

EPC on The Link between Brussels I and Rome II in Cases Affecting the Media

Angela Mills Wade is the Executive Director of the European Publishers Council.

In this article we consider both Brussels I and Rome II as together they set rules to determine which Court should hear a case (Brussels I), and which country's Law should be applied (Rome II) when there is a cross-border conflict including in the case of Brussels I, cases brought against the media for defamation and violations of privacy.

At present, Rome II does not apply to the media, whereas Brussels I does. Even though the European Parliament passed a very sensible amendment from MEP Diana Wallis with the full support of a broad alliance of MEPs and stakeholders, Member States rejected the wording with the backing of the Commission. As a compromise, it was agreed that the media would be excluded from Rome II, a Study undertaken and the matter reviewed at a later time.

But media companies need the legal certainty when they publish - whether in print, on TV or online, that the editorial content complies with the law and any self-regulatory codes which apply where the final editorial decisions are taken. As more and more content is made available outside the country of first publication this legal certainty is ever more important in order to uphold the freedom of expression.

The current Brussels I regulation creates the very opposite - uncertainty and disproportionate risk of law suits in multiple jurisdictions. Plaintiffs often choose to sue publishers and journalists in a particular jurisdiction solely in order to benefit from the most favourable judicial proceedings as regards (a) the choice of the forum and consequently (b) the law that will apply to that case (determined by national conflict of law rules). This inevitably encourages a plaintiff to seek redress for the local damages in multiple countries and according to different laws.

Although both Regulations are now under review at EU level, there are no specific

references in the current consultation on Brussels I to the article which affects the media - 5(3). Therefore we take this opportunity to call for amendments to Brussels I to remove the uncertainty which 5(3) and the *Shevill* case have together created. This is because in all cross-border cases of defamation and privacy violations, the *jurisdiction* under Brussels I is the first matter to be settled, the absence of a rule to determine thereafter which country's *law* should apply is an issue for media companies when defending cases of defamation and violations of privacy in countries outside the place of editorial control because under Brussels I, media companies find themselves defending cases according to foreign laws, often in multiple jurisdictions (see Case ECJ C-68/93 *Shevill and Others* [1995] ECR I?415, paragraph 19 where the claimants were established in England, France and Belgium and the alleged libel was published in a French newspaper with a small circulation in England. The ECJ held that, in the case of a libel in the press:

- the place where the damage occurs is the place where the publication is distributed, when the victim is known in that place (paragraph 29) and
- the place of the event giving rise to the damage takes place is the country where the newspaper was produced (paragraph 24).

The ECJ also held in *Shevill* that as regards the assessment by the English court applying Article 5(3) of Brussels I of whether "damage" actually occurred or not, the national court should apply national rules provided that the result did not impair the effectiveness of the general objectives of the Regulation. Furthermore the ECJ held that where a libel causes damage in several different EU Member States, the victim may sue in any of the jurisdictions where the libel is published in respect of the damage suffered in that jurisdiction.

We need to find a solution which ideally spans the two instruments, removing the threat of forum shopping by claimants and increasing legal certainty for journalists and publishers which is vital as cross-border news reporting increases. Note that since the Regulations were first enacted:

- Content is more readily available outside the country of first publication because of internet use and therefore legal certainty is extremely important in order to uphold the freedom of expression. As well as the press online, increasingly TV programmes are cross-border via VOD as well as via satellite TV.

- There has been a discernible rise in case law and particularly in relation to electronic publications and dissemination of online news on various platforms. The plaintiff can easily claim the competence of any court and applicable law since the information is accessible from any country online.
- There has been a general misperception that this problem of forum shopping is only with/in UK whereas in reality there are many examples from other countries of manifest abuse of the current system.

Of course, the EPC does not question or wish to undermine the ability of any individual's access to justice but we feel we must point out that the current combination of forum shopping and applicable law provides an unbalanced advantage to the plaintiff and therefore directly prejudices editorial independence and press freedom in the different states, often leading to journalists self-censoring, simply to avoid *the possibility of* litigation.

The most proportionate solution would be to remove the media from the scope of article 5(3) which, together with *Shevill* gives rise to legal uncertainty and the dangers of both forum shopping and multiple actions. Instead the media should be subject to the general rule in Article 2.1 which allows plaintiffs to bring cases in their home country for cross border claims of defamation and privacy violations.

On the grounds that Brussels I gives the plaintiff full rights in determining which Court should hear their claim, given that this may not be in the country of the place of editorial control of the publication, we argue that a balanced proportionate approach should mean that any rule determining which laws should apply in such cross-border cases should be the law in the country where editorial decisions were taken.