Privacy and Personality Rights in the Rome II Regime – Not Again?

Andrew Dickinson is a practising solicitor and consultant to Clifford Chance LLP. He is the Visiting Fellow in Private International Law at the British Institute of International and Comparative Law and a Visiting Professor at the University of Sydney. The views expressed are those of the author.

Art. 1(2)(g) of the Rome II Regulation (Reg. (EC) No. 864/2007) excludes from its scope "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation". In its statement on the Regulation's review clause (Article 30), the Commission undertook as follows:

> *The Commission, following the invitation by the European Parliament and the Council in the frame of Article 30 of the 'Rome II' Regulation, will submit, not later than December 2008, 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. The Commission will take into consideration all aspects of the situation and take appropriate measures if necessary.*

The comparative study, prepared for the Commission by its contractors Mainstrat and supporting cast, was published in February 2009. We should not quibble about the two month delay – these review clause deadlines are not, after all, to be taken too seriously. No doubt, the Commission needed a little extra time to take into consideration "all aspects of the situation" and to identify any measures which it thought "necessary". Should its silence on the matter in the following 18 months be taken, therefore, as a tacit acknowledgement that nothing needs be done at this point in time? Or just that the Commission has more "important" fish to fry (such as 200-years of European legal tradition in the area of contract law – a discussion for another day)?

The European Parliament, for one, seems unhappy with the present state of affairs, and this should not come as a surprise. This aspect of the review clause was all that the Parliament had to show for the considerable efforts of its rapporteur, Diana Wallis MEP, and her colleagues on the JURI Committee during the discussions leading to the Rome II Regulation to broker a compromise

provision acceptable to the Member States, the media sector and other interested groups. Those efforts proved futile, doing little more than opening what the former Vice-President of the European Commission, Franco Frattini, described with a classical nod as *la boîte de Pandore* (an expression that appears more earthily in the English translation of the Parliamentary debate as "a can of worms").

In her Working Document, Diana Wallis acknowledges that "[t]he history of failed attempts to include violations of privacy and personality rights within the scope of the Rome II Regulation shows how difficult it is to find a consensus in this area". To illustrate those difficulties, it may be noted that at a meeting of the Council's Rome II committee in January 2006, no less than 13 different options for a rule prescribing the law applicable to non-contractual obligations arising from violations of privacy and personality rights were apparently on the table. The topic, with its close link to the fundamental human rights concerning the respect for private life and freedom of expression, inevitably attracts strong and disparate reactions from the media, from civil liberties groups, from those representing celebrities and other targets of "media intrusion" and from politicians of all colours. Inevitably, any proposal to create uniform European rules in this area, however narrow their scope or limited their effect, will cause a stir, with those involved using the considerable means of influence at their disposal to secure a result (both in the rule adopted and the policy direction) which is perceived to accommodate and further their interests. If the EU does act, one or more groups will claim that a victory has been secured for their own wider objectives (whether they be "freedom of the press", or "protection from media intrusion", or some other totemic principle). Against this background, the most likely outcome (as the Rome II Regulation demonstrates) is a stalemate, with the players pushing their pieces around the board without attempting to make a decisive move.

Why should the outcome be any different on this occasion, especially given the limited time that has elapsed since Rome II was adopted? Wouldn't we all be better off focussing our efforts on more pressing business, or just getting on with our holiday packing?

Mrs Wallis' Working Paper, although admirable in the breadth of its coverage, provides little cause for optimism. If anything, the debate appears to have regressed in the three years since the Regulation was adopted. Instead of the debate being centred upon a clearly focussed proposal, such as that contained in

Art. 7 of the European Parliament's Second Reading Proposal, we are left with a tentative preference for introducing a degree of flexibility (either judicial or party oriented) coupled with some form of foreseeability clause. Other options, such as reform of the related rules of jurisdiction, minimum standards of protection for privacy and personality rights and (gulp) "a unified code of non-contractual obligations, restricted to or including those arising out of violations of privacy and personality rights" are floated, with varying degrees of enthusiasm, but without any clear picture emerging as to what the problem(s) is/are at a European level and how these options may contribute to an overall "solution". Although concrete proposals will emerge, such as those identified on these pages by Professor von Hein, the debate is lacking in focus. If the European Parliament's JURI Committee has now retreated from its former, strongly held position into the legislative outback, what hope is there for its current initiative? Wouldn't it be better to wait, at least, until the full review of the Rome II Regulation by the Commission, scheduled – at least according to the black letter of the Regulation – for next year?

As the foregoing comments may suggest, my own strong preference would be to wait, and to maintain the *status quo* for the time being, for the following reasons:

1. In terms of the law applicable to non-contractual obligations arising out of cross-border publications, there is nothing in the Working Paper to suggest that the problem is a pressing one, or that immediate legislative intervention by the European Union is "necessary". "Libel tourism" may be a cause for concern in some quarters on both sides of the Atlantic, but the focus of that debate is on rules of jurisdiction and on the English substantive law of defamation, and the difficulties do appear to have been somewhat overstated. There is also, in my view, a real risk, by hasty legislative intervention, of exacerbating existing problems or creating new ones, for example by a rule of applicable law that might subject a local publication (for example, the Manningtree and Harwich Standard) to the privacy laws of a foreign country where the subject of an article is habitually resident and where the article (in hard copy or online form) has not been read except by the subject and his lawyers.
2. We are in the middle of the review of the Brussels I Regulation, whose rules (in contrast to those of the Rome II Regulation) do apply to cross-border disputes involving privacy and personality rights. That process,

which raises issues of major commercial importance (most obviously, the effectiveness of choice of court and arbitration provisions in commercial contracts) has already been drawn out, and we should not impose a further obstacle of requiring at the same time a mutually acceptable and viable solution to the question as to which law should apply in these cases. Either the Brussels I review should be allowed to proceed first, with questions concerning the law applicable to be considered thereafter, or the present subject area should be stripped out of the Brussels I review leaving private international law (and substantive law) aspects of privacy and personality rights to be considered separately, but on a firmer footing than the present debate.

3. It must be recognised that the rules of applicable law in the Rome II Regulation are not (and should not be) rule or outcome selecting. The privacy or defamation laws of the subject's country of habitual residence, or the country where the publisher exercises editorial control, or of any other country to which a connecting factor may point may be more or less favourable to each of the parties. Further, all of the Member States are parties to the European Convention on Human Rights and obliged to respect both private life (Art. 8) and freedom of expression (Art. 10) within the margins of appreciation allowed to them. Those requirements must be observed by all Member State courts and tribunals, in accordance with their own constitutional traditions, whether they are applying their own laws or the laws of a Member or non-Member State identified by the relevant local rule of applicable law. In terms of the legislative structure of the Rome II Regulation, they are a matter of public policy (Art. 26) and not of identifying the country whose law applies. It follows that the impact of rules of applicable law on these Convention rights would appear to be more practical than legal. Might a night editor at a newspaper hesitate to run a story about a foreign footballer's private life if he cannot be sure that it will not expose him and the publisher to a claim based on a "foreign law"? Might an impecunious European aristocrat step back from bringing legal action to protect his family's privacy if it requires him to pay expensive foreign lawyers in order to determine his rights? Moreover, the temptation (as in these examples) to focus on the mass media and on "celebrities" must also be resisted – the position of the web blogger or the office worker, whose rights are equally valuable, must also be considered. Any attempt to formulate a rule of applicable that balances the interests

of both parties, and facilitates the effective enforcement of Convention rights, must take account of these and other practical issues, but (despite the Mainstrat report) a sufficient evidential basis is presently lacking.

4. In view of the constitutional sensitivity of this area (acknowledged in a declaration at the time of the Treaty of Amsterdam*, although apparently not repeated upon adoption of the Lisbon Treaty), it is vital that the debate should be properly focussed and resourced from the outset. A review of the present state of the law must open up not only the Art. 1(2)(g) exception, but also the terms and effect of the eCommerce Directive and the "country of origin" principle that it is claimed to embody, as well as the interface between private international law rules and the Convention rights. The size, importance and complexity of this undertaking should not be underestimated, and the temptation for the legislator to jump in with two feet should be strongly resisted. Laudably, Diana Wallis has not made this error, but her Working Paper demonstrates how much remains to be done to identify the problem and assess potential solutions. Significant additional resources, both within and outside the European legislative machine, will be required in order to create even the potential for a satisfactory outcome to the process. In the present climate, it may be questioned whether this is the best use of scarce resources. Sensible and sensitive, pan-European legislation regulating private international law or other aspects of civil liability for violations of privacy and personality rights may be thought "desirable", but is it really necessary and, if so, is it achievable and at what cost?

* *Declaration on Article 73m of the Treaty establishing the European Community*

> *Measures adopted pursuant to Article 73m of the Treaty establishing the European Community shall not prevent any Member State from applying its constitutional rules relating to freedom of the press and freedom of expression in other media.*