German Federal Court of Justice Rules on International Jurisdiction under Articles 15, 16 and 22 of the Brussels I-Regulation

In a judgment of 23 October 2012, the German Federal Court of Justice *(Bundesgerichtshof)* had to deal with the question of whether German courts have jurisdiction over claims of a consumer against a tour operator arising out of a tenancy of a holiday house abroad. Referring to Articles 15 (1) (c) and 16 (1) of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: Brussels I-Regulation) the court answered the question in the affirmative.

The facts of the case were as follows: The plaintiffs, a German couple domiciled in Schwerin (Germany), rented from the defendant, a Danish tour operator, a holiday house located in Belgium and belonging to a third party. Upon arrival, the plaintiffs realized that the house suffered from substantial defects. When the defendant failed to fix the, the plaintiffs cut their vacation short and returned to Germany.

Back home, the plaintiffs sued the defendant for reimbursement of the travel price and compensation for wasted holiday time in Local Court *(Amtsgericht)* of Schwerin. They argued that under Article 16 (1) of the Brussels I-Regulation German courts were competent to hear the case since the contract in question was a consumer contract in the sense of Article 15 (1) lit. c) of the Brussels I-Regulation. The defendant, in contrast, argued that German courts did not have jurisdiction. Pointing to Article 22 of the Brussels I-Regulation, he argued that in proceedings which have as their object tenancies of immovable property the courts of the Member State in which the property was situated had exclusive jurisdiction.

The Local Court of Schwerin – and later the Appellate Court *(Landgericht)* of Schwerin – followed the plaintiffs' view and ordered the defendant to pay the

requested sums. The defendant, therefore, appealed to Federal Court of Justice *(Bundesgerichtshof)* which, however, confirmed the lower courts' decisions. A consumer, who rented a holiday house belonging to a third party from a commercial tour operator, could rely on Article 16 of the Brussels I-Regulation and bring proceedings in the courts of his home country. Article 22 No. 1 of the Brussels I-Regulation, in contrast, did not apply. According to the case law of the Court of Justice of the European Union, a provision, which compelled a party to bring an action in a member state in which neither party was domiciled, had to be interpreted narrowly. Application of Article 22 No. 1 of the Brussels I-Regulation, therefore, was confined to disputes between the owner and the tenant of immovable property. In contrast, the provision did not apply to disputes between a tour operator and a consumer.

The full decision will soon be available on the website of the Federal Court of Justice (in German).

2012 Clarendon Law Lecture

In November 2012 Oxford University Press and the Faculty of Law of the University of Oxford will host the 2012 Clarendon Law Lectures to be delivered by *Lord Collins of Mapesbury.* Focusing on "Justiciability in National and International Law" the lectures will take place in the Gulbenkian Lecture Theatre, St. Cross Building, St. Cross Road, Oxford OX1 3UL. Further information are available on the Oxford Faculty of Law Homepage.

The programme reads as follows:

- LECTURE ONE, Thursday, 8 November 2012, 17:00-18:00 (followed by a drinks reception)
- LECTURE TWO, Thursday, 15 November 2012, 17:00-18:30
- LECTURE THREE, Thursday, 22 November 2012, 17:30-18:30

Anuario Español de Derecho Internacional Privado, 2011

A new volume of the *Anuario Español de Derecho Internacional Privado* (vol. 2011) has just been released. It includes a number of unique studies, most of which are in-depth developments of the ideas briefly presented both by Spanish and foreign scholars at the International Seminar on Private International Law, held last March at the Universidad Complutense de Madrid. Just a taste of the contributions (clik here for the whole summary):

Sixto A. Sánchez Lorenzo, **La Propuesta de Reglamento relativo a una normativa común de compraventa europea y el Derecho internacional privado**, pp. 35–61.

Sabine Corneloup, **Roma II y el Derecho de los mercados financieros: el ejemplo de los daños causados por la violación de las obligaciones de información**, pp. 63–87.

Juan José Álvarez Rubio, **Jurisdicción, competente y ley aplicable en materia de difamación y protección de los derechos de la personalidad**, pp. 89–118.

Pilar Jiménez Blanco, **Acciones de cesación de actividades ilícitas transfronterizas**, pp. 119–146.

Ángel Espiniella Menéndez, **Problemas de ley aplicable a la responsabilidad por actos ajenos**, pp. 147–166.

Santiago Álvarez González, **Las legítimas en el Reglamento sobre sucesiones y testamentos**, pp. 369–406.

Eva Inés Obergfell, **La libre elección de la ley aplicable en el Derecho internacional privado de sucesiones: una perspectiva desde Alemania,** pp. 407–414.

Iván Heredia Cervantes, ***Lex successionis* y *lex rei sitae* en el Reglamento de sucesiones**, pp. 415–445.

Davì, Le renvoi en droit international privé contemporain (Recueil des cours, vol. 352)

Prof. *Angelo Davì* (University of Rome "La Sapienza") has recently published in the *Recueil des cours* (vol. 352) the course on *renvoi* held at the Hague Academy of International Law: "Le renvoi en droit international privé contemporain".

An English presentation has been kindly provided by the author (a French version is available on the publisher's website):

> *The Course deals with the modern development of scientific thinking on renvoi, examines its various functions in contemporary legal systems and assesses the importance of its current role. The different models of renvoi present in domestic legislations as well as in uniform rules on conflict of laws, of either a conventional or supra-national origin, are analysed on the basis of the fundamental distinction between models which merely take into account foreign choice of law rules and models based on a complete reconstruction of the content of foreign private international law. Ample space is accorded to developments in the EU system of private international law, as well as to an analysis of the relationship between renvoi and other methods and techniques currently employed in this area of the law, mainly for the purpose of assessing the effects their diffusion is likely to produce on the role played by renvoi as an instrument of coordination in contemporary private international law.*

Title: Le renvoi en droit international privé contemporain, by *Angelo Davì*, Brill Academic Publishers – Martinus Nijhoff (series: Collected Courses of the Hague

Academy of International Law, vol. 352), Leiden, 2012, pp. 528.

ISBN: 9789004227262. Price: EUR 145. Available at Brill.

ASIL Conference on What is Private International Law?

On November 2-3, 2012, the Private International Law Interest Group of the American Society of International Law (ASIL) is hosting its conference at Duke Law School, together with the Center for International and Comparative Law, and the Duke Journal of Comparative and International Law.

WHAT IS PRIVATE INTERNATIONAL LAW?

FRIDAY, NOVEMBER 2, 2012

1:15 Welcome / Introduction: Ralf Michaels

1:30 *Panel 1: Philosophical Foundations of Private International Law*
– John Linarelli, Theories of Justice and Private International Law
– Sagi Peari, The Choice-Based Perspective of Choice-of-Law
– Robert S. Wai, Already Transnational Private Law
Chair and Commentator: Trey Childress

3:45 Panel 2: *The Goals of Private International Law*
– Louise Ellen Teitz, The Future of the Hague Conference
– Alex Mills, The Identities of Private International Law – Lessons from the US and EU Revolutions
– Stéphanie Francq, Hierarchy of Norms—the Missing Tool of Private International Law?
Chair and Commentator: Chris Whytock

SATURDAY, NOVEMBER 3, 2012

9:00 Panel 3: *Constitutional and Democratic Aspects of Private International Law*
– Jacco Bomhoff, The Constitution of the Conflict of Laws
– Charles T. Kotuby, General Principles and International Due Process as Sources of Private International Law
– Mark Fathi Massoud, Private International Law in Authoritarian Regimes: International Arbitration and the Outsourcing of the Rule of Law
– Annelise Riles, After New Governance: International Financial Governance and the Surprising Attraction of a Conflict of Laws Approach
Chair and Commentator: Julie Maupin

11:15 Panel 4: *Private International Law and Legal Pluralism*
– Cristián Gimenez Corte, Pushing the Limits: The Function of Private International Law in the Era of Globalization and the Need to Review its Theoretical Foundations
– Yao-Ming Hsu, Pluralistic Justice and Private International Law
– Dwight Newman, Global Legal Pluralism, Collective Rights, and Private International Law
Chair and Commentator: Ralf Michaels

1:00 Lunch: 3rd floor Mezzanine
ASIL prize presentation

2:00 *Wrap-up panel*
All participants

On Negative Declarations and the Brussels I Regulation

The latest issue of the *Anuario Español de Derecho Internacional Privado* (vol. XI, 2011), which has been recently published, includes an article by Crístian Oró Martínez (Universitat Autònoma de Barcelona – Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law) dealing precisely with the question examined by the CJEU in its judgment of 25 October 2012. The

author analyses the long-standing case law on Article 5(3) of the Brussels I Regulation, especially insofar as it required that the action seek to establish the liability of the defendant. This would exclude the possibility of using this jurisdiction rule as regards actions for a negative declaration. However, in the author's view, there are a number of reasons to hold that Article 5(3) should cover this kind of actions, if interpreted both from a literal and from a systematic perspective. Since the issue at stake has resulted in divided opinions not only in legal literature, but also in the case law of national courts, the article analyses the arguments generally advanced in support of these different positions. As a conclusion, the author submits that the CJEU should review its case law in order to allow actions for a negative declaration to be brought under Article 5(3) of the Brussels I Regulation. In short, a position which coincides with the outcome of the judgment of 25 October 2012, even though the Court did not consider it necessary to review its own interpretation of the scope of Article 5(3) in order to reach such conclusion.

Negative declarations, tort and the Brussels I Regulation

An important, if slightly unexpected, ruling from the CJEU in Case C-133/11, Folien Fischer AG and another v Ritrama SpA (25 October 2012). Disagreeing with the Advocate General, the Court has held that an action for a negative declaration seeking to establish the absence of liability in tort may fall within Art. 5(3) of the Brussels I Regulation.

The Court concludes that:

> *If, therefore, the relevant elements in the action for a negative declaration can either show a connection with the State in which the damage occurred or may occur or show a connection with the State in which the causal event giving rise to that damage took place, …, then the court in one of those two places, as the case may be, can claim jurisdiction to hear such an action, pursuant to point (3)*

> *of Article 5 of Regulation No 44/2001, irrespective of whether the action in question has been brought by a party whom a tort or delict may have adversely affected or by a party against whom a claim based on that tort or delict might be made.*

The judgment is available here, and the Advocate General's opposing opinion here .

A short summary of the facts and decision appears on the Incorporated Council for Law Reporting website here.

Le Règlement Européen sur les Successions et la Planification Patrimoniale en Suisse

Although the European Regulation No 650/2012 is not applicable in Switzerland, it can hardly be ignored by Swiss professionals working in the field. The *Centre de droit comparé, européen et international* of the University of Lausanne has organised a workshop to discuss the implications of this text in the relations between Switzerland and some neighboring countries (Germany, France, Italy). It will take place on January 25, 2013. Prof. Andrea Bonomi, Patrick Wautelet, Angelo Davì, Domenico Damascelli, and Robert Danon, will share the stage with experts of the notarial world, such as Dr. Mariel Revillard, Rembert Süß, Paolo Pasqualis or Pascal Julien Saint-Amand.

The number of places is limited; registration before January 9, 2013, is recommended. For the complete programme and further information click here.

Consumer ADR in Europe

Christopher Hodges, *Iris Benöhr* and *Naomi Creutzfeld-Banda*, all from the University of Oxford, have recently published a comprehensive comparative study on consumer ADR in Europe (Consumer ADR in Europe, Hart Publishing, 2012). The volume provides a detailed overview of existing ADR schemes in various European countries, including Belgium, France, Germany, Spain, Sweden and the United Kingdom as well as emerging pan-EU dispute resolution schemes. In light of the European Commission's 2011 Proposals on (cross-border) alternative and online dispute resolution (available here and here) the volume provides a timely and most valuable insight into the current system of consumer ADR in Europe. More information is available on the publisher's website.

By Royal Appointment: No Closer to an EU Private International Law Settlement?

Members of the British Royal Family and aristocracy have long contributed to the development of the law in England governing matters of personal privacy. As long ago as 1849, Prince Albert, the prince consort of Queen Victoria, resorted to the courts to prevent the publication of etchings and drawings by the Royal couple, including of their children (Prince Albert v Strange (1849) 2 De G & Sm 652). In a 1964 case, the Duchess of Argyll sued her formal husband, the 11th Duke, to prevent disclosure of the secrets of their marriage to national newspapers (Argyll v Argyll [1967] Ch. 302). In recent years, both Her Majesty the Queen and Prince Charles, Prince of Wales, have taken legal action in the English courts following the disclosure, or threatened disclosure, of personal information.

The recent flurry of judicial activity following the unwarranted invasion of the privacy of Her Royal Highness Princess William, Duchess of Cambridge, Countess of Strathearn and Baroness Carrickfergus (a.k.a. Mrs Mountbatten-Windsor)

highlights the potential advantages for claimants of French privacy laws, both civil and criminal. No doubt, the Duchess and her husband wished to be seen to have taken prompt and effective action to protect their private lives in this high profile case *pour encourager les autres*. Their chosen avenues of recourse through the French courts would appear to have been designed to serve both as a swift, effective and public assertion of their rights (the civil injunction) and as a deterrent (the nascent criminal complaint).

As yet, the incident and its aftermath do not seem momentous from a private international law perspective. The prosecution by English nationals of a civil claim in France against a French publisher, requiring the delivery up of photographs in the publisher's possession which are said to have resulted from an invasion of the claimant's privacy on French territory, would not appear to raise significant or complex issues of jurisdiction or applicable law.

Nevertheless, the case encourages reflection as to how well EU private international law deals with situations involving (alleged) violations of personal privacy, and other contributors to this symposium have raised a variety of issues.

Two introductory points may be noted before embarking on further discussion of this topic. First, and putting to one side the need to provide an autonomous definition in an EU context (see below), one must accept that the notion of a "violation of privacy" may in common usage cover a wide variety of fact situations, which are not necessarily to be treated alike. Taking the facts of the Duchess of Cambridge case as an example, the essence of any judicial complaint could rest upon the unauthorised (i) taking, (ii) transmission, (iii) receipt or (iv) publication of photographs or other media, with any transfer or publication occurring either (a) electronically (including via the internet) or (b) by other means. In other circumstances, a violation of personal privacy may be tantamount to a physical assault, as in the case of stalking, or to theft, as in the case of the removal of papers (the Pontiff's butler) or computer hacking. The matter may also have a commercial background, in particular if the claimant intended himself to exploit the disclosed information, as in the Douglas-Zeta Jones wedding case (Douglas v Hello! Limited [2007] UKHL 21).

Secondly, if it is determined that any or all of these situations do require special treatment within EU private international law instruments, one must recognise that that this will inevitably create problems of classification, which may be

thought to compromise the underlying objectives of promoting legal certainty, and harmonious decision making, that these instruments outwardly pursue.

EU law has already shown itself to be adept in creating difficulties of this kind. In the Rome II Regulation, non-contractual obligations arising out of violations of privacy (and of personality rights) are presently excluded altogether (Art. 1(2)(g)), but the task of elaborating what wrongful conduct amounts or does not amount to a "violation of privacy" for this purpose has been left to the courts, and remains incomplete. Following criticism levelled at this exception, there have been (as Professor von Hein explains) various proposals for a new, special rule covering the same ground as the current exclusion. If adopted, however, the new rule would not remove the classification problem, but merely transfer it from being one of the material scope of the Regulation to one of the material scope of a rule within the Regulation, and its separation from other rules (in particular, the general rule for tort/delict in Art. 4).

In relation to online activities, the eCommerce Directive raises many (as yet unresolved) issues as to the scope of its "country of origin" regulation, and the various exceptions and qualifications to that regime. The European Court's eDate Advertising / Martinez decision, rather than clearing the air, has only heightened the challenges that this Directive presents in the area of civil liability.

Last but not least, the eDate decision also has a separate jurisdictional aspect, on which the remainder of this comment will focus. The effect of this part of the Court's judgment is that a distinction must now be drawn for jurisdiction purposes between "an infringement of a personality right by means of the internet" (which the CJEU has told us merits a special, claimant-friendly interpretation of Art. 5(3)) and other cases (which remain subject to well-established principles governing the operation of that Article).

At first impression, these two points may seem to pull in different directions, the first supporting a more granular approach and the second tending towards a uniform solution. Both, however, provide reasons for caution when formulating special rules, whether of jurisdiction or applicable law, which treat violations of privacy and personality rights as a single, separate category. Further, the proliferation of different fact patterns within the realm of "violations of privacy" and analogies to other categories of wrongdoing (such as those highlighted above) may itself be thought to militate in favour of maintaining general rules

such as Art. 5(3) of the Brussels I Regulation in its pre-eDate form and Art. 4 of the Rome II Regulation. The latter provision, in particular, may be argued to be sufficiently well-calibrated to deal with the range of new situations that would fall within its scope if the Art. 1(2)(g) exception were simply to be removed when the Regulation is reviewed.

In his contribution, Professor von Hein supports the adoption of a special rule for violations of privacy and personality rights. As part of his proposal, he favours giving claimants who sue in the courts of their own habitual residence or of the defendant's domicile a right to elect to apply the law of the forum to the entire claim.

This element of Professor von Hein's proposal seeks to build upon the jurisdictional aspect of the CJEU's decision in eDate. This, however, is the law reform equivalent of constructing a house on swampland. The decision has strong claims to be the worst that the Court has ever delivered on the Brussels I regime, conflicting with long established principles central to the functioning of the Regulation and giving the impression either that the Court considers itself at liberty to make up new rules of jurisdiction on the spot or that there is a sacred text in its library in which the Regulation's rules are elaborated, but to which the outside world does not yet have access.

The decision may be criticised in no less than seven respects.

First, having expressed ubiquitous remarks about the ubiquitous nature of internet publications (para, 45), the Court observed (with good reason) that this causes difficulty in applying the criterion of "damage" as a factor connecting the tort to a given legal system for the purposes of Art. 5(3) of the Regulation: "the internet reduces the usefulness of the criterion relating to distribution in so far as the scope of the distribution of content placed online is in principle universal" (para. 46). In light of these conclusions, and given that the special rules of jurisdiction are intended to secure "a close link between the court and the action" and/or "to facilitate the sound administration of justice" (Recital (12); see also para. 40 of the eDate judgment), one might have expected that the Court would conclude that the concept of "harmful event" should be given a narrow reading in cases of this kind so as to *exclude* the criterion of damage as a connecting factor for jurisdiction purposes (for an analogous approach in a contractual context, see Case C-256/00, Besix, paras 32 and following). That conclusion would have been

consistent with the dominant approach in the case law to the interpretation of exceptions to the general rule in Art. 2 (e.g. Case C-103/05, Reisch Montage, paras 22 and 23). The Court, however, chose a different path.

Secondly, the Court asserted that the connecting factors used within Art. 5(3) "must therefore be adapted in such a way that a person who has suffered an infringement of a personality right by means of the internet may bring an action in one forum in respect of all the damage caused" (para 48). This argument, which the Court uses as its launching pad for its novel "centre of gravity approach", is utterly devoid of merit. As the Court had acknowledged (para. 43), the claimant in such a case already has at least one, and possibly, two options available for bringing an action in respect of all the damage caused in one Member State court. Most significantly within the framework of the Regulation, he/she may always bring an action in the Courts of the defendant's domicile (see Besix, para 50; Case C-420/97, Leathertex, para 41). Moreover, if the publication emanates from an establishment in a Member State other than that of the publisher's domicile, the claimant may bring an action in that Member State, as the place of the event giving rise to damage, (Case C-68/93, Shevill, paras 24-25; eDate, para. 42; Case C-523/10, Wintersteiger, paras 36-39). There was no need to create a new global connecting factor.

Thirdly, having concluded that the Regulation did not present the claimant with sufficient options for pursuing his claim, the Court proposed attributing full jurisdiction to "the court of the place where the victim has his centre of interests" on the ground that the impact of material placed online might best be assessed by that court (para. 48), sitting in a place which corresponds in general to the claimant's habitual residence (para. 49). In these two sentences, and without further explanation or justification, the Court repudiates its longstanding principle of avoiding interpretations of the rules of special jurisdiction in Art. 5 which favour the courts of the claimant's domicile in such a way as to undermine to an unacceptable degree the protection which Art. 2 affords to the defendant (e.g. Case C-364/93, Marinari, para. 13; Case C-51/97, Réunion Européenne, para. 29).

Fourthly, the Court considered that its proposed new ground of jurisdiction has the benefit of predictability for both parties, and that the publisher of harmful conduct will, at the time content is placed online (being, apparently, the relevant time for this purpose†), be in a position to know the centres of interests of the

persons who are the subject of that content (para. 50). It is, however, extremely difficult to reconcile this confident statement with the Court's earlier recognition that "a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State" (para. 49). If predictability were the objective, it is hard to see how the Court could have done more to remove it.

Fifthly, given that a person's private life (and reputation) may have several centres, which change over time, it does not seem possible to say more than that there *might* be a strong link between the facts of a particular case and the place where the claimant's centre of interests is held to lie. Equally, there might not. Take the case of a former Bundesliga footballer, with Polish nationality, who signs for an English club and moves to England. While visiting a German friend, he has rather too much to drink in a nightclub. The story is published, in German, on a German football website. Does the sound administration of justice support giving the English courts jurisdiction over the footballer's claim against the website publisher? In the Duchess of Cambridge's case, does the sound administration of justice support giving the English courts jurisdiction over the publication of photographs on a French, or Italian or Irish, website, particularly as the current position is that those courts would have no jurisdiction with respect to hard-copy publications by a newspaper or magazine under the same ownership? Given that the French, Italian or Irish courts would have global jurisdiction under Art. 2, it is suggested that the answer is a resounding "no".

Sixthly, having decried the utility, in internet cases, of the criterion of damage *á la Shevill*, the Court inexplicably chose to retain it as a connecting factor for jurisdiction purposes, allowing an action "in each Member State in the territory of which content placed online is or has been accessible" (para. 51). This begs the following question: if the new connecting factor is not a substitute for the "damage" limb of the Bier formulation, what then is it? In para. 48 of its judgment, the Court had seemed to suggest that the claimant's centre of interests was "*the place* in which the damage caused in the European Union by that infringement occurred", but this cannot be taken literally given that the Court returns three paragraphs later to the view that damage may occur in each Member State. The eDate variant of "damage" would seem to be a derivative or indirect form, of the kind that the Court had in its earlier case rejected as being a

sufficient foundation for jurisdiction (Marinari, para. 14). If a label is needed, perhaps "damage-lite" would do the job?

Finally, the Court's assertion that its new rule corresponds to the objective of the sound administration of justice (para. 48) is also called into question by the second part of its judgment, interpreting the eCommerce Directive in a way that gives an essential role in cases falling within its scope to the law of the service provider's (i.e. the defendant's) country of origin. Although questions of jurisdiction and applicable law are distinct, and the Brussels I Regulation and eCommerce Directive pursue different objectives, the suitability of the courts of the claimant's centre of interests is undermined by the need to take into account, in *all* cross-border cases, a foreign law. By contrast, jurisdiction and applicable law are much more likely to coincide where jurisdiction is vested in the courts of the defendant's domicile or establishment.

Any proposed new rule in the Rome II Regulation must also face the complexity which the eCommerce Directive introduces in this area, particularly after the eDate judgment. In an ideal world, the priority between the two instruments would be reversed, with the Directive being pruned to exclude its effect upon questions of civil liability and to enable a single instrument to govern questions of the law applicable to non-contractual obligations arising out of violations of privacy and personality rights. That, however, may be too much to hope for – once embedded, an EU legislative instrument is hard to dislodge.

Professor Muir-Watt makes the important point that, in this area, choice of law rules must yield, to a greater degree than in many other areas of civil law, to considerations of public policy and to the fundamental rights to which all Member States subscribe as parties to the European Convention (we will have to agree to disagree about the significance of the Charter of Fundamental Rights even if the Rome II Regulation were extended).

In cases such as that of the Duchess of Cambridge, there is of course a tension between (at least) two rights – that of the right to a private and family life (Art. 8) and that of freedom of expression (Art. 10). As recent cases before the European Court of Human Rights demonstrate (in particular, the two decisions involving Caroline, Princess of Monaco), the balance between them is not easy to strike, and the margin of appreciation will continue to allow different solutions to be adopted in different States. It may be questioned, however, whether this

perilous balance is well served by a rule of election for applicable law which, coupled with claimant friendly rules of jurisdiction, enables the subject of a publication which is alleged to be defamatory or to violate privacy to choose to apply to the whole of his claim either the law of his country of habitual residence or the law of the defendant's domicile, whichever is the more favourable. This, unlike environmental damage (Rome II Regulation, Art. 7) is not an area where the policy factors favour an overwhelmingly pro-claimant approach.

Enough said. To offer a personal view in conclusion: the best way forward would be (1) to amend the Brussels I Regulation to reverse the eDate decision, (2) to carve civil liability out of the eCommerce Directive, and (3) to remove the exception for violations of privacy and personality rights in Art. 1(2)(g) of the Rome II Regulation, leaving the general rule for tort/delict (Art. 4) to apply to such cases. At the same time, it seems more likely that my own daughter will marry into the Royal Family than that these three reforms will come to fruition. Princess Nell anyone?

† Straying into the detail of Professor von Hein's rule of election, one consequence of this would appear to be that the claimant's habitual residence and the defendant's domicile would be tested by reference to a different point in time (the latter being identified at the date of commencement of proceedings). This is not a reason in itself to reject the rule.