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on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) - Work in progress

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Introduction

My original idea was simply to endeavour to fill the gap in the Rome II Regulation[1] which arose because the Council was unable to agree on the original Commission proposal or on the compromise solution put forward by Parliament in the course of the co-decision procedure on the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality. As part of the compromise which enabled the Regulation to be adopted, the Commission undertook to submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.[2] The resultant study[3] concluded on the following note: "the initiative on adopting a Directive on the subject we are dealing with could be a first step in the harmonisation or unification of national law at Community level. Moreover, this initiative is not presented as an alternative exclusive of others, as the adoption of a single set of conflict-of-law rules on the subject might well be, but instead it is complementary. In fact, a Directive that provides for a threshold of minima on the subject could serve the objective of reconciling positions in the future, facilitating the second stage adopting conflict-of-law rules acceptable to all parties involved, this time, based on the criteria of locus damni."

Before considering this idea further, however, I would briefly recapitulate on some of the many and manifold developments which have occurred in the recent period.

Conflict of laws.net on-line symposium

First, I would like to thank all those who have participated in the on-line symposium organised by conflict of laws.net. It would be nice to say that there was a measure of agreement among participants, which would make my job as rapporteur much easier, but in fact a wide range of views are expressed. This having been said, the contributions are thoughtful and thought-provoking and I am still in the process of digesting them, but I will say more of this later.

Freedom of the press and balancing fundamental rights and the wider world.

I consider that it is absolutely essential that we do not become too inward-looking in our reflections on this question. What has happened in the US as a reaction to the perceived threat to first-amendment rights from the English law of libel is just part of the picture. The internet and blogging are another. Then again, for a time at least, the developments in Iceland seemed to pose a major problem for policy-makers in Europe.

(a) Developments in Iceland

[1] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 1997 L 199, p. 40.
[2] Article 30(2) of the Regulation.
[3] Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, personality, JLS/2007/C4/028, Final Report.

On 16 June 2010, the Icelandic Parliament voted unanimously to create what were intended to be the strongest media freedom laws in the world. What is more, it seemed that Iceland intended these measures to have international impact, by creating a safe haven for publishers worldwide — and their servers.

The proposal, known as the Icelandic Modern Media Initiative, would require changes to Icelandic law to strengthen journalistic source protection ("whistleblowers"), freedom of speech, and government transparency. This would involve the non-observance of foreign judgments violating Icelandic protection of freedom of speech and creating the ability to file counter-proceedings in Iceland. It was also proposed to protect freedom of speech cases against the use of interlocutory measures and to make it possible to create virtual limited liability companies.

The proposal reflected Iceland's financial plight and the need to find new sources of revenue.

WikiLeaks, which a present channels all its material through Sweden, where press freedom is highly protected, has been involved in preparing the initiative. Indeed, some of the people involved in the drafting were part of that organisation, although some of them have now distanced themselves from it. The changes to the law remain to be drafted and it appeared that the Icelandic Ministry of Culture would be relying in part on volunteer legal experts and law students. Whereas it seemed that the legislative changes were to be adopted in stages, possibly ending in mid-2012, Government sources in Iceland now tend to downplay the likelihood of the draft becoming a reality.

(b) WikiLeaks

WikiLeaks constitutes a new phenomenon of global publication both outside the nation State legal framework and any professional journalistic or other code of conduct. It is potentially anarchic: however much we value freedom of information, there is every possibility that various WikiLeaks have put certain people, soldiers and informants in harm's way, injured reputations and in one case totally violated an author's copyright. It certainly has a power for good in so far as it may have indirectly helped start or encourage the "Arab spring" but is totally outside any legal system as we know it. Bizarrely, the organisation even claims to have some form of commercial ownership of the information leaked to it[1].

(c) Developments with regard to the UK Libel Bill

It is clear that, whilst they admit that there is a perceived problem - owing chiefly to the costs of going to law in England and Wales -, the UK government has struggled to find any evidence of "libel tourism" as has been alleged[2]. It must therefore be assumed that all the cases were settled merely on the threat of legal action as there is no supporting evidence in terms of the number, type of cases filed, etc.

[1] See, The New Statesman, 11.05.2011, The £12m question: how WikiLeaks gags its own staff, David Allen Green, which disclosed the "Confidentiality Agreement" by which the organisation purports to imposes a penalty of GBP 12,000,000 on any person breaching the agreement.

[2] But see Levi, Lili, The Problem of Trans-National Libel (March 25, 2011). University of Miami Legal Studies Research Paper No. 2011-11. Available at SSRN: http://ssrn.com/abstract=1795237. For a different view, see Lord Hoffmann, Fifth Dame Anne Ebsworth Memorial Lecture, The Libel Tourism Myth, http://www.indexoncensorship.org/2010/02/the-libel-tourism-myth/.

Be that as it may, the UK Libel Bill has been published as a consultative document on http://www.justice.gov.uk/consultations/docs/draft-defamation-bill-consultation.pdf. Here the main innovation (which stems from Lord Lester's Bill) is the requirement for substantial harm[1]. The Bill also introduces a new statutory defence of responsible publication on matters of public interest and statutory defences of truth and honest opinion. It also brings in a single publication rule to prevent an action from being brought in respect of the same material by the same publisher after the expiry of a one-year limitation period.

As far as private international law is concerned, s. 7 provides that where an action for defamation is brought against a person who is not domiciled in the UK, a Member State of the EU or a State which is a contracting party to the Lugano Convention, a court in England and Wales will not have jurisdiction unless it is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement. Whilst this is designed to improve the situation as far as "libel tourism" is concerned by reducing the possibilities for forum shopping, it has no bearing on the situation as far as Europe is concerned, since (obviously) it can do nothing about the Brussels I Regulation.

It is further noted that the Bill has nothing to say about the applicable law. Even though the notes to the bill refer to the importance of the relationship between Articles 10 and 8 of the ECHR, the Bill itself does not address this question.

At the same time, the controversy about "super injunctions" is concerned with that very relationship and, whilst Twitter has now entered the fray, Max Mosley has just lost his case in the Court of Human Rights[2] in which he had complained that the United Kingdom failed to impose a legal duty on newspapers to notify the subjects of intended publications in advance to give them an opportunity to prevent such publications by seeking an interim court injunction.

First thoughts following the debate so far

(a) As to the desirability of a conflicts rule for rights of the personality.

I still consider that a conflicts rule is necessary. The most interesting suggestion that I have seen so far is that published by Professor Jan von Hein on the conflict of laws.net website. It reads as follows:

Article 5a Rome II – 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 where 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

[1] s.1: A statement is not defamatory unless its publication has caused or is likely to cause substantial harm to the reputation of the claimant.
[2] Judgment of 10 May 2011 *Mosley* v. *United Kingdom* (application no. 48009/08).

liable is habitually resident if he or she could not reasonably foresee 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 this 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.

This proposal couples the basic principle that the law of the place where the damage occurs is paramount, but couples it with a foreseeability clause to take the legitimate interests of publishers into account. For the right of reply, it uses the criterion of the closest connection. Professor von Hein argues that this is advisable, since such relief should be granted swiftly and is interim in nature. There is also provision for party autonomy and the option of electing to apply the lex fori where the claimant elects to sue in the publisher's courts for damage sustained in more than one Member State.

Professor von Hein does not include a special provision on freedom of the press on the ground that the existing public policy clause in Article 26 is sufficient in itself. He points out, rightly, that victims have fundamental rights to be protected also.

This is not my final position, but I find Professor von Hein's approach balanced and reasonable.

(b) Jurisdiction

I note that, in its proposal for a recast regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I")[1], the Commission is proposing to retain *exequatur* for judgments in defamation cases in which an individual claims that rights relating to his personality or privacy have been violated by the media. According to the Commission, "These cases are particularly sensitive and Member States have adopted diverging approaches on how to ensure compliance with the various fundamental rights affected, such as human dignity, respect for private and family life, protection of personal data, freedom of expression and information. These divergences, in combination with the absence of a harmonised conflict rule at Union level (see Article 1(2)(g) of Regulation (EC) No 864/2007 ('Rome II')), make it premature to presume the required level of trust yet exists between legal systems in order move beyond the *status quo* on this matter. It therefore seems preferable to retain temporarily the *exequatur* procedure for judgments in defamation cases, pending greater clarity on either substantive and/or conflict rules in this area."

Now that Tadeusz Zwiefka has been appointed rapporteur for this file, I look forward to working closely with him on this aspect of Brussels I and receiving the benefit of his views on Rome II.

[1] COM(2010) 748 final.

A further development[1] is that Advocate General Pedro Cruz Villalon presented his opinion on 29 March 2011 in *eDate Advertising* (Case C-509/09) and *Martinez* (Case C-161/10). The opinion is not yet available in English (although it is available in a number of other languages from the Court's website).

The issue before the European Court of Justice in these cases is the application of private international law rules to internet websites, and more specifically in defamation cases.

Gilles Cuniberti summarises the opinion of the Advocate General as follows:

In *Fiona Shevill*, the ECJ ruled that the court of the place where the event giving rise to the damage occurred has jurisdiction to compensate the entirety of the loss, while the courts of the places where losses were suffered each have jurisdiction to compensate for the loss suffered in the relevant jurisdiction.

The Advocate General proposes to add a new head of jurisdiction for defamation cases. The court of the place of the "centre of gravity of the conflict" would also have jurisdiction to compensate for the entirety of the loss. The conflict would be the conflict between the freedom of information and privacy. According to Advocate General Cruz Villalon, this conflict would be located where the alleged victim would have the centre of his life and activities, if the media could have predicted that the information would be relevant in that jurisdiction. For the purpose of determining whether information should be considered as relevant in a given jurisdiction, the Advocate General offers to take into account a variety of factors such as the language used, the content of the information (allegations in respect of the life of an Austrian are relevant in Austria). The Advocate General insists, however, that the point would not be to determine the intention of the media, which would not be directly relevant for the purpose of Article 5(3) (as opposed to Article 15) of the Regulation.

(c) Alternative dispute resolution

I do feel that there is a need at European level for alternative dispute resolution in the area of freedom of the press and rights of the personality. The whole question of the cost of legal proceedings, which can be ruinous for publishers and rule out any access to justice for those who are not extremely well-heeled (and "ordinary people" can be defenceless against attacks in the media), is a matter of common knowledge and the introduction of ADR at European level could afford some improvement in the existing situation.

I note also that the Ministerial Foreword to the UK Libel Bill contains the following passage:

The draft Bill does not directly deal with issues relating to costs in defamation proceedings. However, a fundamental concern underlying these reforms is to simplify and clarify the law and procedures to help reduce the length of proceedings and the substantial costs that can arise. The proposals that the Government intends to take forward subject to the results of our recent consultation on Lord Justice Jackson's proposals for reform of civil litigation funding and costs including conditional fee agreements will have a significant impact on reducing costs in civil proceedings generally, and proposals which will shortly be put forward in relation to civil justice reform will encourage and promote alternative dispute resolution and settlement. In addition, this paper consults on proposals for a new procedure to resolve key issues in defamation proceedings at an early stage to encourage settlement and prevent

[1] I am indebted to Gilles Cuniberti posting on conflict of laws.net for this information.

protracted and costly litigation, and the draft Bill proposes the removal of the presumption in favour of jury trial in defamation cases, which currently acts as an impediment to the early resolution of issues, so that the courts will have a discretion to provide for jury trials where this is in the interests of justice.

The UK consultation paper further refers to the need for action to help resolve preliminary issues and the recent work of Sir Charles Gray and Alastair Brett, who have suggested that a voluntary scheme could be established to determine preliminary issues in media disputes. Their suggestion that such a scheme could be funded by defendant publishers and would involve determination of key issues by an expert legal panel through a binding arbitration or mediation process is worth following up at European level. Such a scheme could operate as an alternative to court proceedings for the parties to use to settle their dispute if they wished.

Lastly, I would note that the Nuffield Foundation has a project which aims to investigate the feasibility of establishing a forum and procedure for resolving libel claims outside the High Court[1]. It is hoped this will improve access to justice and clarify the relationship in English law between Articles 8 and 10 of the European Convention of Human Rights. I hope to make contact in the course of my work on Rome II and ADR to contact their working group of legal experts and academics who are overseeing a feasibility study considering the potential scope and status of such a forum, assessing domestic and international models and procedures including press courts, tribunals, small claims courts, commissioners and ombudsmen.

In this connection, I shall also be looking at the work being carried out by Lord Irvine of Lairg on a Pre-Action Protocol for Claims in Defamation, in order to see whether it can find some application at European level. I observe, in particular, that the protocol provides that "the parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the Claimant and Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs."

(d) As to the desirability and feasibility of an EU "Media Law"

It is clear from the above that there is a lot going on in the area of freedom of speech, the media and rights of the personality. It appears to me that it is becoming increasingly obvious that action internationally is the best way of bringing in some order and reasonableness (if not legal certainty) to the table. I strongly believe that it is imperative to initiate an international debate about the relationship between Articles 8 and 10 of the ECHR and it seems to me that the EU is the only forum in which such a debate can be meaningfully launched.

First of all, it would venture to say that, on the basis of the case-law of the Court of Justice on Article 114 TFEU (in particular the "tobacco advertising" case[2]), there would seem to be at least an arguable case that a legal basis exists for a Media Law, in order to deal with what

[1] http://www.nuffieldfoundation.org/alternative-dispute-resolution-defamation
[2] Case C-376/98 *Germany* v. *Parliament and Council* [2000] ECR I-8419.

must be regarded as more than the "abstract risk of obstacles to the exercise of fundamental freedoms".

Of course, this would be a complex and delicate exercise and would necessitate looking carefully at existing legislation including "television without frontiers" and the e-commerce directive[1]. Indeed, I consider that it is surely wrong that national legislators should be left trying to construe a piece of legislation, the e-commerce directive, that was not intended to deal with defamation in relation to the position of ISPs and blog hosters and the like[2].

Secondly, considering whether an EU media law is feasible would also require us to look at the whole issue of public policy and whether a common EU public policy could be constructed on the basis of the case-law of the Court of Human Rights, the Charter of Fundamental Rights and the constitutional traditions of the Member States.

Thirdly, even if harmonisation of the law of defamation is not possible, other avenues may exist whereby an EU media law could make life more comfortable and predictable for journalists and citizens. Certain of these are identified in Lili Levi's paper cited in footnote 1. I would suggest that ADR is another and could form part of such a law. One could conceive of a voluntary ADR system for cross-border defamation cases in the EU, backed up by incentives, or at least disincentives to litigating. Such a scheme could be designed so as to be cheap (or even free for the parties), thus dealing with the excessive cost of litigation (for both individuals and the not so well heeled media). A mix of academic and professional lawyers from different Member States as mediators could lead to the striking of rational and reasonable trade offs between rights which might ultimately result in the emergence of a European public policy for use say where cases involving social media on the internet are involved.

In any event, my intention is to spark further debate and coax ideas out of people. I shall shortly be preparing my draft report and would be grateful for contributions,

(e) A general thought

In weighing these general principles - freedom of speech and the right to a private life or to one's reputation - it is all too easy to forget that ordinary people may get involuntarily caught up in all this. It is not just a question of footballers, politicians and television personalities. It is important that the press and the new social networks should be able to be brought to

[1] Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17/7/2000, p. 1.

[2] Gilles Cuniberti has also drawn attention to the fact that the German supreme court for civil matters has put questions to the European Court on the impact of the e-commerce directive on choice of law. Although Article 1(4) of the Directive provides that it "does not establish additional rules on private international law", Article 3(2) provides: that "Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State." It has therefore long been wondered whether Article 3(2) did in fact establish a choice of law rule providing for the application of the law of the service provider (i.e. in defamation cases the law of the publisher) or, at the very least, whether Article 3(2) requires Member States to amend their choice of law rules insofar as they would stand against the European freedom of service. In the opinion of AG Cruz Villalon, the answer is no to each of these two questions. As Article 1(4) expressly provides, there is no hidden choice of law rule in the Directive. And Article 3(2) should not even be interpreted as requiring Member States to amend their own choice of law rules accordingly.

account in civil proceedings. Some people have succeeded in doing so, but the barriers, particularly in terms of the costs and stress of bringing legal proceedings, are huge. Anything that we can do at European level to alleviate this would be worthwhile.