Muir Watt on Kate Provence Pictures

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

One might start with a few thoughts about the balance of equities in this case. Back at the *café du commerce* (or the ranch, or the street, or indeed anywhere where conventional wisdom takes shape), the debate is usually framed in moral terms, but remains inconclusive, neither side inspiring unmitigated sympathy. On the one hand, invasion of privacy of public figures by the gutter press (however glossy) can on no account be condoned. If the royal couple were stalked in a private place by prying *paparazzi*, then the immediate judicial confiscation of the pictures by the *juge des référés* was more than justified. Of course, there is clearly a regrettable voyeur-ism among the general public that supports a market for pictures of intimate royal doings. The real responsibility may lie therefore with those governments which have failed adequately to regulate journalistic practices. On the other hand (so the debate goes), the main source of legitimacy of devoting large amounts of public resources to fund the essentially decorative or representational activities of national figures abroad (whether royals, ambassadors or others) lies in the reassuring, inspiring or otherwise positive image thus projected, which in turn serves to divert attention from domestic

difficulties, to smooth angles in foreign policy etc. Surely the Duchess of Cambridge, who appears to have been driven from the start by a compelling desire to enter into this role, should have taken particular care to refrain from endangering the public image of niceness of which the British royal family places its hope for survival? Moreover, she can hardly claim not to be accustomed to the prying of the gutter press at home – although of course, in England, the medias may be more easily gagged (see *Trasfigura*), and have apparently agreed in this instance to remain sober, in the wake of last year's hacking scandals and in the shadow of pending regulation. And so on…

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

and which will undeniably contribute to bring glamour to the somewhat fuddy-duddy, or goody-goody, royal style?

What does all this tell us about the conflict of laws issue? Potentially, the choice of connecting factor entails significant distributional consequences in such a case. At present, outside the sway of Rome II, each forum makes its own policy choices in respect of conflict of law outcomes, and these probably balance each other out across the board in terms of winners and losers – at the price of transnational havoc on the way (through the risk of parallel proceedings and conflicting decisions, which Brussels I has encouraged with *Fiona Shevill*, although *Martinez* may be a significant improvement in this respect). If it were to be decided at some point that Rome II should cover privacy and personality issues, whatever consequences result from the choice of any given connecting factor would obviously be amplified through generalization; the risk of one-sidedness would then have to be dealt with. However, as illustrated by the continued failures of attempts to design an adequate regime in Rome II, any such scheme is highly complex. One might initially assume, say, that editors generally choose to set up in more permissive jurisdictions, whereas victims of alleged violations might more frequently issue from more protective cultures, which encourage higher expectations as to the protection of privacy or personality rights. Any clear-cut rule would therefore be likely to favor either the freedom of the press (country of origin principle, constantly lobbied by the medias from the outset), or conversely the right to privacy (place of harm or victim's habitual residence). However (and allowing for the switch from privacy to defamation), while the *Charlie Hebdo* case may conform to this pattern, the *Duchess of Cambridge* affair turns out to be (more or less) the reverse. To establish a better balance, therefore, exceptions must be carved out, whichever principle is chosen as a starting point. The place of injury might be said to be paramount, unless there are good reasons to derogate from it under, say, a foreseeability exception in the interest of the defendant newspaper. Alternatively, the country of origin principle may carry the day (as in the E-commerce directive and *Edate Advertising*), but then the public policy of the (more protective) forum may interfere to trump all. In terms of the semiotics of legal argument, this endless to-and-fro illustrates the phenomenon of "nesting" (Kennedy *op cit*, p357). Each argument carries with it its own oppositional twin. Chase a contrary principle out of the door in a hard case and inevitably, at some point in the course of implementation of its opposite, it will reappear through the window.

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

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

Outside the German domestic context, whatever the legal basis supporting the competing interests here, it would be difficult to imagine a very different outcome. My point, therefore, is merely that given the conflict of values involved, the choice of conflict rule – national or European, general principle or special rule, bright-line or flexible, with foreseeability clause or public policy – is for a significant part, indifferent in the end. The forum will be bound ultimately to a proportionality test, whatever the starting point. And in the end, no doubt, the way in which it implements such a test will depend on its own view of the equities in a specific case. Human rights law indubitably places constraints on adjudication, but it is of course largely context-sensitive and does not mandate one right answer. The economy of any choice of law rule, along with its exceptions, special refinements or escape clauses, is likely to reflect similar constraints – no more, no less.

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

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);*
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> *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.