First Issue of 2013's Journal du Droit International

The first issue of French *Journal du droit international* (*Clunet*) for 2013 was just released. It contains two articles addressing issues of private international law and several casenotes. A full table of content is available here.

In the first article, Marie-Eve Pancrazi (University of Aix Marseille) explores the regime of Foreign Assets in International Insolvency (*L'actif étranger du débiteur en procédure collective*). The English abstract reads:

> *Bankruptcy law has always tried to be pragmatic. It never eludes difficulties likely to arise from the scattering of companies' assets over several countries. Bankruptcy law takes up this challenge by proclaiming that domestic insolvency proceedings exercise their authority over all the debtor's assets, urbi et orbi, as it were. But is not this posture rather vainglorious? One would be inclined to think so, when considering national sovereignties. And yet, this cautious attitude needs to be put in perspective, since it is not valid within Europe, and since, in any case, no reaction from foreign jurisdictions could eclipse the obligations which such authority implies for the debtor, the creditors and the bodies of the procedure.*

The second article is an empirical study on exequatur in *la Grande Region*, i.e. Luxembourg and surrounding regions of France, Belgium and Germany. The study was conducted by a team of researchers of the university of Luxembourg who collected data on judgments rendered by courts of Arlon, Trier, Saarbrücken, Lorraine and Luxembourg.

> *The proposal to recast the Brussels I Regulation issued by the European Commission in December 2010 has launched a debate among European scholars and policy makers as to whether the exequatur procedure should be abolished within the European Union. While the European lawmaker has argued that the exequatur procedure is too costly, most scholars have responded that the public policy exception is a unique remedy against violations of human rights. Are the costs of the exequatur procedure really too high? This article contributes to this debate by offering an empirical analysis of the*

exequatur orders delivered by nine courts of four different member states based in the Grande Region surrounding Luxembourg.

Kiobel and the Question of Extraterritoriality (Paper)

With this work written in English (click here to access the document), Professor Zamora Cabot continues his already wide and prolific research on the *Alien Tort Claims Act* (hereinafter, ATCA) of the United States, and on its application. In this paper the author focuses on a decisive issue: the question of extraterritoriality that is being discussed in the *Kiobel* case. The author declares that the way this question is being presented -i.e., whether the United States is exceeding its competences vis-á-vis public international law from the point of view of extraterritoriality, related to imposition or legal imperialism- is completely wrong. The United States is not acting against the Law of Nations and the debate on this issue is actually unfounded. To support his opinion, after some previous considerations in the introductory Part of this work, Professor Zamora Cabot brings up several cases sustaining the aforementioned negative. Most specifically, in Section II, and just as an *aide-mémoire*, the author highlights three milestones in the field of international economic sanctions: Section 301 *et seq*. of the *United States Trade Act of 1974* and its application, the *Siberian Gas Pipeline* case and the renowned *Cuban Embargo* case which comprises some important elements, such as the *Helms-Burton Act*. In his opinion, based on a long personal research, the opponents to the ATCA are trying to place it into a controversial and troubled field, taking advantage of the negative memory sparked off by the real conflicts of extraterritoriality, as exemplified by the U.S. international sanctions regime.

In Section III, the author, in line with the original interpretation made by the United States Court of Appeals for the Second Circuit in its seminal case *Filártiga*, argues that the cases on the application of the ATCA are based on special torts, for which the mechanics and approaches of Private international law

do play a significant role. Evaluating the set of jurisdictional and legislative competences (jurisdiction to adjudicate and jurisdiction to prescribe) of the United States confronted with the Law of Nations, and regarding its practice, the author declares that those competences can be exercised without problems, just as the United States courts are repeatedly reflecting in their jurisprudence while deciding other kinds of international tort cases. This does not imply denying the special features of the ATCA cases, mainly defined by two facts: first, the need of contrasting the consistency with the *Jus Cogens* of the conducts underlying these cases,to confirm if the reservation of jurisdiction to adjudicate in favor of the federal courts as dictated by the ATCA is justified; second, the possibility for the federal courts to base their decisions *on federal common law*, to the extent that it has integrated the mandates of Public international law.But it is worth noting, in any case, that these special torts do not lead to exclusion, but to the opportunity to make Private international law and Public international law to cooperate, which always ennobles both of them.

Finally, in Section IV, Professor Zamora Cabot concludes his research with this idea: if the United States Supreme Court decides in the *Kiobel* case against the brilliant jurisprudence generated by the ATCA in that country, which is in favor of the Human Rights and which constitutes a magnificent example for the international community, the fight to protect them will continue. And it will do so before the State Courts inside the United States, as well as before many other courts across the length and breadth of the globe. Actually, the international community is becoming more sensitive and mindful, and numerous initiatives are being taken, especially regarding cases based on human rights violations committed by multinational corporations.

El Velo Integral y su Respuesta Jurídica en Democracias

Avanzadas Europeas (Monograph)

This monograph written by Dr. Victoria Camarero Suárez and published by Tirant lo Blanch deals with one of the key issues of the modern conflict of laws: the multicultural society. The main thesis of the author is that the use of the full veil should not be considered as a challenge for the values and principles of democratic societies, particularly of the Spanish society, but as an ideal opportunity to demonstrate a real commitment with those principles and values. The extensive use of the comparative law method and the thorough review of the most relevant bibliography must be highlighted; also, the exhaustive analysis of the case law of different European states' courts and of the European Court of Human Rights. Particular attention has been paid to crucial concepts such as public policy and the so-called "margin of appreciation"; in addition, other significant topics related to nationality and migration are dealt with, again through remarkable cases, like the controversial decision made by the Council of State of France (*Conseil d'état*) as regards the *Silmi* case. The balance and technical rigor with which the author has developed her research make of the monograph a pioneer study in the Spanish doctrine and abroad, at a time when the usual answers to sensitive legal issues having a great impact on minorities are based on ideological grounds and dogmatism.

Click here to access the table of contents.

Dr. Victoria Camarero is professor in the University Jaume I, Castellón (Spain).

Third Issue of 2012's Rivista di diritto internazionale privato e processuale

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

The third issue of 2012 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features three articles and four comments.

In the first article, *Claudio Consolo*, Professor of Law at the University of Padua, discusses the new proceedings for interim relief (with full cognizance) for the ascertainment of the effectiveness of foreign judgments in Italy after Legislative Decree No. 150/2011 ("Il nuovo rito sommario (a cognizione piena) per il giudizio di accertamento dell'efficacia delle sentenze straniere in Italia dopo il d.lgs. n. 150/2011"; in Italian).

In the second article, *Costanza Honorati*, Professor of Law at the University of Milano-Bicocca, offers a critical appraisal of provisional measures under the proposal for a recast of the Brussels I Regulation ("Provisional Measures and the Recast of Brussels I Regulation: A Missed Opportunity for a Better Ruling"; in English).

In the third article, *Theodor Schilling*, Professor of Law at the Humboldt University of Berlin, discusses the enforcement of foreign judgments in the case-law of the European Court of Human Rights ("The Enforcement of Foreign Judgments in the Jurisprudence of the European Court of Human Rights"; in English).

In addition to these articles, the following comments are also featured:

- *Lorenzo Ascanio* (Adjunct Professor at the University of Macerata), "Equivoci linguistici e insidie interpretative sul ripudio in Marocco" (Linguistic Ambiguities and Interpretative Pitfalls on Repudiation in Morocco; in Italian);
- *Lidia Sandrini* (Researcher at the University of Milan), "La tutela del creditore in pendenza del procedimento di exequatur nel regolamento Bruxelles I" (Creditor's Protection Pending the Exequatur Proceedings under the Brussels I Regulation; in Italian);
- *Giuseppe Serranò* (Research Fellow at the University of Milano-Bicocca), "Considerazioni in merito alla sentenza della Corte internazionale di giustizia nel caso relativo alle immunità giurisdizionali dello Stato" (Remarks on the Judgment of the International Court of Justice on Jurisdictional Immunities of the State; in Italian);

- *Cristina M. Mariottini* (Senior Researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law), "Statutory Ceilings on Damages under the Rome II Regulation: Shifting Boundaries in the Traditional Dichotomy between Substance and Procedure?" (in English).

Indexes and archives of the RDIPP since its establishment (1965) are available on the website of the Department of Italian and Supranational Public Law of the University of Milan.

Kinsch on Recent ECHR Cases Relating to PIL

Patrick Kinsch, who is a visiting professor at the University of Luxembourg and a member of the Luxembourg bar, has posted Private International Law Topics before the European Court of Human Rights – Selected Judgments and Decisions (2010-2011) on SSRN.

> *This is a presentation of the case law of the European Court of Human Rights in cases decided in 2010 and 2011 involving questions touching on private international law. The selection includes the following themes: Choice of law rules and the right to non-discrimination. – The right to recognition of a status acquired abroad. – International child abduction and the right to family life.*
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> *As a general matter, it is worth recalling that the task of the Court is not to review domestic law in abstracto, but to determine whether the manner in which it was applied to the applicant has infringed the Convention. This means that private international law cases that come before the Court will be dealt with in a refreshingly, or irritatingly – depending on the preferences of the reader –, undogmatic manner: the most subtle rules of private international law, and the most learned judgments of the national courts on the applicant's case, will be nothing more than facts, the effects of which on the applicant's human rights are the Court's sole concern.*

The paper was published in the last volume of the *Yearbook of Private International Law*.

By Royal Appointment: No Closer to an EU Private International Law Settlement?

Members of the British Royal Family and aristocracy have long contributed to the development of the law in England governing matters of personal privacy. As long ago as 1849, Prince Albert, the prince consort of Queen Victoria, resorted to the courts to prevent the publication of etchings and drawings by the Royal couple, including of their children (Prince Albert v Strange (1849) 2 De G & Sm 652). In a 1964 case, the Duchess of Argyll sued her formal husband, the 11th Duke, to prevent disclosure of the secrets of their marriage to national newspapers (Argyll v Argyll [1967] Ch. 302). In recent years, both Her Majesty the Queen and Prince Charles, Prince of Wales, have taken legal action in the English courts following the disclosure, or threatened disclosure, of personal information.

The recent flurry of judicial activity following the unwarranted invasion of the privacy of Her Royal Highness Princess William, Duchess of Cambridge, Countess of Strathearn and Baroness Carrickfergus (a.k.a. Mrs Mountbatten-Windsor) highlights the potential advantages for claimants of French privacy laws, both civil and criminal. No doubt, the Duchess and her husband wished to be seen to have taken prompt and effective action to protect their private lives in this high profile case *pour encourager les autres*. Their chosen avenues of recourse through the French courts would appear to have been designed to serve both as a swift, effective and public assertion of their rights (the civil injunction) and as a deterrent (the nascent criminal complaint).

As yet, the incident and its aftermath do not seem momentous from a private international law perspective. The prosecution by English nationals of a civil claim

in France against a French publisher, requiring the delivery up of photographs in the publisher's possession which are said to have resulted from an invasion of the claimant's privacy on French territory, would not appear to raise significant or complex issues of jurisdiction or applicable law.

Nevertheless, the case encourages reflection as to how well EU private international law deals with situations involving (alleged) violations of personal privacy, and other contributors to this symposium have raised a variety of issues.

Two introductory points may be noted before embarking on further discussion of this topic. First, and putting to one side the need to provide an autonomous definition in an EU context (see below), one must accept that the notion of a "violation of privacy" may in common usage cover a wide variety of fact situations, which are not necessarily to be treated alike. Taking the facts of the Duchess of Cambridge case as an example, the essence of any judicial complaint could rest upon the unauthorised (i) taking, (ii) transmission, (iii) receipt or (iv) publication of photographs or other media, with any transfer or publication occurring either (a) electronically (including via the internet) or (b) by other means. In other circumstances, a violation of personal privacy may be tantamount to a physical assault, as in the case of stalking, or to theft, as in the case of the removal of papers (the Pontiff's butler) or computer hacking. The matter may also have a commercial background, in particular if the claimant intended himself to exploit the disclosed information, as in the Douglas-Zeta Jones wedding case (Douglas v Hello! Limited [2007] UKHL 21).

Secondly, if it is determined that any or all of these situations do require special treatment within EU private international law instruments, one must recognise that that this will inevitably create problems of classification, which may be thought to compromise the underlying objectives of promoting legal certainty, and harmonious decision making, that these instruments outwardly pursue.

EU law has already shown itself to be adept in creating difficulties of this kind. In the Rome II Regulation, non-contractual obligations arising out of violations of privacy (and of personality rights) are presently excluded altogether (Art. 1(2)(g)), but the task of elaborating what wrongful conduct amounts or does not amount to a "violation of privacy" for this purpose has been left to the courts, and remains incomplete. Following criticism levelled at this exception, there have been (as Professor von Hein explains) various proposals for a new, special rule covering

the same ground as the current exclusion. If adopted, however, the new rule would not remove the classification problem, but merely transfer it from being one of the material scope of the Regulation to one of the material scope of a rule within the Regulation, and its separation from other rules (in particular, the general rule for tort/delict in Art. 4).

In relation to online activities, the eCommerce Directive raises many (as yet unresolved) issues as to the scope of its "country of origin" regulation, and the various exceptions and qualifications to that regime. The European Court's eDate Advertising / Martinez decision, rather than clearing the air, has only heightened the challenges that this Directive presents in the area of civil liability.

Last but not least, the eDate decision also has a separate jurisdictional aspect, on which the remainder of this comment will focus. The effect of this part of the Court's judgment is that a distinction must now be drawn for jurisdiction purposes between "an infringement of a personality right by means of the internet" (which the CJEU has told us merits a special, claimant-friendly interpretation of Art. 5(3)) and other cases (which remain subject to well-established principles governing the operation of that Article).

At first impression, these two points may seem to pull in different directions, the first supporting a more granular approach and the second tending towards a uniform solution. Both, however, provide reasons for caution when formulating special rules, whether of jurisdiction or applicable law, which treat violations of privacy and personality rights as a single, separate category. Further, the proliferation of different fact patterns within the realm of "violations of privacy" and analogies to other categories of wrongdoing (such as those highlighted above) may itself be thought to militate in favour of maintaining general rules such as Art. 5(3) of the Brussels I Regulation in its pre-eDate form and Art. 4 of the Rome II Regulation. The latter provision, in particular, may be argued to be sufficiently well-calibrated to deal with the range of new situations that would fall within its scope if the Art. 1(2)(g) exception were simply to be removed when the Regulation is reviewed.

In his contribution, Professor von Hein supports the adoption of a special rule for violations of privacy and personality rights. As part of his proposal, he favours giving claimants who sue in the courts of their own habitual residence or of the defendant's domicile a right to elect to apply the law of the forum to the entire

claim.

This element of Professor von Hein's proposal seeks to build upon the jurisdictional aspect of the CJEU's decision in eDate. This, however, is the law reform equivalent of constructing a house on swampland. The decision has strong claims to be the worst that the Court has ever delivered on the Brussels I regime, conflicting with long established principles central to the functioning of the Regulation and giving the impression either that the Court considers itself at liberty to make up new rules of jurisdiction on the spot or that there is a sacred text in its library in which the Regulation's rules are elaborated, but to which the outside world does not yet have access.

The decision may be criticised in no less than seven respects.

First, having expressed ubiquitous remarks about the ubiquitous nature of internet publications (para, 45), the Court observed (with good reason) that this causes difficulty in applying the criterion of "damage" as a factor connecting the tort to a given legal system for the purposes of Art. 5(3) of the Regulation: "the internet reduces the usefulness of the criterion relating to distribution in so far as the scope of the distribution of content placed online is in principle universal" (para. 46). In light of these conclusions, and given that the special rules of jurisdiction are intended to secure "a close link between the court and the action" and/or "to facilitate the sound administration of justice" (Recital (12); see also para. 40 of the eDate judgment), one might have expected that the Court would conclude that the concept of "harmful event" should be given a narrow reading in cases of this kind so as to *exclude* the criterion of damage as a connecting factor for jurisdiction purposes (for an analogous approach in a contractual context, see Case C-256/00, Besix, paras 32 and following). That conclusion would have been consistent with the dominant approach in the case law to the interpretation of exceptions to the general rule in Art. 2 (e.g. Case C-103/05, Reisch Montage, paras 22 and 23). The Court, however, chose a different path.

Secondly, the Court asserted that the connecting factors used within Art. 5(3) "must therefore be adapted in such a way that a person who has suffered an infringement of a personality right by means of the internet may bring an action in one forum in respect of all the damage caused" (para 48). This argument, which the Court uses as its launching pad for its novel "centre of gravity approach", is utterly devoid of merit. As the Court had acknowledged (para. 43),

the claimant in such a case already has at least one, and possibly, two options available for bringing an action in respect of all the damage caused in one Member State court. Most significantly within the framework of the Regulation, he/she may always bring an action in the Courts of the defendant's domicile (see Besix, para 50; Case C-420/97, Leathertex, para 41). Moreover, if the publication emanates from an establishment in a Member State other than that of the publisher's domicile, the claimant may bring an action in that Member State, as the place of the event giving rise to damage, (Case C-68/93, Shevill, paras 24-25; eDate, para. 42; Case C-523/10, Wintersteiger, paras 36-39). There was no need to create a new global connecting factor.

Thirdly, having concluded that the Regulation did not present the claimant with sufficient options for pursuing his claim, the Court proposed attributing full jurisdiction to "the court of the place where the victim has his centre of interests" on the ground that the impact of material placed online might best be assessed by that court (para. 48), sitting in a place which corresponds in general to the claimant's habitual residence (para. 49). In these two sentences, and without further explanation or justification, the Court repudiates its longstanding principle of avoiding interpretations of the rules of special jurisdiction in Art. 5 which favour the courts of the claimant's domicile in such a way as to undermine to an unacceptable degree the protection which Art. 2 affords to the defendant (e.g. Case C-364/93, Marinari, para. 13; Case C-51/97, Réunion Européenne, para. 29).

Fourthly, the Court considered that its proposed new ground of jurisdiction has the benefit of predictability for both parties, and that the publisher of harmful conduct will, at the time content is placed online (being, apparently, the relevant time for this purpose†), be in a position to know the centres of interests of the persons who are the subject of that content (para. 50). It is, however, extremely difficult to reconcile this confident statement with the Court's earlier recognition that "a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State" (para. 49). If predictability were the objective, it is hard to see how the Court could have done more to remove it.

Fifthly, given that a person's private life (and reputation) may have several centres, which change over time, it does not seem possible to say more than that

there *might* be a strong link between the facts of a particular case and the place where the claimant's centre of interests is held to lie. Equally, there might not. Take the case of a former Bundesliga footballer, with Polish nationality, who signs for an English club and moves to England. While visiting a German friend, he has rather too much to drink in a nightclub. The story is published, in German, on a German football website. Does the sound administration of justice support giving the English courts jurisdiction over the footballer's claim against the website publisher? In the Duchess of Cambridge's case, does the sound administration of justice support giving the English courts jurisdiction over the publication of photographs on a French, or Italian or Irish, website, particularly as the current position is that those courts would have no jurisdiction with respect to hard-copy publications by a newspaper or magazine under the same ownership? Given that the French, Italian or Irish courts would have global jurisdiction under Art. 2, it is suggested that the answer is a resounding "no".

Sixthly, having decried the utility, in internet cases, of the criterion of damage *á la Shevill*, the Court inexplicably chose to retain it as a connecting factor for jurisdiction purposes, allowing an action "in each Member State in the territory of which content placed online is or has been accessible" (para. 51). This begs the following question: if the new connecting factor is not a substitute for the "damage" limb of the Bier formulation, what then is it? In para. 48 of its judgment, the Court had seemed to suggest that the claimant's centre of interests was "*the place* in which the damage caused in the European Union by that infringement occurred", but this cannot be taken literally given that the Court returns three paragraphs later to the view that damage may occur in each Member State. The eDate variant of "damage" would seem to be a derivative or indirect form, of the kind that the Court had in its earlier case rejected as being a sufficient foundation for jurisdiction (Marinari, para. 14). If a label is needed, perhaps "damage-lite" would do the job?

Finally, the Court's assertion that its new rule corresponds to the objective of the sound administration of justice (para. 48) is also called into question by the second part of its judgment, interpreting the eCommerce Directive in a way that gives an essential role in cases falling within its scope to the law of the service provider's (i.e. the defendant's) country of origin. Although questions of jurisdiction and applicable law are distinct, and the Brussels I Regulation and eCommerce Directive pursue different objectives, the suitability of the courts of

the claimant's centre of interests is undermined by the need to take into account, in *all* cross-border cases, a foreign law. By contrast, jurisdiction and applicable law are much more likely to coincide where jurisdiction is vested in the courts of the defendant's domicile or establishment.

Any proposed new rule in the Rome II Regulation must also face the complexity which the eCommerce Directive introduces in this area, particularly after the eDate judgment. In an ideal world, the priority between the two instruments would be reversed, with the Directive being pruned to exclude its effect upon questions of civil liability and to enable a single instrument to govern questions of the law applicable to non-contractual obligations arising out of violations of privacy and personality rights. That, however, may be too much to hope for – once embedded, an EU legislative instrument is hard to dislodge.

Professor Muir-Watt makes the important point that, in this area, choice of law rules must yield, to a greater degree than in many other areas of civil law, to considerations of public policy and to the fundamental rights to which all Member States subscribe as parties to the European Convention (we will have to agree to disagree about the significance of the Charter of Fundamental Rights even if the Rome II Regulation were extended).

In cases such as that of the Duchess of Cambridge, there is of course a tension between (at least) two rights – that of the right to a private and family life (Art. 8) and that of freedom of expression (Art. 10). As recent cases before the European Court of Human Rights demonstrate (in particular, the two decisions involving Caroline, Princess of Monaco), the balance between them is not easy to strike, and the margin of appreciation will continue to allow different solutions to be adopted in different States. It may be questioned, however, whether this perilous balance is well served by a rule of election for applicable law which, coupled with claimant friendly rules of jurisdiction, enables the subject of a publication which is alleged to be defamatory or to violate privacy to choose to apply to the whole of his claim either the law of his country of habitual residence or the law of the defendant's domicile, whichever is the more favourable. This, unlike environmental damage (Rome II Regulation, Art. 7) is not an area where the policy factors favour an overwhelmingly pro-claimant approach.

Enough said. To offer a personal view in conclusion: the best way forward would be (1) to amend the Brussels I Regulation to reverse the eDate decision, (2)

to carve civil liability out of the eCommerce Directive, and (3) to remove the exception for violations of privacy and personality rights in Art. 1(2)(g) of the Rome II Regulation, leaving the general rule for tort/delict (Art. 4) to apply to such cases. At the same time, it seems more likely that my own daughter will marry into the Royal Family than that these three reforms will come to fruition. Princess Nell anyone?

† Straying into the detail of Professor von Hein's rule of election, one consequence of this would appear to be that the claimant's habitual residence and the defendant's domicile would be tested by reference to a different point in time (the latter being identified at the date of commencement of proceedings). This is not a reason in itself to reject the rule.

On Legal Pluralism and Multiculturality

Pluralismo y multiculturalidad: Tribunal arbitral musulmán y consejos islámicos (Sharia courts) en el Reino Unido is the title of the last paper by professor V. Camarero Suárez and professor F. Zamora Cabot, both from the University of Castellón. The paper, written in Spanish, has been published in the *Anuario de Derecho Eclesiástico del Estado*, 2012; professor Zamora will kindly send a pdf copy to those interested (just send him an email to this address: zamora@dpr.uji.es)

Here is the abstract:

> This study explores the interface between legal pluralism and multiculturality, taking as reference british muslim minority *nomoi* groups and the alternative means of solution of controversies embodied in the Sharia

Councils and the Muslim Arbitral Tribunal (MAT). However, before dealing with this matter in the United Kingdom, our study makes insights from a comparative point of view both in Canada and the United States, where, in spite of no minor similitudes, the status of the aforesaid means of alternative solution of controversies is, at present time, far more different, given a deeper degree of religious pluralism and more reliance in arbitration at large in the United States. These two factors, and the widely known pragmatism and tolerance of the United Kingdom result, although there have been rounds of controversy about it, in the acceptance in that Country of the workings of the Sharia Councils and the MAT, in the twilight of British law- in the first case- or taken under the rule of that law, covered by the Arbitration Act of 1996, in the case of the MAT. Conceived on these terms, we agree on the acceptation of these types of controversies's solutions – specially in case of the MAT- that we think are in full accordance with the modern State's duty to preserve minorities' rights and freedom of religion and beliefs as examples of a genuine commitment towards the fulfillment of Human Rights.

As for Shell…

Four Nigerian farmers, aided by the Dutch branch of Friends of the Earth, have managed to prosecute the multinational Shell for polluting the Niger Delta between 2004 and 2007. Today the case has been declared admissible by a civil court in The Hague, i.e., in a different country and continent to the alleged dumping, and could set a legal precedent. If the Dutch court indeed holds Shell responsible for not (properly) cleaning up oil pollution in Nigeria, the Anglo-Dutch company would face paying millions in compensation for victims; it should also heighten their safety standards abroad to macht those applied in Europe. What's more, the door to more transnational legal cases would be open. Victims of violations of environmental standards and human rights perpetrated by Western multinationals would be expected to seek satisfaction through a civil court in the Netherlands and possibly in other EU counties as well.

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).