Cross border infringement of personal rights

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Personality rights

- Personality rights are the rights related to the protection of the integrity and inviolability of the person

- Grey area between public and private law. In many countries, the infringement of a personality right is considered a criminal offence

- No pan-European consensus on the nature and scope of personality rights

- Different historical origins
Convergence of substantive law

- Art 8 ECHR provides that everyone has the right to respect for his private and family life.

- The discrediting of someone’s reputation will result in an infringement of art 8 if the factual allegations are of such a seriously offensive nature that their publication has an inevitable effect on the private life of the individual concerned.

- Art 10 ECHR provides that everyone has the right to freedom of expression.

- The balance between the freedom of speech and the right to private life, or the amount of intrusion into his private life that an individual has to tolerate in the name of public debate, is essentially the reflection of a particular view on how a democracy should operate.
The European Court of Human Rights

• In balancing the freedom of expression against the right to private life a national court should take into account:
  I. whether the publication is a contribution to a debate of general interest;
  II. the degree to which the person concerned is known;
  III. the content, form and consequences of the publication;
  IV. the circumstances under which the information is gathered.

• If the person had a legitimate expectation for the protection of their private life and the publication contributes little to a debate of general interest, then the balance will generally tilt in favour of the protection of personality rights.

• If the person lives a more exposed life and the publication is in the interest of the public, the balance will generally tilt in favour the protection of the freedom of expression.
The European Court of Human Rights

- ECtHR will only step in when the national legal framework is manifestly insufficient to arrive at a well-balanced solution.

- *von Hannover v Germany*: national law excluded altogether, subject to some minor exceptions, the protection of the right to private life with regard to persons of contemporary society.

- ECtHR has refused to accept that Art 8 requires the introduction into national law of an obligation to notify the subject of publication of the intent to publish certain information (*Mosley v United Kingdom*)
Sources of Private International Law

- EU PIL Regulations
  - Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Ibis)

- International Conventions
  - Hague Convention of 1 February 1971 on the recognition and enforcement of foreign judgments in civil and commercial matters

- National (procedural) law
Jurisdiction – which instrument applies?
Jurisdiction: Brussels Ibis

- **Basic rule:**
  - Art. 4 (1): Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State

- **Concurrent jurisdiction:**
  - Art. 7 (2): in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur
• CJEU in *Mines de Potasse* (Case 21/76): the place where the harmful event occurred could be both the place of the event giving rise to the damage (Handlungsort) as well as the place where the damage occurred (Erfolgsort)

• CJEU in *Shevill* (C-68/93):
  - the *Handlungsort* is the place where the publisher of the newspaper in question is established since "*that is the place where the harmful event originated and from which the libel was issued and put into circulation*"
  - the *Erfolgsort* is the place where the publication is distributed when the victim is known in those places since that is the place where "*the injury caused by a defamatory publication to the honour, reputation and good name of a natural or legal person occurs*"

• Jurisdiction on the basis of the *Erfolgsort* is limited to the damages actually sustained in that forum
• The approach of the CJEU has been dubbed in German legal writing as the "mosaic principle"

• Shevill leaves an applicant with an important strategic choice: he may (i) either bring proceedings before the court of the place where the publisher is established, and seek recovery of the prejudice suffered worldwide, or (ii) enjoy the benefit of suing locally, but having to restrict the claim to the damages sustained within that forum

• Shevill strikes a balance between interests of the publisher and the alleged victim

• The reconciliation of the competing fundamental rights is largely based on the distribution of the publication; by distributing the publication in a specific Member State, the publisher may reasonably foresee the jurisdiction of the courts of that Member State.
Shevill and the internet

- *Shevill* predates the digital age and may be difficult to apply to online publications

- On the internet information is not actively made available by a publisher in a specific Member State, but only passively by allowing Member State citizens to visit the relevant website

- Moreover, since information circulates on the web perpetually, the affront to the personal reputation of the victim by online defamation may potentially be much more severe
The court of the place where the alleged victim has his centre of interests will be in the best position to assess the potential impact of the publication on the personality rights of the individual concerned.

This place will often correspond with the habitual residence of the person concerned.

If the reduced importance of the element of distribution is the justification for the reconsideration of the Shevill doctrine, one would expect the CJEU to introduce a requirement aimed at guaranteeing foreseeability of the jurisdiction of national courts.

CJEU appears to have introduced a *forum actoris* while it has always consistently held that such a forum is incompatible with the structure of Brussels I(bis).
• CJEU amends the Shevill doctrine by reading a third connecting factor into art 7(2) with regard to infringement of personality rights via the internet.

• Distinction between analogue and digital world is at odds with the principle of technological neutrality (*Pammer & Hotel Alpenhof; Wintersteiger*).

• What to do with newspapers which are distributed online and in print (*Financial Times, Economist, Der Spiegel*)?

• *eDate Advertising* is a judgment most likely specific to the context of personality rights.
Defendants not domiciled in a EU or Lugano state

• Jurisdiction over defendants not domiciled in a EU Member State or Lugano Contracting State is subject to national procedural law

• London (England) is sometimes referred to as the "libel capital of the world"

• Kate Hudson and Britney Spears (US celebrities) have both successfully brought actions against the National Enquirer (a US magazine) in England

• Rule 3(1)(9) of the Civil Procedure Rules, and Practice Direction constitutes effectively the codification of CJEU Mines de Potasse. Moreover, English courts can rely upon the doctrine of forum non conveniens to strike out actions that have a manifestly closer connection with another jurisdiction
There may be other reasons why England is such a popular destination for libel tourists:
- Absence of language barriers
- Damages are generally higher than on the Continent
- Structure of the legal fees (no win, no fee; expensive to litigate)

American plaintiffs seeking to circumvent the absolute protection of the First Amendment

The effectiveness of the forum non conveniens to strike out such cases was significantly undermined by the multiple-publication rule

The *Ehrenfeld* case was severely politicised in the US and worked as a catalyst
The US response: Libel Terrorism Protection Act (New York)
The US response: the SPEECH Act

- The Securing the Protection of our Enduring and Established Constitutional Heritage Act (2010)

- The SPEECH Act basically requires that, if a plaintiff seeks enforcement of a foreign judgment in the US, the foreign court must guarantee the freedom of speech to an extent at least equivalent to the First Amendment

- Insofar as enforcement of the foreign judgment would be necessary in the US, the observance of the First Amendment is in this way factually imposed upon a foreign court

- SPEECH Act is not entirely free of the cultural imperialism it sought to address
Defamation Act 2013

- UK Defamation Act 2013 attempts to discourage forum shopping

- Introduction of single publication rule

- Strengthening of forum non conveniens: Section 9 (2) "A court does not have jurisdiction to hear and determine an action to which the section applies unless it is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement'.

- Defamation Act is a serious effort to prevent the most abusive examples of forum shopping
Applicable law

• Contrary to Brussels Ibis, Regulation 864/2007 on the Law Applicable to Non-Contractual Obligations ("Rome II") applies regardless the place of domicile

• First draft Commission proposal: a cross-border defamation claim should be governed by the law of the place where the victim is domiciled at the time of tort or delict

• Art. 1(2g) Rome II: The Regulation does not apply to "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation". Exclusion was caused by an extensive media-lobby which feared being made subject to more foreign law more restrictive on the freedom of speech

• Pyrrhic victory? Conflict of laws spaghetti only seems to support the position of the creative claimant
The defamation exclusion

- The issue of personality rights was included in the review clause contained in art 30 Rome II Regulation

- The Commission presented accordingly a comparative study on the situation in the (at the time) 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality

- The Mainstrat Study (Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality (JLS/2007/C4/028)) appears to be in oblivion

- Applicable law is determined by the national rules of PIL
Law applicable to the cross-border infringement of personality rights

- In the majority of Member States, the infringement of personality rights is governed by the general conflict of laws rules on the law applicable to non-contractual obligations.

- The most commonly used connecting factor is the *lex loci delicti*, leading to the application of the law of the place where the harmful event occurred.

- In the event where the place giving rise to the damage and the place where the damage occurred diverge, the conflict of laws rules of some Member States formally favour the former, but the result is in practice more ambiguous.
Some national examples

• Austria: disputes relating to non-contractual obligations are governed by the law of the country where the harmful conduct takes place (Art 35 and 48 IPR-Gesetz)
  - With regard to defamation, Austrian courts have interpreted the *lex loci delecti* to be the place where the injured party has suffered the affront and where the effects are felt most deeply. That place will often coincide with the place of habitual residence of the victim

• Principle of ubiquity prevails in Germany and Italy (Art 40 EGBGB; and Art 62(1) Italian PIL Act)
  - the *lex loci delecti* refers, in the case of a tortious act committed at a distance, both to the *Handlungs- and Erfolgsort*. The applicable law will in principle be the law of the country in which the liable party has acted. However, the plaintiff may instead require the application of the law of the place where the harm occurred
Five Member States have adopted a specific rule

- **Belgium**: victim may choose between the law of the *Handlungs* and *Erfolgsort* (Art 99 (2) Loi portant le Code de droit international privé)

- **Bulgaria**: victim may choose between (i) place of residence of the victim; (ii) *Erfolgsort*; and (iii) place of residence of the party allegedly liable (Art 108 International Private Law Code)

- **Hungary**: *Handlungs*ort unless the application of the lex fori is more favorable to the victim (Art 10 Decree-Law no. 13 of 1979 on International Private Law)

- **Lithuania**: for infringements caused by mass media, the victim may choose between (i) his place of domicile or main place of business; (ii) *Handlungs*ort; and (iii) place of domicile or main place of business of the party allegedly liable (Art 1.45 Lithuanian Civil Code)
  - Right of reply is governed by the law of place in which the publication appeared or where it was broadcasted
Specific conflict of laws rules

- **Romania**: victim may choose between (i) his place of residence; (ii) *Erfolgsort*; (iii) place of residence of the author of the publication (Art 112 Law no. 105 on the Settlement of the Private International Law Relations)

- These conflict of laws rules generally favour the alleged victim of the infringement of personality rights

- In Belgium, Bulgaria and Romania the victim can only opt for the law of certain places if the person potentially liable could have reasonably foreseen that harm would occur in that country

- Such a requirement of foreseeability is also applicable in Slovenia via the general conflict of laws rules (Art 30 Private International Law and Procedure Act)
Towards a European approach

• Some possibilities:

• Lex fori:
  - Simplicitly for the courts
  - There would be as many potentially applicable laws as there are potentially competent jurisdictions
  - Factually favours the plaintiff

• Erfolgsort
  - Multitude of applicable laws
  - Place of injury may in a globalised world be difficult to determine
  - Factually favours the plaintiff
Towards a European approach

- Place of establishment of the publisher
  - Benefit of one single applicable law
  - Forseeable (at least to the publisher)
  - Favours the freedom of speech

- Cross-border infringements of personality rights may be difficult to catch into a single hard and fast rule

- Combination of different rules?

- A more flexible approach?
Proposal by the European Parliament

- European Parliament proposed to amend Rome II by adopting a special conflict of laws rule regarding privacy and rights relating to personality.

- New recital:

  "This Regulation does not prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media. In particular, the application of a provision of the law designated by this Regulation which would have the effect of significantly restricting the scope of those constitutional rules may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (ordre public) of the forum."
Proposed Article 5a:

“1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, including defamation, shall be the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur.

2. However, the law applicable shall be the law of the country in which the defendant is habitually resident if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated by paragraph 1.

3. Where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law shall be applicable. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors.

4. The law applicable to the right of reply or equivalent measures and to any preventive measures or prohibitory injunctions against a publisher or broadcaster regarding the content of a publication or broadcast and regarding the violation of privacy or of rights relating to the personality resulting from the handling of personal data shall be the law of the country in which the publisher, broadcaster or handler has its habitual residence.”

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Recognition and enforcement

- Decision from a court in another Member State:
  - Proceedings instituted before 10 January 2015: Brussels I
  - Proceedings instituted on or after 10 January 2015: Brussels Ibis

- Decision from a court in a non-EU Member State:
  - National procedural law
  - Possible relevance of the ECHR
  - Limited relevance of the Hague Convention of 1 February 1971 on the recognition and enforcement of foreign judgments in civil and commercial matters (Albania, Cyprus, Kuwait, the Netherlands and Portugal)
Decisions stemming for a court in another Member State

- Under Brussels I, a court only has very limited possibilities to refuse the recognition and enforcement of a decision rendered by a court in another Member State
  - No révision au fond
  - Most relevant exemption ground is public policy (Art 34 Brussels I)

- High standard
  - No cases have been reported where a court refused on the basis of public policy the enforcement of a defamation judgment from another Member State

- When the abolition of the exequatur was proposed by the Commission, personality rights became (again) subject of political controversy
Brussels I bis

- Commission proposal: abolition of exequatur would not apply to decisions relating to the infringement of personality rights
- Decisions relating to the infringement of personality rights were ultimately not exempted from the abolition of the exequatur
- Direct enforceability
- A judgment debtor may still prevent recognition and enforcement
- Substantive reasons remain the same
Recognition and enforcement

- Recognition and enforcement of a decision stemming from a court in a non-EU or non-Lugano State is governed by national procedural law.
- ECHR may require (via the public policy exception) the non-recognition of a decision from a third country.
- In reverse, the recognition and enforcement of defamation judgments from EU courts in third countries may be very difficult (SPEECH Act).
Wrap up

- Regulation of cross-border infringement of personality rights is often politically very sensitive

- Striking the right balance between the right to a private life and freedom of speech is an extremely delicate exercise; likewise finding the right balance between the protection of a country’s own constitutional heritage and international comity is often difficult

- Multitude of competent jurisdiction and conflict of laws spaghetti factually strengthen the position of the claimant

- The deletion of the defamation exception in Rome II seems advisable