Perreau-Saussine on Rome II and Defamation

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1. The "Rome II" Regulation deals with harmonized conflict-of-law rules relating to non contractual obligations. Unfortunately, it was left incomplete as, *inter alia*, no consensus was reached on the suitable applicable law to non-contractual obligations arising out of violations of privacy and personality rights. However, the Commission made it clear that the debate should be re-open (cf. article 30 of the Regulation), and this is precisely the object of Mrs Wallis's *Working Document on the Amendement of Regulation EC N°864/2007 on the law applicable to non-contractual obligations*, which offers an insightful overview on the matter

2. As the *Working Document* points out that "the unification of Member State laws on non-contractual obligations arising out of violations of privacy and personality rights is not a feasible option at the present stage of European legal integration" (p.7), this paper will focus on the harmonization of conflict-of-laws rules in this area of law, and, more precisely, on what could be the conflict of law rule suitably include in the "Rome II" EC Regulation. In line with the general principles of the "Rome II" Regulation, the *Working Document* recalls that the conflict-of-law rule must be "neutral", *i.e*. independent from all the parties involved's interests – which is said to be "very difficult" (p. 9) – and insure legal security and predictability. Moreover, the non-contractual obligations arising out of violations of privacy must put up with two specific problems, namely the "distance publication problem" – the place of the event giving rise to the damage and the place where the damage materialises are not the same – and the "multiple publications problem" – the damage materialises in several places.

In the *Working paper*, several connecting factors are discussed:

– the "place in which the tort took place" (1);

– the "place in which the damage materialises" (2);

– the “place of the publisher’s establishment” (3);

– a flexible rule based on choice of the applicable law either by the parties or the judge (4).

Scrutinizing both the *Working Document* and the *Mainstrat study*, it is clear that none of those four conflict-of-laws rule satisfies *per se* both the media organisation and the plaintiff’s interests. The media organisations tend to reject conflict-law rules n°1-2-4, blaming their lack of predictability for the defendant, and advocate the use of connecting factor n°3. If this option satisfies the need for predictability and insures that both the “distance publication problem” and the “multiple publications problem” can be sorted out, such a rule is obviously ill-balanced in favour of the defendant, and cannot be chosen for that very reason.

3. When analysing the process which led to the exclusion of the scope of the “Rome II” EC Regulation of non-contractual obligations arising out of violations of privacy and rights relating to the personality, one of the most striking feature is how soon a *special* conflict law rule has been discussed, without having really challenged the suitability of the *general* rule of article 4 (connecting factor n° 2). On the contrary, considering, first, the general structure of the “Rome II” Regulation and, next, the general trend of the *Working Document,* and specially the list of the “things which need to be determined” (displayed in page 8), it is clear that:

– the general rule of article 4 cannot be set aside unless it has been proven that is not suitable for a category of torts: there should be good reasons to deviate from that rule.

– as the preliminary provisions of the Regulation put it (point 16), the general rule fulfils the legitimate expectations of both the publisher and the person harmed. Moreover, article 4.3 matches the need for flexibility mentioned in the *Working Document* (p. 10).

– most media organisations find it impossible to apply the general rule without adapting it.

4. That said, one of the main question is: what are the changes that ought to be brought to the general rule of article 4 to make it acceptable and applicable to non-contractual obligations arising out of violations of privacy and rights relating

to the personality?

- **Article 4.1**:

Following the Commission and the European Parliament proposals, an exception to article 4.1 should be made for the right of reply, which should remain governed by the law of habitual residence of the defendant.

The *first objection* to the application of that rule to non-contractual obligations arising out of violations of privacy and rights relating to the personality is the "multiple publications problem": it can probably be solved by using the exception clause of article 4.3 which would allow the judge, in certain cases, to apply a single law to the whole case. The media's *second objection* to the general rule of article 4, concerns "the possibility of a journalist losing a case under a foreign law when the material published conforms with the law of their place of establishment". The *Working Document* wonders whether an "exception to the effect that a publisher should not be liable under a law that is contrary to the fundamental rights principles of its place of establishment" (p. 8) could be included. It is quite clear, however, that the drawbacks of such a rule would outweigh its advantages, for several reasons:

– first, some guidelines would have to be given as to what is a "fundamental rights principles", and, obviously, this expression must receive a narrow interpretation;

– secondly, it will need to decide which mechanism is at stake: does it mean that the forum will have to apply a foreign public policy rule (and in that case, it is not sure whether it will it be eager to enforce the public policy of a foreign state), or are those rules part of the "lois de police", in which case, the rule will be contrary to article 16 of the "Rome II" Regulation, which does not allow a judge to apply foreign mandatory rules…

– finally, can all the "laws of the place of establishment" be treated on the same level? One can understand that a mandatory rule of a Member state where the publisher is established, which shares some common principles with the forum (specially considering the principles settled by the European Convention of Human rights), could be applied by the forum, but what if the law of the place of establishment is very different from the law of the forum? What, specially, if the fundamental rights principles of that foreign country is contrary to the public policy of the forum? What if it appears to be contrary to a principle of EC law?

- **Article 4.2:**

The situation would be a journalist working in France sued for a publication in, say, England, concerning the privacy of a French-based 'celebrity'. No doubt that article 4.2 would satisfy the interest of both parties and should be applied in this field of law. Moreover, it would allow a French forum to take over the case and apply its own law, on the basis of both articles 2 and 5-3 of the "Brussels I" Regulation (even though the English tribunals would also have jurisdiction on the basis of article 5-3).

- **Article 4.3:**

The possibility of applying article 4 to non-contractual obligations arising out of violations of privacy and rights relating to the personality depends greatly on how the exception clause based on the "closest ties" is drafted and used. The uncertainty involved in a bare *closest ties* exception rule must be limited by giving clear guidelines to the judge as to how to use this exception clause in this field of law. As the *Working Document* puts it, the main drawbacks of the exception clause "could be overcome by including criteria upon which the test is to be based" (p. 8). The judge liberty could also be limited by the inclusion of a "forseeability clause", whereby a law of a country would be applied if the damage occurred in this country was foreseeable for the defendant.