España,** *Patricia Orejudo Prieto de los Mozos,* Profesora Titular de Derecho internacional privado (Universidad Complutense de Madrid), Diario La Ley, Nº 7913, Sección Tribuna, 31 July 2012
- **El nuevo reglamento europeo sobre sucesiones,** *Iván Heredia Cervantes*, Profesor Titular de Derecho internacional privado (Universidad Autónoma de Madrid), Diario La Ley, Nº 7933, Sección Tribuna, 28 Sepeptember 2012

Kleinheisterkamp on Dallah v Pakistan

Jan Kleinheisterkamp, Senior Lecturer in Law at the London School of Economics, has written an arcticle dealing with the much commented "Dallah v. Pakistan" case. The article has been published in *The Modern Law Review* 75 (2012), pp. 639-654. The abstract reads as follows:

> *This note analyses the reasoning of the English and French courts in Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan, in which an arbitral tribunal had accepted jurisdiction over the Government of Pakistan on the basis of an arbitration agreement concluded by a trust that was created, controlled, and then extinguished by the Government. It highlights the English courts' clarifications on the degree to which arbitral awards should benefit from the presumption of validity at the stage of enforcement and discusses how the cultural background of the English and French judges – and of the arbitrators – drove them to come to contradictory results. Moreover, it argues that both judges and arbitrators, owing to the way the parties framed their arguments, probably missed the proper solution of the case.*

Article IV, Paragraph 2 of the New York Convention on Arbitration

Confirming Switzerland's reputation as an arbitration-friendly forum, the Swiss Supreme Court has recently opted for a flexible and pragmatic interpretation of the New York Convention, admitting that in certain circumstances, a party seeking enforcement in Switzerland of an award issued in English may be exempt from producing a certified comprehensive translation of the entire arbitral award into one of the Swiss national languages.

Facts

A party initiated recognition and enforcement proceedings for an International Chamber of Commerce commercial arbitral award before the cantonal court in Switzerland. The party filed a certified German translation of the dispositive part of the award, together with a non-certified German translation of the cost section, but filed no comprehensive German translation of the award.

The cantonal court held that it had sufficient knowledge of English not to request a full translation of the award, especially since a German translation of the decision on costs, which constituted the subject matter of the dispute, had been produced. It thus dismissed any objection to enforcement. The cantonal court granted recognition and enforcement of the award.

The cantonal court's decision was challenged before the Supreme Court on the ground of infringement of the mandatory requirements of Article IV, Paragraph 2. The challenging party further contended that the examination of its public policy-based objection to enforcement (Article V, Paragraph 2(b)) required careful consideration of the entire award, which implied a full translation thereof.

Decision

The Supreme Court dismissed the challenge and considered that the partial translation produced by the requesting party was sufficient to comply with the formal requirements of Article IV, Paragraph 2.

The Supreme Court noted the lack of uniform judicial practice in Europe, as well as the absence of a clear converging scholarly view in favour of either a strict application of Article IV, Paragraph 2, or a more pragmatic approach to the issue.

Considering that the purpose of the New York Convention is to facilitate the recognition and enforcement of foreign arbitral awards, the Supreme Court held that it ought to be applied and construed in an enforcement-friendly manner, following a pragmatic, flexible and non-formalistic approach, including with respect to the formalistic requirements set forth in Article IV, Paragraph 2.

Source: http://www.internationallawoffice.com

Schmidt on the Effects of Foreign Legacies in Germany

Jan Peter Schmidt, 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 effects of foreign legacies in Germany. The article is forthcoming in RabelsZ and can be downloaded here. The English abstract reads as follows:

Regardless of its long tradition in Roman Law, the legatum per vindicationem, i.e. the legacy that transfers the ownership of an object directly from the testator to the legatee, was abolished in German law at the end of the 19th century with the creation of the German Civil Code (BGB). Ever since then a legatee acquires only a personal right against the heir for the transfer of title. In German private international law, there is a long-standing debate on whether a legatum per vindicationem created under foreign law (e.g. that of France) has to be recognised in case the object is located in Germany. The courts and most authors in legal literature argue that recognition would violate fundamental principles of the German law of property and therefore adapt the legatum per vindicationem to a legacy with obligatory effects.

The problem sketched out touches not only on the conflict between the lex hereditatis and the lex rei sitae, but also on the relationship between universal and singular succession upon death and the principle of Numerus clausus in property law. This article shows that the policy decisions of the law applicable to the succession must be respected as far as possible and not be overturned under the guise of alleged fundamental principles of the lex rei sitae.

This approach is also to be followed under the EU Regulation on Succession. For German law this means that a foreign legatum per vindicationem will have to be recognised in the future, in the same way as it should already be accepted at present under autonomous law.

Blogger Served by Chevron to Reveal Gmail Information

Kevin Jon Heller, a regular contributor to international law blog *opiniojuris*, was subpoenaed by Chevron to reveal information related to his Gmail account. Heller has often criticized Chevron's action in Ecuador on the blog.

The email that he received from Google and his thoughts about it are available here.

It is interesting to note that Chevron was asking for

> *nine years of IP logs, which would likely have given them three types of information: (1) the geographic location from which I sent each and every Gmail; (2) the kind of device I used to send each and every Gmail (phone, computer, iPad); and (3) the service provider (internet, mobile, etc.) I used to send each and every Gmail.*

So, who is next in the blogosphere? Heller states that 43 other persons, including other bloggers, were subpoenaed.

Does this go with the job?

Von Hein on Kate Provence Pictures

Jan von Hein is Professor of Private International Law and Comparative Law at the University of Trier.

The Duchess of Cambridge's topless photos
A boost for amending the Rome II Regulation?

As Gilles Cuniberti has already informed the readers of this blog, the Duchess of Cambridge recently obtained a victory in a lawsuit that she and her husband had filed at the Tribunal de Grande Instance de Nanterre in France (the full text of the court's judgment is available at http://www.legipresse.com). The royal couple had demanded both damages for and an injunction against the publication and further reproduction (both online and in print media) of photos made of the Duchess without her consent while she was sunbathing at the terrace of a private residence in France, which was surrounded by a large woody park, well shielded from intrusive gazes by passers-by or any other people. Rumour has it that the pictures may have been taken by a so-called "drone", i.e. a pilotless radio-controlled mini aircraft (on this aspect of the case, see the interesting comment by Dr. Claudia Kornmeier in the Legal Tribune Online). The Nanterre court based its judgment on article 9 of the French Code Civil without discussing issues of jurisdiction and choice of law. Nevertheless, the case has obvious international elements: While the defendant is a French publisher, the plaintiffs are habitually resident in the United Kingdom; moreover, the pictures were accessible via the internet across Europe. This raises the question what European choice of laws rules have to say about the proper law in this case. At the moment, the answer is: nothing, because the Rome II Regulation contains a deliberate carve-out for violations of personality rights (Article 1(2)(g) Rome II). The European Parliament, however, has adopted, on 10 May 2012, a resolution with recommendations to the Commission on the amendment of the Rome II Regulation. The Parliament's proposal reads as follows:

> *Article 5a Privacy and rights relating to personality*
>
> *1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, including defamation, shall be the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur.*
>
> *2. However, the law applicable shall be the law of the country in which the defendant is habitually resident if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated by paragraph 1.*

3. Where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law shall be applicable. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors.

4. The law applicable to the right of reply or equivalent measures and to any preventive measures or prohibitory injunctions against a publisher or broadcaster regarding the content of a publication or broadcast and regarding the violation of privacy or of rights relating to the personality resulting from the handling of personal data shall be the law of the country in which the publisher, broadcaster or handler has its habitual residence.

This most recent proposal, drafted by rapporteur Cecilia Wikström, combines various elements of suggested solutions that have been on the table before. It all started with the Commission's initial draft proposal of 2002 which recommended submitting violations of personality rights to the habitual residence of the victim. This proposal, although popular in academia, met with fierce resistance from the media lobby and was replaced in the Commission's final proposal of 2003 by a mosaic principle which would have led to the application of the laws at the various places of distribution, limited to the damage suffered by the victim in the respective country. The Parliament, in 2005, presented a proposal which was similar to paragraphs 1, 3 and 4 of its current article 5a; in the former version, however, the specific rule for publishers of printed matter and broadcasters was extended to internet publications as well. At the end of the day, a consensus could not be reached, and the whole question was excepted from the scope of the Rome II Regulation. In 2011, former rapporteur Diana Wallis made a new attempt at amending the Regulation, presenting a proposal which was influenced by a rule that I had suggested in a conflictoflaws.net online symposium before (see here). Miss Wallis' proposal read as follows:

Article 5a – Privacy and rights relating to personality

(1) Without prejudice to Article 4(2) and (3), the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation, shall be the law of the country in which the rights of the person seeking compensation for damage are, or are likely to be, directly and substantially affected. However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated by the first sentence.

(2) When the rights of the person seeking compensation for damage are, or are likely to be, affected in more than one country, and that person sues in the court of the domicile of the defendant, the claimant may instead choose to base his or her claim on the law of the court seised.

(3) The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.

(4) The law applicable under this Article may be derogated from by an agreement pursuant to Article 14.

For a full explanation of the reasons behind this proposal, I refer both to Miss Wallis' excellent working document of May 23, 2011 and to my contribution to the online symposium already mentioned. In sum, the basic ideas guiding this approach were the following: (1) Closely tracing the Court of Justice's Shevill jurisprudence, which relates to Article 5(3) Brussels I, for choice of law as well, i.e. applying the so-called mosaic principle (full damages available at the publisher's domicile, only partial damages at the various places of damages). Although the plaintiff was slightly favoured by giving him or her an option to choose the applicable law, this favour was mitigated by restricting the reach of the laws in force at the place(s) of damage, thus creating, on the whole, a balanced solution. (2) Anchoring the rule in the doctrinal framework of Rome II, i.e. avoiding an uncritical bias towards favouring the victim and reserving the application of general rules for torts (Articles 4(2) and (3), Article 14). (3) Online publications and conventional modes of publication (print media, broadcasting) should be treated alike for the sake of simplicity, clarity and to avoid unnecessary technicalities. (4) Sticking to the concept of a loi uniforme (Article 3 Rome II), i.e.

avoiding any distinction between EU and third state victims or defendants. (5) Denying the need for a specific public policy clause to protect the freedom of the press, but taking into account the legitimate need for foreseeability of the applicable law from the point of view of alleged tortfeasors.

However, the CJEU's jurisprudence on Article 5(3) Brussels I has evolved considerably since Shevill. In its eDate judgment (C-509/09 and C-161/10) of October 25, 2001 (see the pertinent post on this blog here), the Court modified its Shevill decisional rules for violations of personality rights committed via the Internet. For the latter group of cases, the plaintiff now has three options: (1) Suing at the defendant publisher's domicile for recovering his or her whole damage, (2) suing at his or her habitual residence as the presumptive centre of interests, again for recovering his or her whole damage (3) suing at the various places of damages; in this case, however, the plaintiff remains limited to recovering only the damage that he or she has suffered in the respective forum. From the Court's reasoning, it must be inferred that the judges intend to cling to the former Shevill rules, however, as far as violations of personality rights by conventional media (print, broadcasting) are concerned. This artificial distinction raises severe doubts: As the case of the Duchess of Cambridge's topless photos demonstrates, media content violating personality rights is, in our modern world, regularly distributed through various media channels simultaneously (print, broadcast, Internet, Twitter etc.). Differentiating between those channels creates the risk of contradictory decisions concerning the same substantive content: Pursuant to the eDate principles, the Duchess could have sued the French Magazine in the UK (her habitual residence) for recovering her whole damage with regard to the topless photos disseminated online, but would have been limited to the partial damage suffered in this forum with regard to the printed pictures. The CJEU justified such a distinction by two reasons: First of all, it referred to "the ubiquity of that [online] content. That content may be consulted instantly by an unlimited number of internet users throughout the world, irrespective of any intention on the part of the person who placed it in regard to its consultation beyond that person's Member State of establishment and outside of that person's control" (para. 45). Yet, this factual assumption is hard to square with the reality of the internet. Every user of youtube, for instance, knows that, instead of a video clip, sometimes a sign pops up which informs the viewer that the desired content is protected by copyright and not available in his or her country. Evidently, users are identified by their IP address, and their access is

restricted accordingly. Apart from that, several online media require a user's registration before allowing him or her to access the content provided. Thus, it is far from evident that a publisher should be deemed to have absolutely no control of where the content that it places online is accessed. "Moreover", the Court assessed, "it is not always possible, on a technical level, to quantify that distribution with certainty and accuracy in relation to a particular Member State or, therefore, to assess the damage caused exclusively within that Member State" (para. 46). Yet it is of course feasible to design websites in such a way that they record the number of times that they have been visited. Every page on SSRN, for example. displays the number of "abstract views". I am sure that every publisher's marketing department collects such data (at least my publishers do…). So why should it not be technically possible to quantify distribution of online content in a certain member state? If the victim does not know these figures, this is a problem of procedural rules on the disclosure of evidence by the defendant, but not an issue that should have an influence on the question of jurisdiction.

Be that as it may, any new conflicts rule will have to be tuned to the current jurisdictional framework established by the eDate decision. In this light, I will now turn to an analysis of the most recent proposal by the Parliament (PP 2012). It is obvious from a first glance that this draft as well contains a problematic differentiation between various channels of distribution: There is a general rule in Article 5a(1) PP 2012, but this paragraph is superseded by Article 5a(3) PP 2012 with regard to a violation caused by the publication of printed matter or by a broadcast. Contrary to the Parliament's proposal of 2005 (therein paragraph 1, subparagraph 3), the special rule on printed matter and broadcasts is no longer extended "mutatis mutandis" to the distribution of content via the Internet. From this change in the drafting, it must be inferred that the law applicable to violations of personality rights committed online will have to be determined by the general rule found in Article 5a(1) PP 2012. Unfortunately, however, paragraphs 1 and 3 of Article 5a PP 2012 lead to diametrically opposed results. Paragraph 1 refers to the "law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur". Thus, the place of acting (the publisher's domicile) is discarded in favour of a "centre of gravity" approach. In the context of the eDate decision, this centre of main interests of the victim will have to be located at his or her habitual residence. Contrary to the eDate decision, however, the mosaic principle (the Shevill approach) is no longer of even residual relevance. If one applied Article 5a(1) PP

2012 to the Duchess of Cambridge's topless photos which have been distributed online, this rule would lead to the application of English law. With regard to the photos distributed by the publication of printed matter, however, Article 5a(3) PP 2012 would lead to the application of the law of the "country to which the publication or broadcasting is principally directed, or if this is not apparent, the country in which editorial control is exercised". This rule points to the application of French law, because the photos were published in a French Magazine. It is highly debatable whether such an artificial and technical differentiation is justified by any convincing reasons of policy. Whereas Article 5a(1) PP 2012 favours the victim, Article 5a(3) PP 2012 favours the defendant, but why this should be so is far from evident.

Could there be a better solution? Burkhard Hess has proposed to simply apply the lex fori (either at the publisher's domicile or at the victim's habitual residence) to violations of personality rights and to discard the mosaic principle completely (Juristenzeitung 2012, p. 189, 192 et seq.). This approach certainly has the appeal of simplicity and procedural economy. Hess himself is ready to admit, however, that his proposal would lead to a dubious discrimination of third-state victims, who would be limited to the publisher's law to recover their damages from an EU tortfeasor. Thus, the concept of a loi uniforme would be sacrificed. The German Council for Private International Law, on the other hand, has proposed to use the victim's habitual residence as a general and single criterion of attachment (Junker, RIW 2010, p. 257, 259). This again has the virtues of simplicity and clarity. It has the drawback, however, that it would force the victim to rely on his or her own law even in cases in which the suit is brought in the courts of the defendant's domicile, thus making more expensive (and slowing down considerably) the passing of an injunction or the recovery of damages in this forum. A compromise solution could consist in returning to Diana Wallis' draft proposal of 2011 (supra), while at the same time accommodating the basic rationale of the eDate decision in its second paragraph, which would then read as follows:

> *(2) When the rights of the person seeking compensation for damage are, or are likely to be, affected in more than one country, and that person sues* ***either*** *in the court of the domicile of the defendant* ***or in the court of the plaintiff's habitual residence****, the claimant may instead choose to base his or her claim on the law of the court seised.*

Contrary to the eDate decision, however, this rule should apply regardless of the kind of media channel via which the content was distributed. It certainly tilts the scales towards the victim, but this can hardly be avoided after eDate. Comments welcome!

Clara Cordero on Kate Provence Pictures

Clara Cordero Alvarez teaches Private International Law in Madrid (Universidad Complutense). She has written her PhD on the protection of the right to honour, to personal privacy and image.

Nowadays, almost all the people around the world have already heard something about the new scandal that has arisen concerning the British royal family: the topless photos of Catherine, Duchess of Cambridge. The pictures – that were taken when she was privately sunbathing during a vacation in a chateau belonging to her husband's uncle in Provence- were initially spilled into public view by the French magazine Closer, but Kate´s private images were rapidly spread all over the world. New photos were published later by different tabloids in several Member States, such as the Italian gossip magazine Chi (owned by the same company that had previously published the pictures inFrance) and the potential harmful content was uploaded in Internet. This is another example where the violations of personality rights are connected with acts in which the alleged offender exercises the fundamental freedom of expression or information.

In this particular case, from a civil perspective, the claimants exclusively asked a French court to stop further publication of the pictures. Based on article 9 of the French Civil Code they were seeking an injunction barring any future publication – online or in print – by the French magazine of the Duchess´ topless

photographs. They neither have pushed for existing copies of the magazine to be withdrawn from sales points nor for financial damages. The court has partially accepted the claimants´ request distinguising between photos published on the internet and photos published in the hard copy of the tabloide. Regarding the damages already occurred, the court has barred the defendant from assigning or forwarding all digital forms of the pictures to any third party, ordering to surrender all of them to the plaintiffs. However, no action was taken regarding the potential future publication of these images by the defendant.

Although injunctions to halt or prevent damages are subject to Private Int´l Law general rules on non-contractual obligations, their specific notes in this field must be highlighted. The spatial scope of injunctions to halt or prevent damages –contained either in a provisional measure or in a final judgment on the merits- is linked to the basis on which the jurisdiction of the court of origin is founded. In this case, an unlimited jurisdiction based on the defendant's domicile -article 2BrusselsI Regulation- or on the place of origin –the establishment of the publisher, in accordance with article 5.3- (both of them available in this case), allows obtaining injunctions to halt or prevent damage in any Member State where these damages could be suffered. Nevertheless, in this case the ruling is limited to French jurisdiction. If the court had resorted to this possibility the main problem would be the eventual recognition and enforcement of the French judgment in each EU Member State in which the publication had been distributed and where the victim was known (for example, Italy, Ireland or Denmark where several tabloids have already published the controversial photos), apart from the potential circulation of these photos on the Internet.

The freedoms of speech and information tend to prevail in most legal systems over rights related to the protection of privacy provided that certain conditions are met. Notwithstanding this finding, the different balance between these fundamental rights determines that their respective scopes –and the consideration of certain acts as illegitimate- vary deeply from oneMemberStateto another. In this field, public policy plays a decisive role not only in the application of the provisions on choice of law but also on the recognition and enforcement of judgments. In particular, the recognition and enforcement of decisions–especially in international defamation cases- public policy has a particular relevance as the main cause to deny recognition and enforcement of a judgment (art. 34.1 Brussels I Regulation). Although within the EU the use of public policy not to recognise a

decision originating in another Member State should be exceptional in practice, since all Member States belong to the European Convention on Human Rights and they are all bound by the Charter of Fundamental Rights, such a possibility is still available. In fact, the Italian newspaper that published recently the new photographies has already expressed that, in accordance with the Italian law, the publication of these photographies does not imply a violation of the Duchess right to privacy and that they are protected by the freedom of press. This only an example, since the number of countries –Member and not Member of the EU- in which the photographies could be distributed using Internet, is potentially numerous.

This scenario would not improve if a European uniform rule of conflict of laws in this field is finally established (Rome II Regulation) without a parallel revision of the recognition and enforcement provisions of the Brussels I Regulation. Looking at the Proposal of December 2010 for the review of the Brussels I Regulation, the recognition and enforcement provisions establish that the judgments arising out of disputes concerning violations of privacy and rights relating to personality will be excluded from the abolition of exequatur and subject to a specific procedure of enforcement (public policy being kept as reason for the refusal of recognition). Hence, in the current circumstances, victims could only ensure the success of their actions in multiple States by bringing their claims before each national jurisdiction where damages occurred (*locus damni*) with limited jurisdiction (*Shevill*, latter confirmed by *eDate)*.

In conclusion, as long as the unification of conflict of laws rules in personal rights within the EU is pursued –in search for a common balance between the interests in conflict-, the exclusion of recognition and enforcement of the decisions in this field from Brussels I would seem clearly detrimental for victims. For the time being, the Duchess will therefore would have to require a large number of courts intervention to achieve a complete and effective protection.

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).