When to Depart from Rome?

The Commission has published lists of the Conventions which Member States have notified under Art. 26(1) of the Rome I Regulation and Art. 29(1) of the Rome II Regulation.

It appears that Belgium alone among the Member States has not notified the Commission of any derogating conventions, even though it has ratified the Hague Traffic Accidents Convention and signed (but not ratified) the Hague Products Liability Convention, two instruments to which Art. 29(1) Rome II was clearly intended to apply.

The reasons for these omissions are unclear, with the deadlines for notification having long passed (28 July 2008 in the case of Rome II and 17 June 2009 in the case of Rome I). The failure to notify should not prevent Belgian Courts from applying the Hague Traffic Accidents Convention, just as it should not prevent any other Member State court from applying any convention involving a third state, to determine the law applicable to contractual or non-contractual obligations. Belgium's apparent lack of engagement with EU private international law instruments, resulting in doubt for those litigating before Belgian courts, is however unfortunate. It is unclear whether the Commission intends to take steps to address this.

Rome III: Agreement in Council on the Text of the New Rules on Divorce and Legal Separation

The JHA Council, in its meeting held on 3 December 2010 in Brussels, **agreed on the text** (doc. n. 17045/10) **of the Rome III regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation** (see our previous post here).

As stated in the Council's press release (doc. n. 17151/10),

> *The new rules will apply to all participating member states as of mid-2012. Other EU member states which are not yet ready but wish to join this pioneer group at a later stage will be able to do so. The agreement also constitutes the implementation of the first enhanced cooperation in the history of the EU.*
>
> *For its adoption two more procedural steps are necessary: The European Parliament is expected to adopt an opinion on the file in its December plenary session. The Council will then adopt the new rules without discussion, most likely at the Environment Council on 20 December 2010.*

Upon the adoption, the regulation will be accompanied by declarations by the Council (on *forum necessitatis*), and by the Commission, Malta and Finland on a new controversial art. 7a ("Differences in national law"): see Annexes I, II, III and IV to doc. n. 17046/10.

The position of the European Parliament, under examination in the JURI Committee, can be found in the Draft report prepared by rapporteur *Tadeusz Zwiefka* (see, in particular, the Explanatory Statement) and additional amendments.

Rome-ing Instinct?

In February this year, the English courts appeared finally to have woken up to the arrival of the Rome II Regulation, with the first published decision addressing its provisions.

In Jacobs v Motor Insurers Bureau [2010] EWHC 231 (QB), Mr Justice Owen applied Rome II's provisions to reach the conclusion that the compensation to be paid by the MIB (acting as the UK's compensation body under the Fourth Motor Insurance Directive) to the claimant as a result of an accident in a Spanish

shopping centre car park in December 2007 in which the other driver was German (and uninsured) should be assessed in accordance with Spanish law, as the law of the place where the damage occurred. In the course of his judgment, the judge rejected the claimant's arguments that (1) the matter was not one involving a "conflict of laws" within Art. 1(1) of the Regulation, (2) damage was suffered in England for the purposes of Art. 4(1) by reason of the MIB's failure to compensate the claimant there, (3) the reference to the "person claimed to be liable" in the common habitual residence rule in Art. 4(2) was a reference to the named defendant (here, the MIB) not the primary tortfeasor (i.e. the uninsured driver), and (4) that the "escape clause" in Art. 4(3) should be invoked by reason of the MIB's involvement, on the basis that its compensation obligation was manifestly more closely connected to England. Owen J concluded that, insofar as the UK statutory instrument which obliged the MIB to compensate the claimant appeared to require that the compensation be assessed in accordance with English (or British) law (as to which, see below), it must be considered to have been overridden by Rome II's provisions.

That decision has now been reversed by the Court of Appeal ([2010] EWCA Civ 1208), which treated Rome II as having no material impact on the issues to be determined in the case before it and did not consider it necessary to address any of the (interesting and important) issues concerning the proper application of Art. 4. In the Court's view (para. 38 of its judgment), the relevant provision within the UK Regulations invoked before it (reg 13 of the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations (SI 2003/37) (the "Compensation Body Regulations")) defined the MIB's compensation obligation in such a way as to require the application of English law principles to the assessment of compensation and did not constitute a rule of applicable law which was incompatible with, and could be trumped by, the Rome II Regulation. The Court considered that its conclusion was entirely consistent with the scheme and provisions of the Fourth Motor Insurance Directive (Directive (EC) No 2000/26), which the Compensation Body Regulations were designed to implement.

Assuming that there is no further appeal, the claimant Mr Jacobs will receive compensation according to English law principles of assessment, with the result that his award will likely be higher than if the MIB had prevailed in his argument that Spanish law should be applied. That consequence, no doubt, will be of great

comfort to him and may appear to many (given that the economic burden will be spread widely among those holding motor insurance policies) as a "fair result". Nevertheless, certain aspects of the decision remain troubling.

First, the Court did not consider whether and, if so, how the MIB's obligation to pay compensation fitted within the framework of the Rome II Regulation. Here, a number of very interesting questions arise (apart from those identified above concerning the proper interpretation of Art. 4):

- Did Mr Jacobs' claim against the MIB constitute a "civil and commercial" matter within Art. 1(1) of the Rome II Regulation? At first instance, Mr Jacobs' counsel had conceded that it did (and Owen J agreed with that concession – see para. 19 of his judgment), but it is not entirely clear that the concession was correct, given that the MIB was acting as the UK's compensation body under the Fourth Motor Insurance Directive and its (putative) obligation was subject to a special regime established pursuant to the Directive and the Compensation Body Regulations.
- Did any obligation owed by the MIB constitute a "non-contractual" obligation falling within the scope of the Rome Regulation? If so, did it constitute a "non-contractual obligation arising out of a tort/delict" within Art. 4? Owen J found that it did (see para. 30 of his judgment), but it may be doubted whether a scheme of this kind for compensating victims of anti-social conduct from public funds was intended to fall within the ambit of the Regulation.
- If the Rome II Regulation does apply, what is its effect in terms of defining the applicable law and its relationship with the Compensation Body Regulations? In principle, the Rome II Regulation applies to determine the law applicable to a non-contractual obligation in its entirety and not only to a specific issue, for example the assessment of damages. If the MIB's (putative) obligation fell, therefore, within the scope of the Rome II Regulation then the starting point would be that not only the amount of compensation payable but also the basis and extent of the MIB's liability would fall to be determined in accordance with the law applicable in accordance with its provisions. This leads to the following conundrum: if Art. 4 points in this case to Spanish law (as Owen J concluded), how can the MIB be under any obligation at all as no provision of Spanish law will impose any compensation obligation on the MIB (as opposed to its

Spanish counterpart)? The answer, it is submitted, may be found in Art. 16 (overriding mandatory provisions) whereby provisions of the law of the forum may be given overriding effect in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation. The Compensation Body Regulations, being intended to fulfil the United Kingdom's obligations under the Fourth Motor Insurance Directive, may well be of this character, although the Court of Appeal did not explicitly seek to explain their application in these terms.

Against this background, it is disappointing that the Court of Appeal did not consider it necessary to address any of these issues in concluding (para. 38) that:

> *Rome II has no application to the assessment of the compensation payable by the MIB under regulation 13 [of the Compensation Body Regulations] and it is therefore unnecessary to consider the issues relating to the construction of Article 4 that would arise if it did so.*

(Earlier in his judgment, although not necessary for the decision in Jacobs as liability was not in issue, Moore-Bick LJ did appear to accept that the law applicable under Rome II should govern the question whether the driver of the uninsured/untraced vehicle was "liable" to the claimant, being (as the Court held – para. 32) an implicit pre-condition to a compensation claim under regulation 13. If correct, this would involve a partial, statutory incorporation of the Regulation's rules with respect to the driver's non-contractual obligation, without applying them in their full vigour to the MIB's compensation obligation. It may, however, be questioned whether this approach can be supported, given that its effect is to distort the Regulation's scheme by applying its rules only to the question of liability and not questions concerning the assessment of damages.)

Secondly, the Court of Appeal's explanation of the legal effect of the relevant provision in the UK Regulations appears incomplete. Regulation 13(2) of the Compensation Body Regulations provides as follows:

> *(2) Where this regulation applies—*
>
> *(a) the injured party may make a claim for compensation from the compensation body, and*

> *(b) the compensation body shall compensate the injured party in accordance with the provisions of Article 1 of the [Second Motor Insurance Directive] as if it were the body authorised under paragraph 4 of that Article and the accident had occurred in Great Britain.*

The Court of Appeal accepted (para 34) a submission on the part of the MIB that the intention underlying the closing words in sub-para. (b) ("as if it were the body authorised *[under Art. 1(4) of the Second Motor Insurance Directive*] and the accident had occurred in Great Britain") was to require the MIB to respond to Mr Jacobs claim on the basis of a legal fiction that the accident had occurred in Great Britain. In such cases, it must be noted, the MIB is also the body responsible for providing compensation to the victim of an accident involving an uninsured or untraced driver under the extra-statutory scheme established by the Uninsured and Untraced Drivers Agreements between the MIB and the UK Secretary of State for Transport. These Agreements, in their current form, seek to implement the UK's obligations to establish a compensation mechanism under the Second Motor Insurance Directive.

Taking this submission to its logical conclusion (although it does not appear that the MIB sought to press it this far), it would follow that the content of the MIB's statutory obligation under regulation 13 ought to have be determined by reference to the terms of either the Uninsured or the Untraced Drivers Agreement (as applicable), on the premise that the accident had occurred in Great Britain and not abroad. The Court, however, proceeded to the conclusion that the MIB was under an obligation to compensate Mr Jacobs in accordance with English law principles, without any further analysis of the Agreements to determine (for example) (a) which of the Agreements applied to the facts of the case, (b) whether any pre-conditions for obtaining compensation under the applicable Agreement (for example, in the case of the Uninsured Drivers Agreement, the obtaining of an unsatisfied judgment) had been or were capable of being met, or (c) whether the applicable Agreement provided any guidance for the assessment of compensation by the MIB.

Instead of undertaking this exercise, and without citing any supporting authority, the Court concluded (para. 35) that:

> *The mechanism by which the MIB's obligation to compensate persons injured in*

> *accidents occurring abroad involving uninsured or unidentified drivers is established is to treat the accident as having occurred in Great Britain, but in the absence of any provision limiting its scope it is difficult to see why it should not also affect the principles governing the assessment of damages, particularly in the absence at the time of complete harmonisation throughout the EEA of the conflicts of laws rules governing that issue. Nonetheless, the matter is not free from difficulty. As I have already observed, at the time the Regulations were made damages recoverable as a result of an accident occurring in Great Britain would normally have been assessed by reference to the lex fori, yet regulation 13(2)(b) does not make any provision for the application of English or Scots law as such, presumably leaving it to the court seised of any claim to apply its own law.*

This reasoning is unconvincing. In short, it does not appear to be tied to the wording of regulation 13 or to be consistent with the Court's explanation of why it was so worded. A further examination of the Agreements may have found them to be impossible or excessively difficult to apply to foreign accident cases such as Jacobs or of being incompatible with the Fourth Motor Insurance Directive and this analysis, in turn, might have led the Court to doubt its approach to statutory construction. The short-cut taken by the Court, however, appears to leave a sizeable gap in its reasoning.

Third, the Court comforted itself (para 37) with the fact that (on the interpretation that it favoured) regulation 13 of the Compensation Body Regulations (dealing with untraced or uninsured drivers) would produce the same outcome for a claimant in Mr Jacobs' position as for a claimant relying on the apparently clear wording of regulation 12 (dealing with the situation where an insurer's representative has not responded within the prescribed time, in which case the Regulations refer to "the amount of loss and damage … properly recoverable … under the laws applying in that part of the United Kingdom in which the injured party resided at the date of the accident"). In each case, English law principles would normally be applied to the assessment of compensation (a result which would also accord with English private international law at the time that the Compensation Body Regulations were adopted: Harding v Wealands [2006] UKHL 32). As the Court also recognised, however, this understanding of the Compensation Body Regulations produces two apparent anomalies (see paras. 29 and 30):

- *In many cases, the claimant will receive more compensation from the MIB in cases of "insurance delinquency" than if it had sued the driver or made a direct claim against its insurer, being claims to which the rules of applicable law in the Rome II Regulation would undoubtedly apply.*
- *The MIB, having paid that compensation, will be unable to pass the full burden to the compensation body in the Member State where the vehicle is based or the accident occurred, pursuant to the provisions of the Fourth Motor Insurance Directive. Under the 2002 Agreement between the Member States' compensation bodies, the MIB's recovery will be limited to the amount payable under the law of the country in which the accident occurred. Nor will the MIB have any express right of subrogation under the Directive for the balance against the driver or its insurer, such right being limited to the reimbursing compensation body.*

Powerless as the Court of Appeal may have been to address these anomalies, they deserve the attention of the UK legislator (and – dare I say it – the European legislator) at the earliest opportunity. In the meantime, it remains to be seen whether there will be a further appeal to the Supreme Court in Jacobs.

Symeonides on Party Autonomy in Rome I and II

Dean Symeon Symeonides has posted Party Autonomy in Rome I and II from a Comparative Perspective on SSRN. The abstract reads:

> *This essay discusses the modalities and limitations of party autonomy under the Rome I Regulation on the Law Applicable to Contractual Obligations (and secondarily Rome II) on the one hand, and the Second Conflicts Restatement, on the other hand. The comparison reveals the differences between the legal cultures from which these documents originate and which they are designed to serve.*

The Restatement opts for under-regulation, reflecting a typically American skepticism toward a priori rules and a high degree of confidence in the courts' ability to develop appropriate solutions on a case-by-case basis. That confidence finds its justification in the fact that American state and federal judges share the same legal training and tradition and have long experience in working with malleable "approaches". The drafters had hoped – but could not mandate – that, over time, judges would develop similar solutions and thus eventually provide a modicum of consistency and predictability. Four decades later, the extent to which that hope has materialized remains debatable.

In contrast, Rome I reflects the rich continental experience in crafting a priori rules and a reluctance to entrust courts with too much discretion. This reluctance finds additional justification in the fact that Rome I is designed to serve a plurilegal and multiethnic Union, one that brings together uneven legal traditions. As a result, Rome I consists of many detailed black-letter rules, subject to few narrow escapes according little judicial flexibility, and aims at greater consistency and predictability.

At the same time, the drafters of Rome I deserve praise for having the political courage and legal acumen to devise a series of specific rules explicitly designed to protect consumers, employees, passengers, and insureds. As the discussion in this essay illustrates, however, these rules work quite well in the case of consumers and employees, but not so well in the case of passengers, insureds, and other presumptively weak parties, such as franchisees. Even so, one might well conclude that it is preferable to have rules protecting weak parties in most cases (even if those rules do not work well in some cases), rather than not having any such rules, as is the case with the Restatement and American conflicts law in general.

The paper is forthcoming in *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr* (2010).

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

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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

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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.

Heiderhoff: Privacy and Personality Rights in the Rome II Regime – Yes, Lex Fori, Please!

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I. Overview

It would seem that there are already three camps in the symposium. The first two contributions (*Wallis'* working paper, even if very carefully phrased, and *von Hein's* paper) are both in favour of specific regulation to deal with violation of privacy and defamation in Rome II and have both stressed the importance of finding a balanced approach. Whilst the working paper is more strategic and,

understandably, refrains from formulating a potential rule, *von Hein* has designed a full rule. In doing so, he has opted for a system that is, vaguely, similar to the Romanian one that *Wallis*' working paper presents as an example: the location of the injured party's habitual residence is taken as primarily decisive and this is then combined with a foreseeability rule. There is more to *von Hein's* suggestion, which will be touched on below.

Boskovic's paper also favours the integration of defamation into Rome II. However, she is promoting the application of article 4 Rome II – or, in other words, she simply wants to delete the exception in article 1(2) (g) Rome II.

The last two contributors (*Dickinson* and *Hartley*) prefer maintaining the status quo for the time being. In particular, they highlight the current revision of the Brussels I Regulation as a reason to hold off. However, it seems that article 2 and article 5 (3), which are applicable to jurisdiction in defamation cases, are not under reconstruction. There is no reason to believe that the Shevill doctrine will be changed in the near future. On the contrary, it may be advisable to draft a conflict rule soon so that, if necessary, Brussels I can be changed accordingly. Nevertheless, this position raises a very important point: Jurisdiction and applicable law are, at least in the eyes of English lawyers, often perceived as closely connected.

It seems that, as far apart as they may sound, at least the two extreme positions should be reconcilable.

II. Important issues

If a new rule on the violation of privacy rights and defamation is aspired to, then first and foremost its task must be to consider and weigh the interests of both parties. This is an obvious need with regard to the injured party. However, even more than in other cases of tortious liability, the injurer must also be protected, as he/she is acting within the sphere of basic rights, namely the right to free expression. Therefore, article 4 Rome II seems unsuitable for privacy violations.

In trying to balance potentially conflicting interests, one faces two layers of difficulty. Firstly, there is the conflict of basic laws as mentioned above. Secondly, this conflict between freedom of expression and privacy is viewed and weighted quite differently all across Europe. It is, therefore, not easy for a European

conflict of laws rule to weigh the various interests in a manner that all member states will find acceptable. The task of finding a solution to this conflict is set be fulfilled by the new rule. However, it must be solved not only in PIL, but also in procedural law, when fixing jurisdiction.

Certainly, in international procedural law we are at a completely different point. Unlike Rome II, Brussels I already comprises claims based on the injury of privacy rights and the ECJ has formed a rule on how to cope with multi-state cases. The court shaped the Shevill doctrine very carefully and, it appears, acceptably. The Shevill doctrine excludes exorbitant cherry-picking for the injured and, at the same time, impedes publishers from retreating to libel havens (if they exist).

III. Lex fori solution

Having such a balanced procedural rule (even if it is judge-made) for jurisdiction, it seems obvious to test its suitability for private international law (PIL). In doing so, it is obvious that one cannot merely transpose the entire rule into PIL. Were one to do so, the result would be ridiculous: the claimant would be allowed to choose both the forum and, independently, the applicable law. If an Italian newspaper reported, in a defamatory manner, on an English actress, the actress could opt to sue the publisher in England under Italian law – or vice versa. This risk, it appears, is not quite precluded in *von Hein's* approach. His draft rule *allows* the injured party to choose the law of the forum – but what if they don't? Why not force such synchronization?

By applying the lex fori, as Wagner has suggested (e.g. in the hearing), this goal is easily reached. At the same time, the somewhat contentious foreseeability test is side-stepped and, maybe more importantly, the application of foreign law in a legal field, where cultural differences truly exist, is completely proscribed.

At first glance, this seems a very un-German suggestion. After all, the lex fori paradigm is an English one and it is usually something of a taboo in continental systems. In defamation and privacy cases – and in combination with Shevill – such prejudice should be overcome, as the lex fori offers all the required advantages.

The Shevill approach has, admittedly, got its own disadvantages. While *Wallis* claims that "*By providing a mechanism for informed choice, either by the judge or the parties themselves, from all of the available options, the conflict-of-law rule is*

far more likely to designate the most suitable law in practice" – this is only partly true. For one thing, following the Shevill doctrine, it is not the court that chooses the applicable law: it is always the party choosing the court that, thereby, automatically chooses the law. Now, the party obviously doesn't make the choice personally, but acts on the advice of a lawyer. Even for a lawyer, however, it must be noted that choosing the best forum for the party is extremely difficult and mistakes will occur.

IV. End

In many papers, here and before, it has been assumed that violations of privacy rights and defamation are rare, because judicial protection is effective. Still, it should be effective *and fair.* Only where there are balanced rules, can media and injured parties can be certain that their rights are adequately and equally considered.

Fairness, it seems, can be reached by a conflict of law rule much more simply than by a minimum standard or unified material rule. Why should a country like France, that has article 9 cc protecting privacy, and a country like England, where, as Hartley has put it "*if something is true, you should (usually) be allowed to say it*", be forced into parallel standards?

Boskovic on Rome II and Defamation

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Many recent studies on defamation and violations of rights relating to personality assert that both jurisdiction and choice of law rules in this area are problematic. The following observations will mainly focus on choice of law.

However, it is worth saying that jurisdiction rules, laid down by the Brussels regulation (articles 2 and 5-3) seem globally satisfactory, even though one has to

recognise that they need to be adapted to torts committed via the internet. The mere possibility to access a website from the forum State should not be considered sufficient to found jurisdiction under article 5-3. Closer connection with the forum (through the idea of targeting) should definitely be required. This adaptation does not require legislative intervention, the ECJ can do it. However one problem remains. Under article 5-3 (as interpreted in *Shevill*) when jurisdiction is based on the place of damage, the remedy must be limited to damages arising in the forum State. The problem is that for some remedies, it is impossible or at least difficult to limit the remedy so that it does not have an impact in other countries (it is possible for damages, less so for injunctions). However the French *Yahoo* case (TGI Paris 20 nov. 2000, JCP 2000, Act, p. 2214) shows that it can be done.

Concerning choice of law, the situation is different. The working document of the European Parliament questions the necessity of legislative intervention and envisages the option of maintaining the status quo. It is submitted that this would be an unsatisfactory solution from the point of view of legal certainty. Whatever one thinks of the Rome II regulation and the rules it lays down, it can not be denied that its main objective, that is improving legal certainty, has been attained. The same reasons justify legislative intervention in the area of defamation, area in which conflict of law rules in the member States vary considerably.

Having said that, the main question is obviously what is the appropriate choice of law rule?

Several options had been envisaged during the elaboration of the Rome II regulation. Basically these were the law of the habitual residence of the victim, the law of the place of damage subject to certain exceptions and the law of the country to which the publication is principally directed. The first two were perceived as being more claimant-friendly and the last one as being more favourable to the media.

Actually the country to which the publication is principally directed is not as such, necessarily, more favourable to the media. What explained that perception was that the European Parliament proposed to apply the law of the country in which editorial control is exercised whenever it was not apparent to which country the publication was principally directed. This is definitely favourable to the media and

in contradiction with the general orientation of the regulation which chose to give relevance to the law of the place of damage as opposed to the law of the place of acting. The law of the country to which the publication is principally directed is a variant of the law of the place of damage and shall be discussed as such.

As for the law of the habitual residence of the harmed person, apart from the general criticism of being too favourable to the claimant three other criticisms were to be found. The first was uncertainty, based on the fact that celebrities' habitual residence is difficult to determine. This is very unconvincing. The second and third are linked. The idea is that this connecting factor makes it possible for a media to be held liable for behaviour perfectly legal in the place of acting and hence constitutes a danger for freedom of speech. The first part of the argument is correct, but this is true of any connecting factor other than place of acting, which precisely was rejected by EU authorities. Does the fact that the harmful act involves exercise of a fundamental right change something? Proponents of this argument think so. They take the example of foreign dictators who would become impossible to criticise under the law of their residence, which probably considers any criticism ipso facto defamatory. This would endanger freedom of speech. The argument seems slightly excessive. Surely, in such cases the public policy exception (ordre public) could apply and constitute a sufficient barrier against such laws.

However, there is one argument against the law of the habitual residence of the victim that seems valid. Defamation and violations of rights relating to the personality involve two fundamental rights: freedom of speech and the right to privacy. The way nations all over the world strike a balance between these rights is very different. Hence, it appears that each State should remain in charge of striking that balance for its own territory. This consideration points to the law of the place of distribution, that is the law of the place of damage. Of course this connecting factor needs adaptation in the context of the internet (distribution, as a positive action has no sense in this context). Mere accessibility of a website should not be considered as distribution. Some targeting should definitely be required (this problem would be avoided with the law of the habitual residence of the victim, rejected for aforementioned reasons).

So it appears that the general rule (article 4-1) could perfectly apply to defamation. This is not necessarily true for article 4§2. Initially, one could think that there is no reason to treat defamation and violation of rights relating to

personality differently than other non contractual obligations. This would mean that article 4§2 should apply. On second thought, several reasons come to mind. First of all, applying article 4§2 would hinder the possibility of each State striking the aforementioned balance as it thinks fit. Secondly, the general justification of the exception in favour of the parties' common habitual residence is that this law has closer ties with the case than the law of the place of the damage which is often fortuitous. But precisely, the place of damage in cases we are concerned with is not fortuitous (the media know where the defamatory article, for example, will be distributed), provided that place of damage in the context of internet be defined in a more demanding way.

However, this does not mean that common habitual residence would have no relevance whatsoever. It could certainly be taken into account by the court within the general "closest ties" exception. This exception provides for flexibility and allows for the application of several laws (of places of distribution) or one unique law (possibly of the parties' common residence) according to the circumstances.

This possible application of multiple laws is often seen as a serious disadvantage of the law of the place of damage rule. However, one may wonder why this is considered to be such a problem in this area, while it is accepted in others, such as unfair competition. In any case the existence of the general closest ties exception would allow to limit the negative effects of the place of the damage rules in extreme cases.

So at the end of the day, the only real problem with the place of damage rule is the internet and defining the place of damage in its context. It appears that it is probably preferable to leave this question to the courts and not lay down a final rule at this stage (although one can say that some targeting must be required).

In any case the public policy exception (ordre public) should apply and should be a sufficient barrier against laws which do not respect the requirement of the European Convention on human rights. No specific exception is needed.

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

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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.*

Von Hein on Rome II and Defamation

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Diana Wallis deserves praise for her lucid and insightful working document on a possible amendment of the Rome II Regulation with regard to violations of rights relating to the personality. In devising a conflicts rule for this special type of tort, one has to take into account that, although the Rome II Regulation is at present not applicable to this group of cases, the European legislators are no longer operating on a clean slate, because any new conflicts rule will have to fit into the basic doctrinal structure of the Regulation. Moreover, Recital No. 7, which mandates a consistent interpretation of Rome II and Brussels I is of particular importance here because of the ECJ's *Shevill* judgment (C-68/93), which established the so-called mosaic principle.

There are mainly two possible approaches: The first one would be to provide that the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality shall be the law of the country where the victim is habitually resident at the time of tort. This solution is popular in academia (for those who read German, I recommend the excellent contribution by my good friend Michael von Hinden to the *Festschrift* for Jan Kropholler [2008], p. 575), and a corresponding amendment of the Rome II Regulation has been recommended on February 19, 2010 by the German Council for Private International Law, a group of German P.I.L. professors advising the Federal Ministry of Justice (full disclosure: I am a member of this group, but did not participate in the vote on this issue). This proposal certainly has the virtues of simplicity and guaranteeing a protection of the victim in accordance with the social standards that he or she is accustomed to. With due respect, it has some drawbacks as well. From a political point of view, one must not forget that this approach has been on the table before, in the Commission's preliminary proposal for a Rome II Regulation of May 2002. It failed then, after protests from the media lobby, and I really doubt whether it would survive this time. From a doctrinal point of view, its main disadvantage is that V.I.P's – who are the main targets of the "yellow press" – frequently reside in tax havens. It would be a dubious irony of

European conflicts legislation if the laws of third states such as Switzerland or tiny Monaco were to govern the freedom of the E.U. press more often than the laws of the Member States. Such an approach would be insensitive to the legitimate interests of E.U. newspaper readers, TV viewers and other media consumers in accessing legal content. Finally, the habitual residence of the victim is out of tune with the jurisdictional principles of the ECJ's *Shevill* judgment.

A different solution would result from closely tracing the existing framework of Rome II. First of all, in line with Article 4(1), the place of injury (i.e. here: the distribution of the media content) should be paramount, unless there are good reasons to deviate from this rule. Following the example set by Article 5(1) on product liability, however, one should restrain this connection by way of a foreseeability defense, in order to take the legitimate interests of publishers into account. Moreover, party autonomy (Article 14), the common residence rule (Article 4(2)) and the closest connection exception (Article 4(3)) should be respected. A good reason to deviate from the place of injury exists with regard to the right of reply, because such relief should be granted swiftly and is interim in nature. This was already recognized both by the Commission and the Parliament in their earlier proposals of 2003 and 2005. A specific clause on public policy appears unnecessary, because Article 26 is fully sufficient to deal with any problems in this regard. A special clause safeguarding only the freedom of the press would be hard to legitimize in light of the fact that a lack of protection against violations of privacy may contravene human rights of the victim as well. It should be remembered that in the famous case of *Princess Caroline of Hanover v. Germany*, the Federal Republic was condemned by the European Court of Human Rights (judgment of June 24, 2004, application no. 59320/00) not because the Federal Constitutional Court had not respected the freedom of the press, but, on the contrary, because it had failed to protect the princess against intolerable intrusions of *paparazzi* into her private life. Apart from that, there should be a sufficiently flexible, general rule on violations of personality rights and no special rule concerning cyberspace torts. Frequently, potentially defamatory statements are often circulated via multiple channels (print and internet), so that differing outcomes are hard to justify. Any new rule should rather be slim and adaptable to technological developments rather than fraught with ponderous casuistics As far as the E-Commerce Directive is concerned, the precise demarcation between the Directive and Rome II should be left to Article 27 and the ECJ, where a pertinent case is currently pending (case C-509/09).

Specific problems arise in cases involving multi-state violations. Here, both the *Shevill* judgment and the model developed for multi-state restrictions of competition (Article 6(3)(b)) argue for a modified codification of the so-called mosaic principle. By adopting this approach, jurisdiction and the applicable law will regularly coincide, which saves time and costs for all the parties involved. For persons enjoying world-wide fame, it creates a welcome incentive to concentrate litigation in the defendant's forum. For rather unknown persons, it does not introduce any additional burden, because their reputation will usually only be affected in their home country anyway.

Taking the above considerations into account, I would like to propose the following rule, which builds upon earlier proposals and the existing regulation. Details concerning the interpretation of notions such as "reasonably foreseeable" or "direct and substantial" could be fleshed out in the recitals, where further guidance on public policy may be given, too.

> ***Article 5a Rome II – Privacy and rights relating to personality***
>
> *(1) Without prejudice to Article 4(2) and (3), the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation, shall be the law of the country where the rights of the person seeking compensation for damage are, or are likely to be, directly and substantially affected. However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee substantial consequences of his or her act occurring in the country designated by the first sentence.*
>
> *(2) When the rights of the person seeking compensation for damage are, or are likely to be, affected in more than one country, and this person sues in the court of the domicile of the defendant, the claimant may instead choose to base his or her claim on the law of the court seised.*
>
> *(3) The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.*
>
> *(4) The law applicable under this Article may be derogated from by an agreement pursuant to Article 14.*