Country of Origin Versus Country of Destination and the Need for Minimum Substantive Harmonisation

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The views that are displayed below are an extract from the opinion I had occasion to rule on the so-called Mainstrat's Study made for the Commission with my colleagues of the University of Basque Country.

The first question to be solved is whether we should continue with the process of harmonization initiated in the field of civil non-contractual obligations, taking it into the field of violations against personality rights. In case of a positive answer we have to decide which are the methods to be used; also, if harmonisation of conflict-of-laws is a workable and satisfactory solution.

Given the difficulties of reaching a formula acceptable to all involved, we should deliberate if it would be possible to develop neutral conflict rules that, being suitable for balancing the interests of the alleged author of the damage and the injured party, might thereby serve to achieve the desired consensus.

For a potential, satisfactory unified conflict-of-law rule, its workings must guarantee a sufficient level of protection for the participants in a cross-border situation, on the one hand, and that the judicial-political conditions of the market in which they operate effectively places them in a position that ensures an equal treatment for both of them, on the other hand. Only if it can be guaranteed that

neither party to the process can avoid these minimum protection standards in its actions can a unification of conflict-of-law rules be produced. For this it is necessary to ensure a balance and equality between the parties, their full knowledge of the rules of working of the market, and a high level of predictability of costs and benefits of the action or case that they are going to bring. Only under such conditions unification of conflict-of-law rules may be considered a valid tool for harmonisation.

The envisaged outcome could be based on the principle of country of origin (we follow Prof. M. Virgos Soriano and Prof. Garcimartin Alferez when they explain the meaning of "country of origin" in the European framework). The principle of country of origin starts from the assumption that market operators sell their products or render their services in accordance with their own terms. When it comes to opting for the law, they choose the most favourable one: usually, the law of their domicile or their establishment. In this way the risk and amount of costs inherent to cross-border actions fall on the other party -the buyer- who, knowing that in the event of dispute he will be subject to a foreign law, accepts it as part of the deal and is in a position to decide whether to proceed or not with the transaction. Translated into the field of infringements of personality rights or defamation by the media, this means that both parties -the injured one and the author of the injury-, should be on equal terms.

The principle of the country of origin poses difficulties when the situation of the participants is not the one that we have assumed, that is, if one of the parties is in a weaker position in relation to the other; also, when from the circumstances of the case it emerges that one of the parties does not have the same guarantees as the other – as it happens with non-contractual obligations. In this case, the party in the favourable position can succeed in choosing the applicable law considering only his/her own interests, taking advantage of the weakness or inequality of the other party: therefore, private international law designed to follow the country of origin principle fails. In the case of non-contractual obligations, if the injury's author can choose the law applicable to potential non-contractual damage caused by his/her actions, he/she will choose the one that is most favourable, even before the damage has occurred. That means that the injured party will have to face conditions set down even before he/she became a party. In such situations, the law of the country of origin must be abandoned and the law of the country of destination should be preferred.

The logic of the law of the country of destination presupposes a difference between the parties and re-establishes a balance by choosing the law that favours the weaker party. It thereby ensures that the other party must comply at least with the minimum requirements of the law most closely linked to the injured party. The unequal position in which the parties find themselves requires that the cost of the international nature of the case fall on the party that is in the most favourable position.

This is the option chosen by the Rome II Regulation: article 4 establishes the law of the place in which the direct injury occurs or might occur. In the context of infringements against personality rights or defamation caused by the media, the first draft of the Regulation also favoured this option by including them in article 6. Article 6 of the First Draft of the Regulation refers us back to the general rule of article 3 (current art. 4 RII). Following the logic of the law of the country of destination of article 4 R II, the law applicable will be that of the place in which the damage occurs: in cases of infringements of personality rights or defamation, the place where the injured person suffers the injury to their privacy or private life; or where the effects of this infringement are most severe. This will usually be the victim's place of residence. This does not exclude the possibility that this option will be complemented by an exception clause applicable to cases in which another law has closer links.

Amongst the advantages of the locus damni it may be highlighted that it usually coincides with the victim's residence, therefore constituting a close link for the victim which is also predictable for the person alleged to be responsible (usually the victim of defamation committed by the press will be known by the author of the damage, who can therefore easily determine where his/her residence is, and which law will be applicable in the event of dispute).

Not surprisingly, criticisms from the press associations to this conflict of law rule have been overwhelming. On the one hand, they cite the difficulty in knowing the victim's residence. Also, that it might happen that although the product complies with the laws in force in the country of the publisher's establishment, and no copy of it has been distributed in the country of residence of the victim, it may end up with the law of the victim's place of residence being applied. Nevertheless, this argument should not detain us because if no injury occurs in the victim's place of residence it does not matter which system of laws should apply.

If we follow the logic of the country of origin, as suggested by the press and the media, the costs of the international aspects of the case will be suffered by the victim of the action carried out by third parties: an action in which he/she has no negotiating capacity as he/she knows nothing about, and cannot foresee it since the person initiating the action is fully in command; the inequity of the arrangement is unquestionable. The victim cannot predict the result because he/she does not know where or whom the injury will come from. What's more: faced with this advantageous situation, the author can choose the country of origin that best suits him/her, and in which the regulations applicable to his/her activity will be the most favourable, without the victim having any saying or decision-making power.

Given the difficulty of breaking the stalemate on this aspect, another possibility is to try and put an end to the problems inherent in the existing substantive diversity by means of harmonisation through the establishment of a few common minimum principles. And we can say that the way has begun with the Judgement of the Court of 16 December 2008, case C-73/07.

European legislation could prevent inequalities or defects in the market by establishing minima where such deficiencies are present. If all legal systems provide a satisfactory level of protection to the victim of violations against personality rights, it would not be so attractive to the perpetrator to opportunistically seek the most favourable legal system, because all of them would have adhered to the substantive minima laid down at the community level.

As a matter of fact, unification of conflict rules should not be presented as an alternative option to substantive harmonisation of the legal systems of member states, but as an additional option. The most satisfactory solution for assuring a minimum level of concordance among legal systems to prevent problems connected with the diversity of legislation is to seek the appropriate combination between mechanisms for harmonisation of conflict-of-law rules and a certain amount of minimum substantive harmonisation. Frequently, the success of measures intended to harmonise conflict-of-law rules at the European level will depend on bringing substantive legislation and the general principles of national legal systems closer together. Thus it may be advisable in non-contractual matters to coordinate the unification of the conflict-of-law rules route with initiatives on partial harmonisation. Indeed, only harmonisation of the principles or substance of national law could justify use of the criterion of country of origin instead of the

country of destination, the natural conflict-of-law rule in non-contractual matters.