Tick, Tock: Temporal Application of the Rome II Regulation Referred to the CJEU

Two recent decisions of the English High Court consider the temporal effect of the Rome II Regulation, with the first of these making a reference to the CJEU as to the combined effect of Articles 31-32 of the Regulation (to my knowledge, the first reference with respect to this Regulation).

Each of the cases (Homawoo v GMF Assurance SA [2010] EWHC 1941 (QB) and Bacon v Nacional Suiza [2010] EWHC 1941 (QB)) concerned proceedings with respect to injuries suffered by the claimant in a road traffic accident occurring (a) in a Member State (France in Homawoo and Spain in Bacon) and (b) in 2007 (but in each case after 20 August, the first critical date in terms of defining the temporal effect of the Regulation). In each case, proceedings were issued in England before 9 January 2009 (the second critical date). In Bacon, the sole defendant was the insurer of the only car involved in the accident (Mr Bacon was a pedestrian). In Homawoo, although the driver and owner of the car causing injury were also joined, proceedings were only pursued against the insurer. Liability was disputed (successfully) in Bacon, but accepted in Homawoo.

The question for decision by each of Sharp J (Homawoo) and Tomlinson J (Bacon) was whether the Rome II Regulation applied, with the result that damages would fall to be assessed by reference to the law applicable under the Regulation (French or Spanish law) and not the law of the forum (cf. Harding v Wealands [2007] 1 AC 1, under the pre-existing English rules of applicable law).

Under Article 31 of the Rome II Regulation, the Regulation "shall apply to events giving rise to damage which occur after its entry into force". Under Article 32, the Regulation (with the sole exception of Article 29) "shall apply from 11 January 2009". This combination clearly suggests, as both judges accepted, a distinction between the date of entry into force of the Regulation and its date of application, with only the latter being specifically designated in Article 32 (9 January 2009). If that view, supported by records of the discussions in the Council's Rome II working group, is accepted as representing the legislative intention of the EU, it

would seem to follow that the date of entry into force must be fixed at 20 August 2007 in accordance with Article 254 of the EC Treaty (now TFEU, Article 297). Nevertheless, an important conundrum remains to be resolved, in that the precise meaning of the words "shall apply" in Articles 31 and 32 must be explained: What is it to which the Regulation's rules of applicable law "shall apply"?

Needless to say, given the unsatisfactory drafting, commentators differ in their approaches (for my own, see Dickinson, The Rome II Regulation (2008), paras 3.315-3.321), as did the two judges in these cases.

In Homawoo, Sharp J (at [43]-[49]) was unhappy with interpretations of Article 32 as referring to the date of commencement of legal proceeedings or the date of determination of those proceedings. She suggested (at [50]) that a reading of Articles 31 and 32 as inter-linking and complete in themselves so that the Regulation would apply only to events giving rise to damage after 11 January 2009 "would give legal certainty", but accepted that the "clear language of Article 31" made it impossible to reach this conclusion, at least without a preliminary reference to the CJEU. Accordingly (at [51]) she posed the following questions:

> *If the meaning and effect of Article 31 is that Rome II is to apply to events giving rise to damage which occur after the 'entry into force' of the Regulation on 20th August 2007, what is the meaning and effect of 'shall apply from 11th January 2009' in Article 32? Is it 'apply to proceedings commenced' or 'apply to determination by a court' after that date? What is the meaning and effect of Article 31? Should it be interpreted so that the Regulation shall apply to events giving rise to damage which occur on or after 11th January 2009?*

In Bacon, it was not necessary for Tomlinson finally to decide the temporal application point or to consider whether to make a reference, as he had held the claimant on the facts solely responsible for the accident and exhonerated the defendant under Spanish law, which it was agreed applied to the question of liability in any event. Nevertheless, having heard arguments similar to those advanced before Sharp J, he concluded (at [61]) that the Regulation applied to the determination as from 11 January 2009 of the law applicable to a non-contractual obligation arising out of an event giving rise to damage on or after 20 August 2007.

Although Sharp J (at [46]) had observed that parties who are considering the possibility of settlement will wish to understand what law applies to the calculation of damages and they (like judges) need to know whether Rome II applies, Tomlinson J took the view (I would submit, correctly) that the Regulation is directed at the Member States and their courts (see [61]). This is not to deny that the Regulation's provisions are not relevant in calculating the parameters of settlement, but merely to accept that the parameters of settlement must themselves be calculated by reference to a hypothetical future determination by a court or tribunal having jurisdiction over the matter. Settlement discussions, as other commercial negotiations, are conducted by reference to the putatively applicable law, and in cross-border transactions it must be accepted that the rights and obligations of the parties may fall to be determined at different times and by different courts or tribunals according to different legal rules.

On the view taken by Tomlinson J (according with the wording and legislative history of Articles 31-32) the likely date of any future judicial determination was a factor which those negotiating settlements in the EU before 11 January 2009 would need to take into account, alongside such other factors as the identity and geographical location (within or outside a Member State) of the court(s) or tribunal(s) before which the matter could be brought if their negotiations were not to bear fruit. That is not illogical or unjust (see Tomlinson J, at [38]). Nor does it involve giving retroactive effect to the Regulation's provisions, which were published in the Official Journal on 31 July 2007. Nor, at the point of determination, does it result in any uncertainty as to the source of the rules of applicable law that the court must apply. Further, as Tomlinson J pointed out (at [65]), the opportunity for taking any tactical advantage of the separation of entry into force and application of the Regulation ended (if this interpretation is accepted) on 11 January 2009, following which any determination by a Member State court of the law applicable to a non-contractual obligation must carried out in accordance with the Regulation's rules. From that date, the Regulation (at least according to its major objective) promotes a different kind of certainty (decisional harmony), in ensuring that Member State courts apply the same law in the determination of non-contractual obligations, even if the event giving rise to damage occurred between 20 August 2007 and 11 January 2009. The harmonisation of approach in this area across the Member States is, of course, the primary objective of the Rome II Regulation (see Recitals (6) and (15)) and this interpretation appears, therefore, teleologically superior, even if it leads to a

short term problem (now expired) in terms of the foreseeability of court decisions (see Recital (16)).

In any event, it may be questioned whether the form of "legal certainty" craved by Sharp J and other proponents of this solution is of any significant or lasting value. The very fact of a reference to the CJEU on this point (and the contrary view of Tomlinson J and many others) will leave those engaging in settlement discussions with respect to events occurring between 20 August 2007 and 11 January 2009 in doubt as to the source of the rules for determining the law applicable to the parties' non-contractual obligations for years to come. By the time that we have a firm answer, the large majority of cases (particularly those involving traffic accidents) will likely have settled notwithstanding that doubt (unpredictability of outcome may even be seen as a driver of settlement). If the CJEU follows the view of Tomlinson J, as I would submit that it should, all those whose claims remain (and those whose claims remain undiscovered) will know where they stand, even if the events on which the claim is based occurred in the interregnum. As decisional harmony will (or ought to) have been improved, even in the latter class of cases, so too the incentive for one party to upset settlement discussions by rushing off to bring proceedings in a Member State court that it considers will apply a favourable law will (or ought to) have been diminished. We will all, according to the tin, be better off.

It is suggested that, what as first sight may appear an awkward or "arbitrary" (Tomlinson J, at [38]) combination of provisions in Articles 31 and 32, is in fact a combination of puritanism and pragmatism. The authors of the Regulation, in their unremitting quest to harmonise the rules of European private international law, were anxious that their new creation should be vivified at the earliest opportunity. That, however posed a problem in that the objectives of the Regulation might be put at risk if the creature's handlers (Member State judges) were not trained as to how to use it, with the result that a period of education was built in. The modified prospective effect of the Regulation can be seen, therefore, as an attempt to resolve the conflict between the ideals of a single area of justice and the reality of twenty six different ones.

The significance of questions of temporal effect will, of course, fade over time as claims are resolved and new ones arise. In a few years, we may all be better off and wonder what the excitement was about, although Mr Homawoo, Mr Bacon and others in their position may question exactly what they have found

themselves in the middle of.

Resolution of the DGRN on the registration of foreing insolvency proceedings

On Monday 10, August, the Spanish *Boletín Oficial del Estado* (BOE) published the Resolution of June 11, of the *Dirección General de los Registros y el Notariado* (DGRN), revoking a decision of the *Registro de la Propiedad de San Javier No. 1*, whereby registration of two English judgments declaring bankruptcy was denied. Registration was refused on the ground that, pursuant to the interplay of Articles 38.1 and 39 of Regulation 44/2001, 4 of the Spanish *Ley Hipotecaria* (Mortgage Act) and 10.1 of the Civil Code, it is necessary to obtain a prior Spanish court order enacting «un asiento procedente conforme a la legislación hipotecaria pertinente» (translated, I guess that woul be "a legitimate mortgage registration entry under the relevant mortgage legislation"). On the contrary, in the appellant's opinion direct registration is available as provided by Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings.

According to the DGRN the proper resolution of this action requires identifying the applicable rules and their respective scopes. In this sense the DG indicates that, contrary to what is stated in the decision under consideration, Regulation 44/2001 does not apply as Article 1 excludes insolvency proceedings from the substantive scope; nor is it applicable Article 10.1 of the Civil Code , being a provision which contains a conflict rule determining the law applicable to the creation and effectiveness of real rights; an issues that does not arise in the instant case . The answer to the question must actually be sought in the international rules on insolvency proceedings contained in Regulation 1346/2000. Article 16 of the Regulation establishes automatic recognition: "Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member

States from the time that it becomes effective in the State of the opening of proceedings". Therefore, the system is clearly at odds with the rule stated in the Spanish *Ley Concursal* 2003 (Insolvency Act 2003) on the effectiveness in Spain of foreign judgments, Art. 220, which requires the exequatur procedure under the *Ley de Enjuiciamiento Civil* 1881 (Civil Procedure Act 1881) be attended prior to registration.

Given the primacy of EU regulations, the applicability of the solutions set out in the Spanish Insolvency Act depends on whether the instant case falls outside the scope of Regulation 1346/2000: but the answer is a clear "no". Far from it: having examined the circumstances of the case the application of Regulation 1346/2000 is indisputable. According to this conclusion, the refusal of the inscription on the grounds that it is necessary to obtain a Spanish court order approving the foreing judgment prior to its registration can not be shared, and the Registrar's decision must be revoked.

Parties are entitled to apply against this DGRN's resolution before a civil court within two months.

Yves Fortier Chair at McGill

Applications are currently invited for the L. Yves Fortier Chair in International Arbitration and International Commercial Law tenable in the Faculty of Law, McGill University

The L. Yves Fortier Chair in International Arbitration and International Commercial Law, endowed in 2009, has been created through the generous support of Rio Tinto Alcan Inc., in order to bring a leading scholar and teacher in the field of international arbitration and commercial law to the Faculty of Law at McGill University. The Chair is named in honour of L. Yves Fortier, BCL'58, formerly Canada's Ambassador, Permanent Representative, Chief Delegate to the General Assembly of the United Nations and former Chairman of the Board of Alcan Inc.

The Faculty seeks applications from scholars of international reputation in the field of international commercial law and arbitration. The purpose of the Chair is to reinforce a Canadian locus for the study and research in these fields. Through his or her engagement in teaching and research, the chair holder will advance the understanding of theoretical and practical dimensions of international commercial law including trade and investment, formal and informal regulatory models, corporate governance and responsibility as well as dispute resolution. The chair holder will teach and supervise undergraduate students and graduate students at the master and doctoral levels in the Faculty of Law. The chair holder will endeavour to establish, where appropriate, relationships with other scholars, civil servants, international organizations and experts in non-governmental organizations.

Given the bilingual environment of McGill's Faculty of Law, the chair holder will be expected to evaluate written and oral work presented by students in both English and French.

The position is tenured and the Chair is fully endowed. In addition to a proven record as a teacher and a scholar, the successful candidate would ideally have experience interacting with international organizations and national governments. The salary and the academic rank will reflect the successful candidate's qualifications and experience. The term for the chair is seven years and is renewable. The appointment would commence January or July 1, 2011.

The Faculty of Law at McGill University was established in 1848. Its undergraduate program represents an international benchmark for contemporary legal education, and leads to the joint award of the Bachelor of Civil Law (B.C.L.) and Bachelor of Laws (LL.B.) degrees. The graduate program comprises both a non-thesis master's degree and substantial research degrees at the master and doctoral levels. Through its research programs and pedagogical initiatives it reflects a central commitment to the study of legal traditions, comparative law and the internationalization of law. In conjunction with this overarching mission for the study of law at McGill University, four areas of academic priority have been identified by the Faculty: Transsystemic Legal Education; Trade, Mobility and Enterprise; Public Policy and Private Resources; and Human Rights and Legal Pluralism.

The L. Yves Fortier Chair in International Arbitration and International

Commercial Law will be invited to stimulate research and teaching at the intersection of these four areas, and, in so doing, to contribute to the University's national and international profile as well as to the Faculty of Law's expertise in comparative law.

How to apply

Applications and nominations, accompanied by a complete curriculum vitae, are now invited and will be considered as of October 15, 2010. Applications should be addressed to Professor Geneviève Saumier, Chair, Staff Appointments Committee, Faculty of Law, McGill University. Applications should be sent by electronic mail to Linda.coughlin@mcgill.ca

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New Articles in Canadian Publications

Two recent publications contain several topical articles:

In the 2010 issue (volume 60) of the University of New Brunswick Law Journal are the following five articles: Catherine Walsh: "The Uses and Abuses of Party Autonomy in International Contracts"; Joshua Karton, "Party Autonomy and Choice of Law: Is International Arbitration Leading the Way or Marching to the Beat of its own Drummer?"; Stephen Pitel, "Reformulating a Real and Substantial Connection"; John McEvoy, "'After the Storm: The Impact of the Financial Crisis on Private International Law': Jurisdiction"; and Elizabeth Edinger, "The Problem of Parallel Actions: The Softer Alternative". This journal is available to subscribers, including through Westlaw.

In Jeff Berryman & Rick Bigwood, eds., *The Law of Remedies: New Directions in the Common Law* (Toronto: Irwin Law Inc., 2010) are four articles that relate to the conflict of laws: David Capper, "Mareva Orders in Globalized Litigation"; Scott Fairley, "Exporting Your Remedy: A Canadian Perspective on the Recognition and Enforcement of Monetary and Other Relief"; Garry Davis,

"Damages in Transnational Tort Litigation: Legislative Restrictions and the Substance/Procedure Distinction in Australian Conflict of Laws"; and Russell Weaver & David Partlett, "The Globalization of Defamation". This collection of articles is available for purchase here.

Call for Papers – Journal of Private International Law Conference 2011 in Milan

The ***Journal of Private International Law*** will hold its fourth major **conference** at the **University of Milan** on **15 and 16 April 2011**. As was the practice at the prior conferences at the University of Aberdeen in 2005, at the University of Birmingham in 2007, and at New York University in 2009, we are including a "call for papers" on any aspect of private international law to be presented at the Conference with a view to having the final papers submitted for consideration for publication in the Journal through the normal refereeing process. Speakers will be selected on the basis of abstracts of 500 words submitted to Professor Stefania Bariatti at the University of Milan (stefania.bariatti@unimi.it) and Professor Paul Beaumont at the University of Aberdeen (p.beaumont@abdn.ac.uk) by **31 October 2010**. The abstracts will be considered by the local organisers of the conference (Professors Fausto Pocar and Stefania Bariatti) and the editors of the Journal (Professors Paul Beaumont and Jonathan Harris) and a decision made by 1 December 2010.

The morning of April 15 will be devoted to presentations of papers by legal scholars at an early stage in their academic or professional careers in parallel panel sessions (in New York we had 6 panels). We particularly encourage research students, postdoctoral fellows and recently appointed lecturers to indicate that they are willing for their abstract to be considered for these parallel sessions as we want to offer an opportunity for presentations by a large number of such scholars. Your final papers will be treated on an equal footing with all

other papers when it comes to them being considered for publication in the Journal.

ABS not responsible for the Prestige disaster

On November 13, 2002, the tanker *Prestige* sank a few miles from the Galician coast, causing an unprecedented environmental disaster. From the Spanish legal standpoint, liability for damage caused in the oil pollution, including international jurisdiction, is governed by the International Convention on Civil Liability for Oil Pollution Damage (CLC) 1969, subsequently amended. As regards the demand for accountability, the CLC follows the principle of strict liability, placing it on the owner of the ship (or his insurer or guarantor). As for jurisdiction, according to Art. IX of the CLC "Where an incident has caused pollution damage in the territory, including the territorial sea or an area referred to in Article II, of one or more Contracting States or preventive measures have been taken to prevent or minimize pollution damage in such territory including the territorial sea or area, actions for compensation may only be brought in the Courts of any such Contracting State or States. Reasonable notice of any such action shall be given to the defendant". Obviously, the scheme is applicable only by courts of States Parties.

The pollution caused by the sinking of the *Prestige* have led to a series of legal proceedings before different courts, including those of States not affected by the accident. In particular, following the French strategy in the Amoco Cadiz case, the Spanish government brought in New York an action worth one billion dollars against the classification society of the Prestige, the American Bureau of Shipping, based in Houston. Spain claimed that the company had been negligent in the inspection of the vessel, giving a positive score only six months before the disaster. The case before these courts and against this defendant has been possible because USA is not part of the CLC, and accordingly applies its own legal regime.

However, things have not gone as expected by the Spanish government. To start with, the demand had to overcome an initial hurdle, that of the declaration of incompetence of the NY court ; this happened in 2008 thanks to the decision of the New York Court of Appeals, which accepted the arguments of the State Bar against a court in the Southern District of New York. Now (on August 4, 2010) the Southern District Court Judge Laura Taylor Swain has ruled in favour of ABS, excluding its responsibility for the wreck. In a 20-page decision, the judge admits the desirability of identifying those responsible for oil spills that cause “major economic and environmental damage.” Nevertheless, she says that under U.S. law classification societies cannot be allocated these responsibilities . In her opinion, liability lies with the owner of the vessel, who “is ultimately in charge of the activities on board the ship”; her decision is consistent with these principles .

Attorney Brian Stare, representative of Spanish interests, said he is dissatisfied with the ruling because it means giving “carte blanche” to classification societies.

So far we don’t know whether or not there would be an appeal against Judge Laura Taylor’s ruling.

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19 Revista Electrónica de Estudios Internacionales (2010)

The Spanish magazine Revista Electrónica de Estudios Internacionales, num. 19, is already available (for free) here.

Contents

Articles:
I. Blázquez Rodríguez, “La dimensión mediterránea del Espacio de libertad, seguridad y justicia. Del Proceso de Barcelona a la Unión Europea por el Mediterráneo”

Abstract: Nowadays Justice and Home Affairs are considered a basic sphere of

action in the context of the Euro Mediterranean Partnership. As a part of the beginning the European Neighbourhood Policy have been appeared a real Mediterranean dimension of Space of Freedom, Security and Justice. On the one hand, due to the Action Plans agreed between the EU and each partner on subject as immigration, cross-border management and, judicial and police cooperation. And the other one, as a result of action on bilateral level, like that already existing between Kingdom of Spain and Kingdom of Morocco, as a key item towards an efficient cooperation.

M.A. Rodríguez Vázquez, "La regulación del Reglamento 4/2009 en materia de obligaciones de alimentos: competencia judicial internacional, ley aplicable y reconocimiento y ejecución de sentencias"

Abstract: This article analyzes the content of the Council Regulation (EC) nº 4/2009 of 18 December 2008, on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. It is the first instrument that provides an overall response to all the questions arises from the perspective of the Private international law, regarding maintenance obligations. Reflecting on the essential aspects allows an assessment of its complex regulation.

Ágora:
A.G. Chueca Redondo, "Aproximación a la política de inmigración de la UE en el Mediterráneo"

A. Rodríguez Benot, "La Unión Europea y el Mediterráneo: ¿Hacia un marco jurídico transnacional para las relaciones familiares?"

Notes:
F.J. Zamora Cabot, "Sobre la International Comity en el sistema de derecho internacional privado de los EE.UU"

Reports:
On International Private Law (July-December 2009). Coord. Pilar Jiménez Blanco. Contributors: M. Álvarez Torné, R. Espinosa Calabuig, G. Esteban de la Rosa, K. Fach Gómez, I. Iruretagoiena Agirrezalaga, N. Magallón Elósegui, J.S. Mulero García, G. Palao Moreno, S. Sánchez Fernández, M. Vinaixa Miquel

On International Civil Procedure Law (July-December 2009). Andrés Rodríguez

Benot, Alfonso Ybarra Bores

Database of New Zealand PIL

See here for a database of publications in the field of New Zealand private international law. The editor is South-African-born Dr Elsabe Schoeman of the Faculty of Law at the University of Auckland in New Zealand.

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.

Perreau-Saussine on Rome II and Defamation

Louis Perreau-Saussine is professor of law at the University of Nancy, France. His scholarship includes an article published at the Recueil Dalloz in May 2009 on Les mal aimés du règlement Rome 2: Les délits commis par voie de media.

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.