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Personality rights, defamation and the internet

Considerations of private international law

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Summary

This thesis discusses areas related to problems of private international law than can arise from an online cross-border violation of personality rights. The thesis can be divided into two parts. One parts deals with jurisdictional issues and specifically a discussion regarding Art. 7(2) of the Brussels I bis Regulation and the CJEU's case law on the topic. The second part deals with choice of law issues and certain legal cultures' balancing act between personality rights, on one hand, and freedom of expression on the other hand.

According to the above mentioned Article a plaintiff can sue in another Member State at the place 'where the harmful event occurred'. This jurisdictional ground developed because of the CJEU's case law to the extent that a plaintiff can sue at the place where he/she has his/her 'Centre of Interest'.

No subsequent case law is currently available and it is uncertain how such a centre is established, what factors affect the assessment and if the jurisdictional ground is applicable in other contexts than online violation of personality rights. In this thesis I will argue for a how COI could be established, hypothetically.

The other part of the thesis concerns certain major legal cultures' perspective on personality rights fundamental rights such as freedom of expression and how these two rights can be balanced. It is clear that it even in the relatively homogenous legal culture that is Union law exist divergent perspectives regarding this. This, in turn, has led to a Sisyphean labor trying to create a common legal framework regarding, specifically, choice of law in disputes with cross-border implications.

Sammanfattning

I detta examensarbete diskuteras frågeområden relaterade till internationellt privaträttsliga problem som kan tänkas uppkomma vid en gränsöverskridande kränkning av personlighetsskyddet online. Uppsatsen kan delas upp i två delar. En del avser frågeställningar avseende domsrätt med diskussion runt Art. 7(2) Bryssel I bis-förordningen samt EU-domstolens praxis på området. Den andra delen kan sägas behandla lagvalsfrågor samt vissa rättskulturers avvägningar mellan just personlighetsskyddet och 'rätten att inte bli kränkt' å ena sidan och yttrandefrihet å andra sidan.

Enligt ovannämnda artikel har en kärande/skadelidande med hemvist i en viss stat rätt att väcka talan mot en svarande i en annan medlemsstat vid den ort där 'skadan inträffade eller kan inträffa'. Denna grund för talan har utvecklats i och med EU-domstolens praxis på området såtillvida att den skadelidande parten har rätt att väcka talan på den plats där hen har 'centrum för sina intressen'.

Ingen efterföljande praxis på området finns i dagsläget och det är oklart hur ett sådant centrum fastställs, vilka faktorer som kan påverka bedömningen samt om det går att applicera grunden i andra situationer än vid just kränkningar av personlighetsskyddet som sker online. Nedan driver jag en tes om hur ett centrum hade kunnat bedömas med bakgrund i den något knappa praxis som finns på området samt i doktrinen.

Den andra delen av uppsatsen berör vissa större rättskulturers synsätt på rättigheter kopplade till personlighetsskyddet och grundläggande rättigheter såsom yttrandefrihet och hur dessa två kan balanseras. Det är tydligt att det även inom den relativt homogena rättskultur som skapats i och med den Europeiska Unionen finns väldigt skilda perspektiv på saken. Detta har i sin tur har lett till ett Sisyfosarbete med att skapa enhetlig reglering avseende framförallt lagval i tvister med gränsöverskridande verkningar, vilket problematiseras ytterligare på grund av *forum shopping* i dylika tvister (s.k. *libel tourism* eller förtalsturism), ett problem som lagstiftaren till dags dato kunnat råda bot på.

Preface

Close to six years of legal studies are about to come to an end. During my five and a half years at university I've had the immense pleasure of meeting some incredible people and I would just like to say thank you to all of you for making my university years great. A special thanks to everyone at Helsingkrona nation for making my supposedly educational years not be all about studying.

I would like to direct a thank you to Michael Bogdan, my supervisor, for helpful comments and advice.

A special shout out to my fantastic family, Håkan, Maja and Susanne, for putting up with me during six years of law school, my uncle Ulf Nilsson for his proofreading and sage advice regarding this thesis and Ida, Niklas and William for being supportive and encouraging in general and throughout the process of writing this thesis.

Lund, May 24, 2017
Sven Axel Nilsson

Abbreviations and definitions

Art.	Article
Cf.	Confer
COI	Centre/s of Interest (from *eDate*)
Ch.	Chapter
CJEU	Court of Justice of the European Union
EC	European Community
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
EU	European Union
IECL	International Encyclopedia of Comparative Law
NJA	Nytt Juridiskt Arkiv
Para/s.	Paragraph/s
PIL	Private International Law
RB	Rättegångsbalk (1942:740)
UK	United Kingdom
UN	United Nations
USA	United States of America
ICCPR	International Covenant on Civil and Political Rights (United Nations General Assembly, resolution 2200 A (XXI) of 16 December 1966)

Throughout this thesis, the following terms are used with the following meaning, unless otherwise indicated:

Brussels-Lugano Regime	A set of rules (The Brussels I bis and II Regulations and the Lugano convention) regulating which courts have jurisdiction in legal disputes of a civil or commercial nature between individuals' residing in different member states of the European Union (EU) and the European Free Trade Association (EFTA.)
Contracting States	Parties of the Lugano Conventions and/or the Brussels Convention, as the case may be.
Defamation	Violation of the right to personal and professional (occupational) reputation. In England: Libel.
England	England and Wales.
English law	Principally refers to the legal system of England and Wales.

European	Refers to things belonging to the Brussels and Lugano States or to the persons established therein.
Internet	The diverse kinds of online communication services, such as WWW, social media sites (platforms) and other applications.
Member States	Contracting States of the EU, including Denmark.
Personality rights	The right to reputation and the right to respect for private life, especially private information, image (likeness) and name.
Publisher	Legal or private person who publishes or places online its/his/her own content. In the case of a legal person, the term "publisher" also covers the act or omission of its employee(s).
Violation of personality rights	A dispute in which the victim seeks to establish the liability off the publisher for the allegedly injurious content cross-border published and distributed either online of offline and claims for compensations for his/her non-pecuniary harm caused by that content. Alternatively, the (potential) victim seeks to prevent the occurrence of such a violation.

Throughout this thesis, the following terms are used as synonyms, unless otherwise indicated:

- European Union, EU and Union.
- Litigation and dispute.
- Parties and litigants.
- Personality rights and rights relating to personality.
- PIL rules, private international law rules and conflict of laws rules.
- Plaintiff and victim.
- Publisher and online/Internet actor.
- Sue and seise.
- Tort, delict, quasi delict and non-contractual obligation.

1 Introduction

1.1 Background

International jurisdiction is an "adjudicatory authority" exercised by the courts and derived from the power of the political entity where the court sits.[1] Rules of international jurisdiction, that is to say private international law rules, localize and, in turn, nationalize trans-border legal disputes. For this purpose, they usually comprise two basic elements: A subject matter and a connecting factor.

The subject matter delimitates the scope of application of the rules. It is "*the element forming one of the facts of the case which is selected in order to attach a question of law to a legal system*"[2]. It is not solely a technicality of a legal order that automatically allocates the adjudicatory authority to the courts seised, but rather it reflects and gives effect to several broad considerations, interests and preferences of the legislator, the litigants and the courts. It implies a selection of law applicable to the procedural and substantive issues of the controversies.[3]

Connecting factors are basically designed on two policies, namely ease of administration of justice and predictability on the one hand and litigational justice, fairness and convenience on the other hand.[4] Although it is desirable to employ both of them in equal measure, von Mehren observes that there is tension between these two policies.[5]

Due to technological advances, connecting factors may be founded or reshaped. Accordingly, the balance between the two policies may vary. Such a challenging technological advance was, e.g., the invention and adoption of automobiles.[6] Currently, one such technological advance challenging private international law is the internet. The informational medium is often portrayed as an interactive, fluid and dynamic medium which has penetrated people's

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[1] Cf. Justice Holmes, as cited in von Mehren (2002), p. 104.

[2] Vischer, in: Lipstein, IECL, p. 3 (s.4-I)

[3] Von Mehren (2002), p. 27 ff.

[4] Von Mehren (2002), p. 70.

[5] Von Mehren (2002), p. 70.

[6] Márton (2016), p. 28. Also e.g. Jenard Report, p. 26 referring to the high number of road accidents as a ground for laying down a rule of jurisdiction in tort.

everyday life and has revolutionized their social relationships as well as their methods of communication and news consumption. Due to its inherently global nature it allows persons, regardless of cultural or financial backgrounds, to consume or distribute information around the world easily, instantaneously, simultaneously, permanently and at a low cost.

Two different views have crystallized among academics and legal practitioners on the application of contemporary physical world-oriented connecting factors to disputes arising out of the use of the internet. Some of the scholars adhere to the opinion that the emergence of this technology suggests a need to adopt, often complex, technology-specific connecting factors, whereas others hold the opinion that the traditional technology-neutral criteria based on the existence of the geographical borders of states are still applicable.[7]

Defamation, slander and libel, and other violations of other persons' right to privacy has, probably, occurred throughout all ages and times. However, the Internet and its rise enabled us to publish and partake of information in a completely different way when compared to traditional media – instantaneously, without respect of physical borders and suchlike. In many cases, it concerns serious and potentially harmful types of defamation which in turn perhaps become even more serious as the potential spread of such defamatory acts are exponentially larger when committed on the Internet. The importance of a reliable protection is emphasized in the UN Universal Declaration on Human Rights (Art. 12) which states that

> "No one shall be subjected to arbitrary interference with his privacy […] Everyone has the right to the protection of the law against such interference of attacks."[8]

1.2 Research questions

The purpose of this thesis is to research, explain and problematize the relation between private international law, the internet and the tort of defamation.

1.2.1 The place where the harmful event

[7] Márton (2016), p. 27 ff.

[8] Similar rights can be found in the European Convention on Human Rights (Art. 8) and in the Charter of Fundamental Rights of the European Union (Arts. 1, 3 & 7).

occurred and the internet

According to the Brussels I bis Regulation Art. 7(2), a person domiciled in a Member State may be sued in another Member State in matters relating to tort, delict or quasi-delict, in the courts of the place where the harmful event occurred or may occur. This provision has been subject to the interpretation of the CJEU and the question is if and how it has been affected by contemporary considerations relating to online defamation.

1.2.2 Jurisdiction based on Centre of Interest and its limitations

This question ties in to the above one. In the not-too-recent case *eDate and Martinez* the CJEU construed a new ground for jurisdiction based upon the plaintiff's Centre of Interests[9] and as of today, there's no recent case law further elaborating this jurisdictional ground. In this thesis aspects linked to the jurisdictional ground COI will be discussed and analyzed - is the jurisdictional ground only applicable in situations of online defamation and what circumstances should be considered when establishing a COI?

1.2.3 Freedom of expression vs. Personality Rights

At the basis of all kinds of defamation is some sort of position taken by the State in which the litigation takes place concerning the balance of freedom of expression and personality rights. This balance varies from country to country and even within the European Union different positions can be found in the Member States. What kind of balance should be sought and how do major legal cultures reason regarding this topic? This thesis will discuss some major legal cultures' approaches to this conflict from a comparative perspective.

1.3 Theory and method

1.3.1 Legal dogmatic method

The overall method employed by this thesis is the traditional Swedish legal dogmatic method. There is an ongoing debate among scholars as to what really constitutes this method but the most suitable explanation for how the

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[9] Abbreviated 'COI' below.

method is used in this thesis is *a study of the sources of law in hierarchical order*; EU law, constitutional law, law, legislative preparatory works, case law, doctrine.[10] The purpose of the legal dogmatical approach is to reconstruct an aspect of a certain legal area. This legal framework can then be applied to the questions stated for the thesis.

A starting point in this reconstruction is collecting material (i.e. some sort of research). This research has not followed a particular method; mostly it has been about reading available sources using them as a logical first step in my continued research.

The research has been done by taking into account the sources of law that create and makes legitimate the legal framework per se and also the doctrine of sources of law that discuss which sources these are as well as to what extent these sources shall, should or could be taken into regard. In this aspect, I've assumed a traditional approach with law, case law, preparatory works and doctrine.[11]

The collected material has then been systematized. Doing this, I hope to present an aspect of the legal framework in such a way that it is clear as to what sources of law exist, and in which order they should be considered. This presentation will then amount to "applicable law," by which I mean the legal framework currently in place. The presentation will give the actual law and case law a prominent role whilst preparatory works and doctrine will be used only to highlight the former.

Lastly, the collected and systematized materials have been analyzed (to such an extent as is possible considering the materials available at the time of writing this thesis).[12] The analysis of the reconstructed area of law means that it is not unbiased. A legal dogmatic approach that doesn't include an analysis would paint a pretty abysmal picture ("*This is applicable law. And that's it.*")[13]

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[10] See Sandgren, Hellner (2001), pp. 21–26.

[11] Peczenik (1990), p. 47 – 49. It should also be mentioned that the norms that suggest which material constitute sources of law and how these sources shall be taken into account looks different within the law of the EU. Case law, for example, has a more dominant role. See below in section 1.3.2.

[12] See Jareborg (2004), p. 2. The legal dogmatic method could therefore be described as "*descriptive-analytical"*, compare Westberg (1992), p. 432.

[13] Author's translation. For original "*Det här är gällande rätt. Och det var hela*." see Sandgren (2008), pp. 652-653.

1.3.2 Methodology of European Union law

Since this thesis also touches upon EU law, some methodological reasoning has been necessary. The EU law is, indeed, a part of the Member State's national law but simultaneously a source of law that is hierarchically superior to the same.[14] According to the CJEU, a principle of primacy exists in the relationship between national law and Union law.[15] This means that the Union law shall be given precedence over national law in case of collision with a rule in the national legal system.[16]

The Union law is construed out of its own sources of law which need to be treated with their own hierarchy. The sources of EU law are, in the order they're mentioned, primary law and the Charter, international agreements, principles of law, binding secondary law and the case law of the CJEU (and the Tribunal). Other than that, there also exist sources of law that are non-binding which are reckoned to be of use as guidelines. These are preparatory works, the GA proposals, doctrine and economic theories. For example, The Brussels I bis Regulation is, being a Regulation, binding secondary law.

In relation to domestic Swedish law a feature of note is the emphasis given to unwritten sources of law, i.e. the case law of the CJEU and general principles of law. Even if Swedish law places emphasis on case law as a source of law, it serves a somewhat different function within EU law. The courts, chief amongst them the CJEU, are to a different extent allowed to create Union law and not only interpret the law made by the legislative organ. That the Union law in this regard is based upon case law means that it might be relevant to allow oneself to glean some inspiration from the precedent tradition as develop within the Anglo-American common law systems in order to better understand the workings of the CJEU. Because of this unique feature something should be said about the CJEU's role and the main features of how it creates case law.

The CJEU, along with the Tribunal, works, partly, as a controlling organ in ensuring that Union law is respected by the Union's institutions and, partly,

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[14] Bernitz & Kjellgren (2014), p. 100 ff.

[15] See C-6/64 *Costa v. E.N.E.L.* From C-11/70 *Internationale Handelsgesellschaft* it also follows that the EU law has primacy also in relation to the Members States' constitutions. This primacy should be observed not only by the national courts but also other governmental organs, e.g. government agencies, see Hettne & Otken Eriksson (2011), p. 175-176 and therein referenced case law.

[16] Hettne & Otken Eriksson (2011), p. 40.

as a complement to the Legislator. The latter function has brought with it that the CJEU has taken upon itself the role of ensuring integration within the Union (which it has also been criticized for.)[17]

The CJEU can at the request of a Member States' national court issue a preliminary ruling regarding the interpretation of Union law according to Art. 267 TFEU. These preliminary rulings are binding for the national court that has requested it, but the CJEU don't consider themselves bound by their previous rulings which differentiates them from the formally binding principle of *stare decisis*[18] that can be found in common law.

When interpreting precedent in EU case law it is necessary to differentiate between statements that have been necessary for the conclusion in the case (*ratio decidendi*) and statements made in passing without having an impact on the conclusion (*obiter dictum*). The latter should, as a point of reference, not be given the same relevance as the former because they may, e.g., be less calculated than statements made *ratio decidendi*. When it comes to preliminary rulings the CJEU may, however, use statements *obiter dictum* to expound upon or illuminate the Union law or its earlier case law. This means that one cannot talk about *obiter dictum* within the Union law in the same sense as in a common law system.[19]

1.4 Material and delimitations

Material regarding defamation, torts and private international law and the relationships between these is relatively vast. The principal judgment for this thesis, *eDate*, is from 2011 and as it of some importance and not quite recent, several commentaries on it has been written. Case law has a prominent position within the legal system of the EU and thus the preliminary rulings have been used as primary sources. The Attorney General's suggestion is just that and as such I've treated it as doctrine.

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[17] The CJEU has been accused of, amongst other things, judicial activism because it takes too much political regard in its judgments, see Hettne & Otken Eriksson (2011), p. 59 and therein referenced works.

[18] "Precedent", defined by Black's Law Dictionary (1979), p. 1059 as a "rule of law established for the first time by a court for a particular type of case and thereafter referred to in deciding similar cases". Compare to Bogdan (2013), p. 101.

[19] Hettne & Otken Eriksson (2011), p. 50. Also Bogdan (2013), p. 101-104 concerning English law.

The primary source on international and European doctrine has been Javier Carrascosa González' course at the renowned Hague Academy of International Law titled *The Internet – Privacy and Rights related to Personality* which was given at the academy and then published in 2016. In this course, González discusses jurisdiction, choice of law and recognition and enforcement from several different perspectives. I've also used Dan Svantesson's book *Private International Law and the Internet* as a primary source as parts of it are very relevant to the topic of this thesis. In the parts pertaining to domestic Swedish law, my primary source has been Michael Bogdan's book *Svensk internationell privat- och processrätt*, but also Svantesson's book as it contains sections on domestic Swedish private international law. The idea and inspiration for this essay comes from a course I took with Michael Bogdan and Ulf Maunsbauch, *Den internationella privaträtten i ett globalt sammanhang*.[20] These are the works that are most commonly referenced in the thesis and most of the secondary sources that I have used to highlight certain sections can be found in the works referenced above.

As for delimitations, the foremost is that this thesis does *not* discuss either recognition or enforcement in the context of private international law. As the thesis will discuss international procedural issues, the substantive rules regarding defamation will only be discussed to the extent necessary in order to provide necessary background on the topic. Substantive laws regarding defamation will therefore not be discussed in any depth.

The first step towards solving a dispute with a foreign element with the help of private international law is to qualify it. It needs to be qualified in order for it to be made clear what rules of jurisdiction and choice-of-law are applicable. In this thesis, the qualification of the claim is not problematized but rather this thesis concerns the tort of defamation that can be a violation on the internet. Damages as such do not, in Sweden as in other countries, constitute a punishment for a committed crime but act as a restitutive compensation with the purpose of restoring the plaintiff to the same situation he/she would have been in had the defamation not taken place.[21]

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[20] During the course we had as an assignment to write an essay on a topic of PIL. A course mate's, Erik Ax, essay *Centrum för kärandes intressen – en rättsosäker domsrättsgrund vid skadevållande handlingar på internet?* was my introduction and inspiration regarding the topic.

[21] Note that e.g. the USA award punitive damages in torts. Hellner & Radetzki (2014), p. 23.

Tort is used in a looser meaning than in Common Law. Civil Law states do not identify torts in the manner Common Law states do. Instead, Civil Law systems often speak of “non-contractual damages” and the like. Within this thesis, tort is thus generally given the meaning of non-contractual damages.

As for the part regarding major legal cultures and their relation to privacy and freedom of expression, I have chosen to use examples primarily from European and North American legal cultures. This is because I find that these offer good examples regarding libel tourism and satisfy the need of different perspectives on the relationship between personality rights on the one hand and freedom of expression on the other hand. Another delimitation is that this thesis primarily concerns civil defamation as opposed to criminal defamation (e.g. *förtal* in Sweden.)

1.5 Disposition

This thesis has the following structure. The first chapter contains an introduction providing some background, the research questions, theory, method, material and delimitations. The second chapter consists of a presentation of the legal background concerning the EU’s judicial cooperation in civil matters, the Brussels-Lugano Regime as well as a brief background on the relation between the internet and private international law.

In the third chapter an introduction to personality rights and their existence in various legal instruments will be presented as well as a background on the possible conflict with freedom of expression.

The fourth chapter discusses the jurisdictional rules of the Brussels I bis Regulation and the case law of the CJEU. In the fifth chapter forum shopping and more specifically libel tourism is presented as well as a discussion of the differences and similarities between the two. The sixth chapter contains a discussion on the current choice of law rules in defamation cases, primarily from a European perspective. The following chapter seven presents a Swedish perspective on this area of private international law, containing discussion on jurisdiction as well as choice of law.

The eight and last chapter contains an analysis on the reach of the jurisdictional ground “Centre of Interest” as well as some remarks on the possible assessment of such a centre.

2 Legal background

2.1 Judicial cooperation in civil matters

In order to gain a better understanding of the questions posed and the system of European private international law and more specifically the Brussels I bis Regulation, the legal instrument most referenced to in this thesis, something should be said regarding the basic legal framework for the EU's judicial cooperation in civil matters.

The four freedoms of the European Union (free movement of goods, services, capital and people) are constantly on the rise. In turn, this leads to the necessity of developing cross-border relations abridging the different legal systems of the Member States. In civil matters having cross-border implications, the Union is developing judicial cooperation in many areas of civil law, amongst them private international law. The main objectives of this development are legal certainty and easy and effective access to justice, implying identification of the competent jurisdiction, clear designation of the applicable law and speedy and effective recognition and enforcement procedures.[22]

Private international law concerns itself with the cross-border aspects of all issues relating to relationships between private persons. The main tools for facilitating access to cross-border justice is the principle of mutual recognition, based on mutual trust between Member States and the direct judicial cooperation between national courts.[23] The EU's action in the area of judicial cooperation in civil matters seeks to ensure a high degree of legal certainty for citizens in cross-border relations governed by national law and to guarantee citizens easy and effective access to civil justice in order to settle cross-border disputes.

2.2 Art. 81 TFEU

The legal ground for the cooperation can be found in Art. 81 of the Treaty on the Functioning of the European Union (TFEU.)[24] The civil law cooperation

[22] Fact Sheets on the European Union – Judicial cooperation in civil matters, p. 1.
[23] Ibid., p. 1.
[24] Formerly Art. 65 of the Treaty establishing the European Community, TEC.

within the Union can arguably be said to rest upon a foundation of mutual recognition that demands, so to say, a relatively high degree of mutual respect between the Member States.[25] Of special interest is Art. 81.2(c) that confers upon the EU the right to decide upon measures for the compatibility between applicable law in the Member States concerning, amongst other things, jurisdiction of the courts especially when it is necessary for the proper functioning of the Internal Market.[26]

2.3 Mutual recognition

The principle of mutual recognition, based on mutual trust between the Member States, is of importance for the entire judicial cooperation within the European Union. However, a precise definition of the term does not exist in the area of civil law. It is, however, made clear from the case law[27] of the CJEU that the principle carries considerable weight for the entirety of the Union and is as such fundamental for judicial cooperation.

2.4 Legal certainty

The cooperation between the EU and its Member Stats goes a way to help individuals gain a measure of foresight in cross-border dealings as well as to develop their access to a trial by court to solve any disputes arising in the Member States between parties domiciled in different states. It is not uncommon that the CJEU in its judgments refers to the principle of legal certainty. The base definition of this principle is that the court system should operate in a predictable way, so that the private individual, without any major concern, is able find out which countries' courts have jurisdiction as well as which substantive law is applicable to the dispute.[28]

2.5 The Brussels-Lugano Regime

There are several different legal instruments available for deciding jurisdiction. The original, the Brussels convention[29], was signed in 1968 and its signatories were the then EC states. The Brussels convention wasn't a

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[25] Hettne, p. 101 f.

[26] See preamble 5 Brussels I bis Regulation.

[27] C-159/02 *Grovit*, para. 24 and C-116/02 *Gasser*, para. 72.

[28] Bernitz (2014), p. 161.

[29] Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

product of the EU's legislative work, but the interpretation of the Convention was conferred through a special protocol to the EC Court (current CJEU). The Convention as well as the protocol was incorporated into Swedish domestic law through the law (1998:358) on the Brussels Convention.

Some time later in 2002, the Convention was replaced by the Brussels I Regulation which in turn was replaced in 2015 by the Brussels I bis Regulation, the regulation in force today.[30] Aside from some changes the Regulation follows the same structure and wording as the original Convention. This means that case law concerning the Convention has some meaning in relation to the interpretation of the Regulations.

Aside from the Brussels convention and the Regulations there's also a convention of 2007, the Lugano convention, that in large parts contain the same contents as the Brussels I Regulation. A simple explanation of the Lugano Convention's scope of application is that it is applicable when the defendant in a dispute has his or her domicile in a non-EU Member State or when one of these states has jurisdiction because of the rules regarding exclusive jurisdiction of an agreement.[31]

The Brussels I bis Regulation along with the Brussels I Regulation and the Brussels Convention of 1968 deal with jurisdiction as well as recognition and enforcement in relation to the Member States of the European Union. The original convention of 1968 can be said to be a *closed double convention*, meaning that the Convention regulates jurisdiction as well as recognition and enforcement, and that the only valid grounds for jurisdiction are the ones provided for in the Convention.[32] The two versions of the Regulation that, largely, replaced the Convention from 2002 and onwards are built on the same structure as its predecessor, the Convention.[33] However in some circumstances the rules of the Regulation will also affect claims against persons not domiciled in a EU Member State.[34]

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[30] Fact Sheets on the European Union – Judicial cooperation in civil matters.

[31] See the Brussels I bis Regulation arts. 24-25.

[32] Svantesson (2016), p. 323.

[33] See Brussels I bis Regulation, Recital 9. Denmark does not participate in the adoption of Regulations in the field of Title IV of the Amsterdam Treaty and is therefore not bound by the Regulation, which binds the other EU members, a special agreement was concluded in 2005 between the EC and Denmark (see OJ L 299, 16.11.2005, pp. 62-70) in order to provide that the provisions of the Regulation apply to the relations between the EC and Denmark.

[34] Brussels I bis Regulation, Recital 14.

As the Brussels I Regulation, now Brussels I bis Regulation, only applies amongst EU Member States the modernization it provides needed to be replicated in relation to those countries that followed the Lugano Convention. As a result of this need, a new Lugano Convention[35] was drafted reflecting the changes made in the transition between the Brussels Convention and the Brussels I Regulation. This new Lugano Convention came into force 1 January 2010 between the Member States of the European Union (including Denmark) and Norway. From 1 January 2011, it also applied in relation to Switzerland and Iceland on May 2011.

The primary purpose of the Regulation is to create, through harmonization of the Member States' legislation regarding international jurisdiction and recognition and enforcement of foreign judgments, a free circulation for judgments in civil and commercial matters within the EU. This free circulation will in its turn forward the establishment of the Internal market.[36]

The Regulation is a part of the Union law which gives it primacy over the national laws of the Member States. As a Regulation, it is also directly applicable in the Member States.[37]

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[35] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (deposited with the Government of the Swiss Confederation) 30 October 2007: Lugano.

[36] Preamble 3, 4 and 6 of the Brussels I bis Regulation. See also Art. 81 TFEU.

[37] See Art. 288 TFEU.

3 Personality rights

3.1 Definition and background

Rights relating to personality refer to a set of rights belonging to all physical persons. The rights relating to personality, or personality rights, (*Personlichkeitrechten*) can be defined as "*subjective rights directly derived from human nature and from the inherent dignity of any person*."[38] Their aim is to protect the personal sphere of any human being in its physical and spiritual aspect.[39] Examples of rights relating to personality are right to life and physical integrity and right to honor, privacy and image rights. The rights have been topic for discussion amongst legal scholars and almost everything about them have, at one point or another, been discussed as they are, in nature, political as well.[40]

González defines rights relating to personality as belonging to two categories:

1. Rights that protect the human being's physical sphere and the person, for example the right to life and the right to physical integrity.[41]
2. Rights that protect the human being's spiritual or non-material sphere. These rights protect the personality, not the person. Examples of these rights are the rights to honor, image rights and right to personal and family privacy.[42]

3.2 The internet and private international law

Data from the International Telecommunication Union estimates that 47% of the World's population, roughly 3 480 million people[43], had access to the internet in 2016.[44] The use of the internet is widespread and it keeps growing by the hour. There is an inconceivable amount of information accessible

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[38] González (2016), p. 308.
[39] Ibid., p. 308.
[40] Ibid., p. 312f.
[41] Ibid., p. 313.
[42] Ibid., p. 313.
[43] 2016 World Population Data Sheet, p. 1, Population Reference Bureau.
[44] ICT Facts and Figures 2016, p. 1 & 4. International Telecommunication Union (ICT) is a specialized agency of the United Nations responsible for issues that concern information and communication technology.

through the internet that is not stored locally on the personal computers of the users, but rather kept on remote servers.[45]

Most of the transactions and operations carried out on the internet are international, or at the very least have possibility to be international. In such situations, there are one or more "foreign elements" and these transactions have the possibility to cause effects in several countries or even in the entire world. Kessedjian said regarding the internet that "*The network of networks is transnational by nature*"[46]. The internet cannot be said to be a physical reality in the everyday understanding of the word. Traditional national legal systems have been designed to govern physical reality, i.e. persons, goods and things that physically exist. These traditional national legal systems are not always prepared to regulate activities developed in the internet as these activities frequently lack a physical base. For instance, law has traditionally regulated the place of performance of the contract conceived as a physical place (the place where a contracting party executes the obligation in a material way, where he/she pays or where he/she delivers the physical goods).[47]

Contrary to the traditional legal regime, the internet can be said to create a new social dimension in which classic concepts such as the "place of execution of the obligations," the "place of performance of the contract," the "place of the damage," the "publication of an intellectual work" and many other concepts don't have the same implication that they have in the physical world. Because of this, when a contract is performed on the internet, the traditional legal concept of "place of performance" is not appropriate as there is no clear understanding of what "place" is referred to. Say, for example, that you buy a digital copy of Microsoft Word and download it to your computer. Would the "place of performance" refer to the location of your computer, to the location of the servers at which you bought the copy or someplace else entirely?

Each state has its own organization of courts and its own laws. Private international law deals partly with deciding, according to international and national law, which domestic court has jurisdiction to hear a case with foreign elements. But with the rise of the internet as a social dimension not clearly being associated with a single, or several, states, the questions of what court has international jurisdiction to hear an international case that has emerged

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[45] Carracosa, p. 292.
[46] Kessedjian (1998), pp. 143-154.
[47] See, for example, the Convention on the International Sale of Goods, CISG.

on the internet begs to be answered. Some authors are of the opinion that the thorniest legal questions that the internet poses correspond to private international law.[48] B. Favarque-Cosson writes that the development of the internet draws new attention to the primary function of private international law to "*ensure the protection of the individuals involved in legal relationships characterized by the presence of foreign elements.*"[49]

Defamation is an interesting area as regulation of defamation requires the balancing of two basic human rights: freedom of expression and the protection of reputation. Both these rights are protected as important under recognized international law in equal measure, see below.

Defamation law is an area where states are often more protective than they are in relation to other fields. The citizens' rights of freedom of expression and the protection of reputation go to the very core of the society, and are often said to be of fundamental importance in democratic societies – which might mean that states would be reluctant to enter into agreements relating to defamation law, or private international law rules regulating defamation.

For example, a typical choice of law rule could the so-called *lex loci delicti* (the law of the place of wrong). As jurisdiction and choice of law in relation to criminal defamation fall outside the scope of private international law, only the civil aspects of defamation are covered. Contextually, however, criminal acts (such as criminal defamation) give rise to the same sort of issues as civil acts do. A victim of a crime can take a civil action seeking compensation, so while criminal defamation falls outside the scope of this thesis, civil implications of criminal defamation necessarily falls within the scope.

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[48] González (2016), p. 294 f.

[49] B. Fauvarque-Cosson, "Le droit international privé classique à l'épreuve des réseaux", in G. Chatillon (ed.), Le droit international de l'Internet, Bruylant, Brussels, 2002, pp. 55-70, esp. p. 56 : "*en réalité, loi de menacer le droit international privé dans son existence, les réseaux en renforcent la nécessité. tout d'abord, le développment parfois qualifiéde 'sauvage' de l'Internet restuaure le droit international privé dans sa fonction première : assurer la protection des individus dans toutes les relations affectées d'un élément d'extraneité".*

3.3 Personality rights in international legal instruments

There are many international instruments that recognize the existence of rights relating to personality. For example, ICCPR[50] Art. 17 states that

> *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

This article, for example, guarantees several rights to all human beings but does not, however, say anything about the right-holder's abilities, means of legal recourse in case of an infringement of a breach of the said rights. The legal instrument does not, as such, contain any system of sanctions. Instead it leaves to the individual States to "give meaning" to the rights.[51]

However, there are other international instruments that don't just declare the existence of rights relating to personality but also endow them with a specific content. The clearest examples of these, according to González, are ECHR[52] Art. 8 (right to respect for private and family life) and Art. 7 of the Charter[53] (respect for private and family life). An individual whose rights have been violated can apply to the European Court of Human Rights for redress.[54]

3.4 International jurisdiction and applicable law

The above-mentioned legal instruments merely declare that all human beings have rights relating to personality but they do not offer any indication of the international jurisdiction of domestic courts or the applicable law to such rights. For example, if a newspaper published online by a European publisher makes an, allegedly, defamatory statement about a European individual with habitual residence in the EU, it would then be necessary to determine which national courts have jurisdiction to hear the case and which national

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[50] International Covenant on Civil and Political Rights (United Nations General Assembly, resolution 2200 A (XXI) of 16 December 1966).

[51] González (2016), p. 316. Also note that ICCPR is an instrument from the UN and that the ICJ does not accept applications from individuals.

[52] Convention for the Protection of Human Rights and Fundamental Freedoms made by the Council of Europe in Rome, 4 November 1950.

[53] Charter of Fundamental Rights of the European Union (2000/C 363/01).

[54] See ECHR Art. 34-35.

legislation should be applied to the substantial claims of the dispute (jurisdiction and choice of law).

None of the above-mentioned legal instruments nor the states' constitutions that govern personality rights deal with their private international legal aspect. These international legal instruments are not instruments of private international law and as such do not include any rules regarding either jurisdiction or choice of law.[55] Private international law is to be applied in order to ascertain which court has international jurisdiction to protect personality rights from the violations, breaches or infringements that they can suffer, as well as to determine the applicable law. As such, it is of great importance.[56]

3.5 ECHR

The Convention for the Protection of Human Rights and Fundamental Freedoms made by the Council of Europe in Rome on the 4th of November 1950[57] includes the '*right to respect for private and family life'* (Art. 8 ECHR) as well as freedom of expression and information (Art. 10 ECHR). Nonetheless, the instrument and the freedoms and rights it governs doesn't affect relationships between individuals as the convention only deals with the vertical relationship between individuals and the State Contracting Parties to the convention and its authorities. There are certain aspects of this convention that should be emphasized within the context of this thesis and the articles mentioned above:

The ECHR has declared that the first paragraph of Art. 10 operates as a general rule, subject to interpretation. That is because the fundamental freedoms (including freedom of speech) are the bases of justice and peace in the world and freedom of speech, specifically, constitutes "*one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment*"[58].[59] Freedom of expression operates as a cornerstone of the principles of democracy and of the human rights

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[55] González (2016), p. 317. See also: Holleaux, Foyer and Geouffré de Lapradelle (1987), p. 504-505 "*Ces conventions ne précisent pas quelle est la loi applicable*" ["*These conventions don't prescribe which is the applicable law*", author's translation.]
[56] González (2016), p. 317.
[57] Since then amended, the current version with amendments entered into force on 1 June 2010.
[58] ECHR 9815/82 *Lingens v. Austria*, p. 41.
[59] Preamble to the ECHR, 5th paragraph.

protected by the ECHR and can be said to, as a principle, prevail over the protection of the rights relating to personality.[60]

The exceptions to freedom of information and expression (Art. 10(2) ECHR) may be found in the protection of the rights relating to personality (Art. 8 ECHR). Any exception to the right of freedom of expression and information, including personality rights, should be construed restrictively.[61] Because of this, ECHR uses a balanced legal model between rights relating to personality and freedom of expression and information.[62] A uniform set of legal provisions that incorporate the above-mentioned balance has been created by the ECHR common to the Contracting States to the Convention.

According to González, this is of importance because the laws of the Contracting States to the Convention are quite similar to each other and conflicts of law should tend not to be as infected.[63] The possibility of intervention of public policy (*ordre public*) to avoid the application of the law of other Contracting States to the Convention also decreases.[64] Regardless, some divergences between the laws of the States relating to the balance between freedom of expression and rights relating to personality still exist (see for example the section on libel tourism below) and the intervention of the conflict rules of PIL still serve an important function in order to determine the applicable law in cases of violation of the personality rights with foreign elements.

3.6 Personality rights in North America

Personality rights are incorporated into the laws of most states, but no such thing as a single set of rights relating to personality common for all the countries of the world exists. For example, with regards to the provisions in the ECHR and the Charter, the Contracting States (and Member States) have a certain margin of appreciation in adapting the rights to their respective legal systems. Some rights relating to personality exist under French law whereas

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[60] González (2016), p. 318.

[61] See e.g. the Center for Democracy and Technology *Defamation in the Internet Age* (2012), especially p. 3.

[62] See e.g. the Center for Democracy and Technology *Defamation in the Internet Age* (2012) and Dickinson (2012).

[63] González (2016), p. 318.

[64] Ibid., p. 318.

other rights and/or rights with different content exist in Germany and Sweden.[65]

In some states, the rights relating to personality have constitutional protection (e.g. Sweden, USA) while in other countries they do not. The rights are defined and designed in a different way in every society and in every state. Gonazález states that there are principally two big different models for regulating the rights relating to personality in Western countries:

The European model: Personality rights are seen as connected to the person's dignity.[66]

The North American model: Under US law, great importance is given to the 'right to be left alone'. Thus, in the United States of America, personality rights are considered as a consequence of the person's right to "control his/her personal information." US law contains provisions that allow individuals to react against governmental acts that may limit the individual's freedom to decide about his/her life. The first ten Amendments to the US Constitution contain many "civil rights." A "right to privacy" is not expressly included on that list but the Supreme Court of the United States has affirmed that such a right exists and is a result of different general freedoms.[67] The right to privacy and the concept of freedom (to plan one's life in peace and freedom, free of interferences) are intertwined in the North American legal system and it can be said that the right to privacy derives from freedom.[68]

In the North American model, it should be kept in mind that the protection of personality rights differs from state to state and that the legal deference of these rights is subject to certain limits – the defamatory information must be completely private and secret, without value for public opinions and offensive.[69]

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[65] Ibid., p. 322.
[66] Ibid., p. 323.
[67] González (2016), p. 324.
[68] Ibid., p. 324.
[69] Ibid., p. 324.

3.7 Personality rights vs. Freedom of expression

Most legal systems in the world acknowledge rights relating to personality. However, all of them also recognize the freedom of expression and the freedom of information. Thus, a tension between the two can frequently be discerned. In some situations, freedom of expression is restricted in order to protect the rights relating to personality, while in other cases these freedoms are restricted in order to protect and preserve the freedom of expression and information. There are different legal models to manage the tension between these two kinds of civil rights.

In North America, the right to privacy and freedom of expression derive from the right to an individual freedom (see above in 3.5). In American legal practice, freedom of expression has greater importance, so this right prevails over the right to privacy, the right to honor and privacy and image rights.[70] The limits imposed on freedom of expression by the rights to privacy, to honor and image rights are less strict under American law than those existing in the law of the European countries. For instance, under American law, materials having an impact on public opinion and those with informational value in themselves can be freely distributed even if they consist of factual or purely private data. This approach comes from the First Amendment to the United States Constitution, which states that

> "Congress shall make no law […] abridging the freedom of speech, or of the press […]"[71]

It should be remembered that the libel laws of the US punish both slander, i.e. oral or spoken communication, and libel, i.e. written communication.[72] In the case of both libel and slander, US law gives the media a chance to criticize public figures, whether officials of celebrities. US law limits in practice the starting of actions for defamation, for three different reasons. Firstly, it is difficult to obtain large sums of money, because compensation is usually limited to the "actual damage" suffered by the victim. Secondly, not all individuals whose honor has been infringed may bring legal actions before the courts. In particular, public figures lack legal actions to sure the media that publish information concerning their private life unless such information

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[70] Ibid., p. 325.

[71] First Amendment to the Constitution of the United States of America – Freedom of Religion, Press, Expression. Ratified 12/15/1791.

[72] Definition taken from Merriam-Webster's dictionary, available online.

has been made “with actual malice.”[73] Thirdly, under US law, the single publication rule applies, which means that a report published several times can only give rise to one legal action for defamation and not many. [74]

In Europe, most countries follow a legal model characterized by several features (that can also be found in the ECHR). There is no systematic preference of the rights relating to personality on the freedoms of expression and information or vice versa. There is, however, a starting preference in favor of freedom of expression and information because this freedom is considered of general interest as it contributes to the formation of public opinion which of vital for a democratic society.[75] Thus, if the defamatory material (data or images) that has been distributed contain information of a public interest, freedom of expression and information should prevail and the rights relating to personality should yield. However, the rights only yield to freedom of expression to the extent necessary to protect the general interest of society. If the information or data that have been distributed do not contain materials of a public interest, personality rights should prevail.

However, even in the Member States of the EU differences can be found. For example, British laws are more favorable to the victim of defamation for different reasons. Firstly, under UK law the multiple publication rule applies. The rule means that a separate cause of action is generated whenever an article is reprinted or downloaded.[76] The victim can thus start take legal actions even if the content has already been published. Secondly, compensations for defamation are higher in the UK than in the US and in the UK, punitive damages in defamation cases can be obtained. Lawyers’ fees are high and must be paid be the defendant who has been found against and thirdly, all people (public figures and private citizens), have a right to their privacy and may go to court if that right is violated. Incentives to sue in cases of infringement of the personality rights and particularly in defamation cases are thus much higher in the UK than in the US, however if a plaintiff can sue with an expected positive outcome, the damages tend to be higher in the US taking into consideration that they have punitive damages in torts.

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[73] González (2016), p. 326 and Constitution Annotated (2016), p. 1308

[74] González (2016), p. 326, Svantesson (2016), p. 238 and McFarland (2009), p. 5.

[75] See above in section 3.4.

[76] McFarland (2009), p. 9 and King v. Lewis [2004] EWCA Civ1329. at para 2 (“[…]*by the law of England the tort of libel is committed where publication takes place, and each publication generates a separate cause of action*.”)

4 International jurisdiction and personality rights

4.1 The Brussels I bis Regulation general features and scope of application

Regarding the Brussel I bis Regulation's rules of jurisdiction and its applicability, it is necessary that the dispute has a connection to a Member State.[77] Furthermore, the application of the Regulation presupposes that the dispute is to be tried in court and that it concerns an issue of civil law.[78] The Regulation does not apply to disputes relating to the name of individuals, the existence and death of natural persons, absence and declaration of death, validity and effects of marriage, divorce, separation and annulment, filiation, child protection and incapacitation.[79] Another condition for the Regulations' applicability that does not follow from the text is that the dispute has some kind of foreign element.[80]

4.2 The jurisdictional rules of the Regulation

When determining a domestic court's international jurisdiction to hear the cases arising from disputes concerning personality rights on the Internet, several interests must be taken into account. In general terms, it can be affirmed that in the context of European private international law, the legislator has designed the grounds of international jurisdiction to reflect a link between the matter and the Member State whose courts can hear the case (*rattachement jurisdictionnel*) and such a link is fundamental in the European legal regulation of international disputes also in relation to disputes concerning infringements of personality rights.[81]

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[77] This is called territorial applicability, see e.g. Pålsson (2008), p. 51.

[78] See Art. 1 of the Brussels I bis regulation.

[79] Art. 1(2) and González (2016), p. 329.

[80] Bogdan (2014), p. 103ff.

[81] González (2016), p. 328, for *rattachment jurisdictionnel* see Ch. N. Fragistas, "La compétence internationale en droit privé", *Recueil des cours*, Vol. 109 (1961), pp. 159-267.

Under European law the international jurisdiction of the courts to hear disputes arising from above mentioned infringements of the rights relating to personality – including those occurring on the Internet – is set the by the Brussel I bis Regulation as they are considered litigation in "civil and commercial matters" which fall within its scope.[82] The Regulation considers these infringements as a specific case of tort or extra-contractual responsibility.[83]

4.2.1 The general rule – forum domicilii

Per Art. 4 of the Regulation persons domiciled in a Member State must ("*shall*"), regardless of their respective nationality, be sued in the courts of that Member State (Arts. 4 & 5). Of note is that the defendants' citizenship in this regard does not matter as it's only the domicile that is relevant. This rule is applicable for the entirety of the Regulation, but with the reservation that there are certain other, alternative grounds for jurisdiction (e.g. art. 7). Furthermore, there are some provisions that are exclusive and as such excludes the general rule. It should be observed that Art. 4 only provides for the international jurisdiction, domestic jurisdiction is to be decided per domestic law.[84]

The purpose of *forum domicilii* as a rule is not of a practical nature. Instead it concerns the realization of a "balance of weapons" which is to say that one party in the dispute shouldn't have an advantage over the other. Since the plaintiff has the advantage of being able to elect where and when to file a suit, and seeing as the defendant has a limited time to prepare a defense, the defendant should at the very least as a general rule have the possibility to litigate in a court with which he/she is familiar with.[85] In this regard a principle derived from the judgment in *Marinari vs. Lloyd's Bank Ltd* is of interest – the principle that jurisdiction to the largest possible extent should not be granted the courts in the plaintiff's country of domicile (*forum actoris*).[86]

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[82] Brussel I bis Regulation, Art. 1.
[83] P. Mankowski, "Art. 5.3", in U. Magnus and P. Mankowski (eds.), *Brussels I Regulation*, 2nd ed., Munich, Sellier, 2012, pp. 261-265.
[84] Pålsson (2008), p. 105f.
[85] Sramek (2014), p. 166f.
[86] C-364/93 *Marinari*, p. 13.

4.2.2 Special jurisdictional rules for tort – forum delicti

In the absence of a court chosen by the parties and alternatively to the ground of the defendant's domicile, the courts of the place where the harmful event occurred or may occur also have international jurisdiction to hear the case (Art. 7(2) Brussels I bis). According to this provision a person domiciled in a Member State may be sued in another Member State in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur. This *forum delicti* is applicable to every non-contractual litigation.

The CJEU established in *Kalifelis*[87] that "matters relating to tort, delict or quasi-delict" (non-contractual obligations) "must be regarded as an independent concept covering all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 7(1)[88]." Furthermore, the Court established that, amongst others, Art. 7(2) is to be considered an exception to the principle that it is the court in the state where the defendant is domiciled that has jurisdiction to try the case, and that this exception should be interpreted in a restrictive manner (the principle of territoriality).[89]

Not all types of damages fall under Art. 7(2) Brussels I bis Regulation which is why it's important to keep the delimitation in mind. Amongst other things, the plaintiff must have suffered a direct and immediate damage in order to sue at the place where the harmful event occurred. This means that in deciding whether a certain Member State's court has jurisdiction, no consideration is given to indirect damages suffered by the victim or any other person in that territory.[90] Most importantly, economic losses having occurred in another country than where the primary damage happened is not relevant for the question of jurisdiction based on Art. 7(2) Brussels I bis regulation.

The meaning of the concept of harmful event is not defined within the Brussels-Lugano Regime. It was left intentionally open by the drafters of the Brussels Convention, as they preferred to "*keep to a formula that has already*

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[87] C-189/87 *Kalifelis*.

[88] Former Art. 5(1).

[89] *Kalifelis,* pp. 18-19.

[90] The ECJ has stated (in *Dumez)* that the forum delicti is limited to the place where the wrongful act "*directly produced its harmful effect upon the person who is the immediate victim of that event*." Compare also to the CJEU's reasoning in *Mariniari*.

been adopted by a number of legal systems"[91]. It would seem that the drafters charged the CJEU with the interpretation of this concept, which has been clarified in a line of judgments dating back to 1976 when it was first dealt with in *Bier*.

4.3 C-21/76 *Bier*

Factual background

This case concerned pollution matters, specifically the Mines de potasse d'Alsace SA, a mining company established in France. The company discharged chloride into the inland waterway to the Rhine. Although the discharges were authorized by the officers of the French prefecture,[92] they caused damage to the plantations of Bier, the first plaintiff, who had to take expensive measures in order to limit the damage. Thus, Bier and the Reinwater foundation, a Dutch organization, brought an action for compensation for the damage caused in a Dutch court in accordance with Art. 5(3) of the Brussels Convention.

Judgment

The CJEU were thus faced with a distance tort since the elements of tort (i.e. causal event and damage) occurred in two different Member States. The CJEU established twin criteria in paragraphs 24-25 of its judgment, giving the claimant the possibility to choose between the place of origin of the damage and the place of its outcome, when these two are not identical. This choice founded on the physical damage in *Bier* has served as starting points for interpreting the concept of harmful event in other distance and scattered torts[93] involving pecuniary or non-pecuniary damage.[94] The twin criteria of *Bier* encounters some difficulties concerning violations of personality rights as the CJEU in *Bier* introduced a certain amount of flexibility in its interpretation by remaining silent on what event and whose damage is to be deemed jurisdictionally relevant. Violations often involve a series of activities and consequences possibly taking place at different places and times. It is thus not entirely clear which one of the acts leading to the violation and which of the losses caused by the violation shall be regarded as jurisdictionally relevant events and damages.

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[91] Jenard Report, p. 26. AG in *Bier*, 3 (p. 1751) with different wording.

[92] AG in *Bier*, 8 (pp. 1756-1757).

[93] Torts in which the causal event (threatens to) give(s) rise to damage in more than one states. Cf. AG 1994 in *Shevill*, 52 (regarding violation of personality rights).

[94] Márton (2016), p. 135.

Comment
Consider the following example. The person "A" makes defamatory and injurious content available online and to the public. Thus, everyone in the public arena including the victim is able to possess and comprehend the content, which in turn causes pain to the victim and to his close relatives. Is it the first act or final act in this chain of events that directly causes damage, or does it cover the whole act? Does damage mean the direct or indirect harm caused to the direct and/or indirect victim?

The twin criteria under Art. 7(2) for the interpretation of the concept of harmful event established in *Bier* can be adjusted to specific torts by balancing the governing objectives and underlying principles of the Brussels-Lugano regime. The balancing exercise is a delicate issue in disputes concerning cross-border defamation through the offline press, since these disputes involve a complex chain of successive acts.[95] The policy-based selection of jurisdictionally relevant concepts amounting to causal event and damage for the purpose of Art. 7(2) was undertaken by the CJEU in *Shevill*, which in turn provided a sound basis for ruling on online violations of personality rights in *eDate and Martinez*.

4.4 C-68/93 *Shevill*

Factual background
The defendant in *Shevill* was Presse Alliance SA, a company incorporated under French law with a registered office in Paris. Presse Alliance published a newspaper, *France-Soir*, in which an article in French appeared in 1989. The article alleged that the first plaintiff, Ms. Fiona Shevill, a resident of England, had worked three months at a *bureau de change* in Paris in the summer of 1989 and had been involved in laundering drug money. The article also claimed that the bureau de change was involved. The newspaper was mainly distributed in France and had a very small circulation in the UK. The circulation was a bit over 200.000 and only 230 copies were sold in England and only 5 copies in Yorkshire, where Ms. Shevill resided. The defendant published a retraction and an apology but Ms. Shevill brought proceedings in England, claiming that due to the publication in England, she had suffered damage including hurt feelings, great distress and great embarrassment. Thus, she asked for damages. The defendant claimed that the court lacked jurisdiction because under Art. 5(3) of the Brussels Convention, the place where the harmful event occurred was not England, but France. On appeal

[95] Márton (2016), p. 153.

from the *Court of Appeal* to the *House of Lords*, the latter authority referred seven questions to the CJEU.

Judgment

Out of these seven questions the CJEU pointed out that four dealt with the localization of the concept of harmful even within Art. 5(3) of the Brussels Convention. In other words, "[…] *establishing which courts have jurisdiction to hear an action for damages for harm caused to the victim following distribution of a defamatory newspaper article in several Contracting States.*"[96]. After reaffirming its earlier case law from especially *Bier*[97], the CJEU stated that the expression 'where the harmful event occurred' in Art. 5(3) of the Brussels Convention in a libel case meant that the victim of a libel by a newspaper article may

> *"[…] bring an action for damages against the publisher either before the courts of the Contracting States of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised.*"[98]

Comment

This ground, it can be argued, cannot be seen to be fully adapted to the case of damage to the rights relating to personality on the internet for several reasons. Firstly, the victim may not be aware of the place from which the person who is allegedly liable may have acted. Secondly, in cases relating to libel on the internet, the injuring party may not be easily identified (e.g. using a pseudonym, a false name or acting anonymously). On the internet, there are actors that easily can be identified (i.e. big media, communication groups etc.). Establishing a domicile for such an actor does not cause any problem, but there exists a myriad of other actors on the internet that cannot be so easily identified. With regard to this not-so-easily identifiable and sometimes roving actors, the defendant's domicile is not very useful as a ground of jurisdiction.[99]

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[96] *Shevill*, para. 17.
[97] But also from the *Dumez* case.
[98] *Shevill*, para. 33. This is also called the *mosaic principle*.
[99] Swire (2005) defines these actors as the "elephants" and "mice" of the internet.

Thirdly, for the plaintiff (i.e. the alleged victim), litigation in the Member State where the defendant is domiciled can turn out to be a very expensive jurisdictional option if the plaintiff has to make a 'jurisdictional trip' to the country of the defendant's domicile and file a suit there. In terms of judicial expediency, this ground of international jurisdiction is inefficient as it implies higher costs to the victim than the alleged wrongdoer. In this aspect, González argues, one could even argue that the jurisdictional ground encourages violation of personality rights as the person who suffered the damage from a violation of his/her personality rights on the Internet would face a high cost to sue the alleged wrongdoer, which in turn might make him/her desist from the initial intention to file a lawsuit. The offender will go unpunished because the costs of filing a lawsuit are very high for the victim.[100] However, the CJEU has since *Shevill* revised the principles in order to meet the demands of the contemporary information society.

4.5 C-509/09 and C-161/10 eDate and Martinez[101]

Factual backgrund

In the *eDate*-case a person, in the case referred to as simply "X", domiciled in Germany, was sentenced to life imprisonment (together with his brother) in 1993 for the murder of a well-known actor. In 2008, X was released on probation. eDate Advertising, a company based in Austria, operated an internet portal where they made available an article (between 1997 and 2007) about X. In the article X was named and it was written that he'd appealed his probational release. A short description of the criminal act was also there to be read as was a quote from X's lawyer. X, by means of letter, demanded that eDate Advertising should remove the publication, which they also did.

Somewhat later X filed a suit against *eDate* in the German courts and called upon eDate Advertising to refrain from using his full name when reporting about him in connection with the crime committed. At this point, no violation of X's personality rights had been committed, but X wanted to make sure no such violation occurred in the future. eDate's main contention was that the German courts had no international jurisdiction in the matter – despite that the first and second court instances in Germany claimed that they had. The *Bundesgerichtshof* (German Federal Court of Justice) chose to ask the CJEU for a preliminary ruling in the matter. The questions referred to the CJEU

[100] González (2016), p. 331.
[101] Cited *eDate*.

were whether Art. 5(3) Brussels I Regulation (current Art. 7(2) of the Brussels I bis Regulation) should be interpreted in such a way that X can bring an action for an injunction against the operator of the website in the courts of any Member State in which the website may be accessed, irrespective of the Member State in which the operator is established or if the jurisdiction was contingent upon a special connection between the contested content of the website and the State of the court seised that goes beyond technically possible accessibility. The second question posed was according to what criteria such a special connection was decided.

The French actor Olivier Martinez and his father Robert Martinez complained before the *Tribunal de grande instance de Paris* (Paris Regional Court) that an English company, *MGM*, who published the British magazine *Sunday Mirror*. They published, on the 3rd of February 2008, on their website a text in English entitled "*Kylie Minogue is back with Olivier Martinez*" with details of their meetings that they claimed came from the father, Robert Martinez. The plaintiffs claimed that this publication interfered with their private life and infringed upon the rights of Olivier Martinez to his image by the posting. MGM raised the objection that the Tribunal de grande instance de Paris lacked jurisdiction since there was no connecting link between the act of posting the infringing content and the alleged damage in French territory. A preliminary ruling from the CJEU was called for regarding the interpretation of Art 5(3) of the Brussels I Regulation (currently Art. 7(2) of the Brussels I bis Regulation). The question posed was whether the plaintiff's personality rights had been infringed by content posted on a website edited in another Member State than the State in which the court was seised.

Judgment

The legal question in both cases was how "the place where the harmful event occurred or may occur" in the Brussel I Regulation should be interpreted in an alleged infringement of the personality rights through the contents of a website.

Initially it wasn't clear to what degree the contents of the *Shevill*-judgment could be applicable in these cases. There were some common denominators, not least the grounds for damages (as they both concerned infringement of the personality rights). The most obvious difference between the cases was the medium of publication – where Shevill concerned traditional publication in a paper/magazine, these cases concerned publication on the internet. Another major differentiating factor was the degree of distribution – in Shevill barely 250 000 copies of the publication was sold and it could additionally be

established that the majority of the publication was sold in France. In the cases of *eDate and Martinez* the degree of distribution was hard to establish.

The judgment of the CJEU

The AG proposed an examination of the *Shevill*-doctrine bearing in mind the digital development. The proposal was to create a technologically neutral solution in which the medium of publication wouldn't be decisive in the plaintiff's choice of forum.[102] Instead it was proposed that, in addition to the domicile of the defendant and the place where the publisher is established (the *Shevill* principles), the victim in such a situation would be entitled to commence proceedings in the courts in the Member State where the 'centre of gravity of the conflict' is found. That centre was to be located by reference to the location at which the content in question is of particular relevance.[103]

The CJEU, at first, extended the application of the *Shevill*-approaches to other media and means of communication. It also established that they "may cover a wide range of infringements of personality rights "*recognized in various legal systems, such as those alleged by the applicants in the main proceedings*"[104]. After revising the place of the damage, it went on to rule:

> *"*[T]*he answer to the first two questions* [...] *is that Article 5(3) of the Regulation* [Brussels I] *must be interpreted as meaning that, in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised."*[105]

[102] Opinion of Mr Advocate General Cruz Villalón delivered on 29 March 2011, paras. 53-54.
[103] Op. Of AG Cruz Villalón delivered on 29 March 2011, paras. 42-54.
[104] eDate and Martinez, para. 44.
[105] *eDate and Martinez*, para. 52.

4.6 Concluding remarks

Relying on the judgment in the *Shevill*-case, the CJEU revised the place of the damage in two respects: besides retaining the mosaic approach in the form of the accessibility test, it centralized the place in the Brussels-Lugano State in which the victim's centre of interests is located.

The CJEU underlined the revision of the second *Shevill*-approach and consequently the introduction of the victim's centre of interest by focusing on five issues: worldwide accessibility, the serious nature of the harm, the victim's centre of interests, sound administration of justice and predictability.[106] The CJEU also introduced the second aspect of the concept of the place of the damage by holding that:

> *"*[T]*he criterion of the place where the damage occurred, derived from Shevill and Others, confers jurisdiction on courts in each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised."*[107]

With this ruling, the CJEU confirmed the concept of distribution with all its features in the context of online violations of personality rights in the form of the concept of accessibility, a concept that was consistently refused in legal theory and practice.[108] It is supposed that the concept of accessibility shares the features of the victim's centre of interest criterion, apart from the extent of jurisdiction that it confers on particular courts. Due to the difficulties in giving effect to the intention of the publisher and in quantifying page views, one can presume that if the disputed content is accessible in a Brussels-Lugano State it automatically has a negative impact on personality rights as well as its holder's social environment. Furthermore, the jurisdiction of the courts of the Brussels-Lugano States in which the disputed content is or has been accessible depends neither on potential injury to reputation nor on the requirement that the victim be known in the states in which the courts sit. Rather, it hinges on the potential injury to personality rights without the requirement that the victim be known in those states.[109]

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[106] eDate and Martinez, paras. 45-50.
[107] *eDate and Martinez*, para. 51.
[108] The refusals were announced in the context of violations of rights other than personality rights, such as AG in C-523/10 *Wintersteiger*, paras 22-23; C-585/08 *Pammer and Hotel Alpenhof*, paras. 69-74.
[109] AG in *eDate and Martinez*, para. 51.

The CJEU adapted the second *Shevill*-approach to (potential) online violations by doubling the jurisdictionally relevant places under the concept of damage. Although the criteria of accessibility and centre of the victim's interests share common features, their differences are significant and lead to tension under the concept of damage.

Bogdan has, in commentaries to the *eDate*-judgement, stated that the judgments show that the CJEU in a creative manner has adapted the interpretation of the Brussels-Lugano legal framework in such a way that it follows the conditions resulting from a developing IT-society, which is both welcome and necessary.[110] He also writes that – although not explicit in the judgment – a plaintiff should only be able to have one singular COI because of the wording of the CJEU's judgment.[111] Regarding the extent of the jurisdictional ground COI, Bogdan writes that it should be applicable for defamation via other media than the internet, contingent upon these other media sharing similar features with the internet, i.e. that the sender's information reaches an unlimited public and that it is hard to quantify the reach of the information in a specific Member State. Examples of such media, he writes, are short wave radio and satellite TV.[112] While noting that the judgement does not eliminate the practice of libel tourism, Nielsen writes that the judgment in *eDate* is "to be welcomed in general, because it strikes a fair procedural balance between the alleged victim and the publisher.[113]

It's essential, in this part, to mention that the CJEU doesn't clarify how the assessment of COI should be done. The guidelines given is that COI, in general, is the place where the plaintiff is domiciled but that other factors, such as professional activities abroad, can be a reason for another assessment. In this regard, the AG proposal to a judgment is more detailed. The AG suggests that a third jurisdictional ground, adapted for the internet, should be introduced. This proposed third ground for jurisdiction means that a court can try the case for the damages suffered globally in the place where the "gravity of the conflict" is. To establish this place, one should look to what state's court best can adjudicate a conflict between freedom of information and personality rights, which according to the AG is also the place where the risk

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[110] Bogdan (2011), p. 485.

[111] "*It seems that a person can only have one single centre of interests (the holding of the judgment speaks of "the" and not "a" centre of interests,*" Bogdan (2011), p. 486

[112] Bogdan (2013), p. 959 and Bogdan (2011), p. 485.

[113] Nielsen (2013), p. 395.

of infringements of personality rights is the largest.[114] Summarized, the AG claims that two factors must be taken into account to establish where the conflict has its gravity. The first factor regards the person whose personality rights have been infringed – the gravity of the conflict is where this person has his/her main interests. The other factor regards the character of the information. In deciding where the gravity of the conflict is, consideration should be given to whether the disputed information is made in such a way that it awakens interest within a specific territory and thus encourages the readers within this territory to take part of it.[115]

In conclusion, the CJEU in the *eDate*-case delimits itself to deal with infringements of personality rights online. It cannot in all certainty be stated whether COI can be used in other situations, and in that case which situations.[116] However, in regard to applying the principle beyond personality rights, the Supreme Court of Sweden ruled that it could be extended to moral rights under intellectual property law (see below in chapter 7.)

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[114] It is also in this place the medium used can be predicted to cause damages by infringements, thus meaning that it's most likely to be sued in that State.

[115] AG Villalóns proposal for judgment, paras. 57-61.

[116] For example, in *Wintersteiger*, the CJEU rejected COI as a ground for jurisdiction for cases concerning infringements of registered trademarks and in C-170/12 *Pickney*, the CJEU rejects it in cases concerning the economical elements of copyright. In both cases, the CJEU refers instead to the principle of territoriality as a ground for jurisdiction, thus implying that the existence of the principle of territoriality delimitates the applicability of COI.

5 Forum shopping and libel tourism

5.1 Introduction

Libel tourism is, perhaps, the most obvious example of the contemporary importance of the rights relating to personality on the internet. Libel tourism refers to "*international forum shopping in which the 'libel tourist' files a defamation action in a forum with laws favorable to the plaintiff*."[117] Libel tourism is a common action before the courts of England and Wales. A famous case of libel tourism before English courts is the libel action filed by Russian businessman Boris Berezovsky against Forbes magazine in 1997.[118] Berezovsky, a citizen and resident of Russia, sued Forbes, an American magazine, in England alleging that an article researched in Russia and published in America damaged his reputation residing in Britain. Despite the fact that only .02% of Forbes total circulation made its way into Britain, the House of Lords determined that England had a sufficient interest in the controversy to acquire jurisdiction over the foreign defendants and compel them to pay a Russian citizen substantial damages. They were also ordered to publish an apology.

The case is of note because it signified that the House of Lords approved of England's adjudicative (and legislative) engagement in transnational libel disputes having little connection to England.[119] In *Berezovsky*, none of the parties were either citizens of domiciliaries of England, and the libel litigation regarded a magazine article published in a U.S. magazine regarding activities in Russia. The plaintiff argued that England had an interest in the litigation because his international reputation was damaged within the territorial borders of England by the copies of Forbes in circulation in England and viewed on the Internet. The defendant sought dismissal on the grounds of *forum non conveniens*, arguing that England's interest in the litigation was insufficient to justify its involvement in litigation and that the English libel action would deprive the defendant of its speech rights.

[117] McFarland (2009), p. 8.
[118] Berezovsky v. Michaels [2000] 1 W.L.R. 1004 (H.L.) (11th May, 2000).
[119] McFarland (2009), p. 11.

Lord Hoffman rejected the defendants' *forum non conveniens* challenge and reasoned that *any* plaintiff libeled in England should be allowed to choose England as the forum to vindicate his reputation there.[120] If England has a justiciable interest in a libel dispute on the basis of publication within its borders, then England would be a proper forum in any libel action based on internet publication that can be viewed in England thus giving England the ability to regulate and police all speech available on the Internet.

England is not the exclusive destination for libel tourism. Australia, for instance, is another popular destination. In *Dow Jones v. Gutnik*[121], the High Court of Australia authorized jurisdiction over an American newspaper on the basis of evidence that Australian citizens viewed information on the newspaper's website. Publication occurred within Australia, according to the court, because the American newspaper was viewable in Australia on the internet. The court's reasoning was akin to that of Lord Hoffman in the *Berezovsky*-case in the sense that they allowed the publication within territorial borders to become the lynchpin of jurisdictional analysis in transnational libel disputes.

González describes libel tourism as composed of three different elements: very side grounds for international jurisdiction, a *lex fori* conflict rule and substantive laws very favorable to defamation victims.[122]

5.2 Attributes of libel tourism

5.2.1 Wide grounds for international jurisdsiction

Libel tourism is made possible because some States use very generous grounds of international jurisdiction for plaintiffs whose habitual residence is in another state. An example of this is Section 9 of the English Defamation Act (2013)[123] that indicates that in case of actions for libel against a person

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[120] "I do not have to decide whether Russia or America is more appropriate inter se. I merely have to decide whether there is some other forum where substantial justice can be done […] If a plaintiff is libeled in this county, *prima facie*, he should be allowed to bring his claim here where the publication is."

[121] Dow Jones and Company Inc v Gutnick [2002] HCA 56. (10th of December 2002).

[122] González (2016), pp. 286 ff.

[123] "(1) This section applies to an action for defamation against a person who is not domiciled—

(a) in the United Kingdom;

not domiciled in the UK, or in a EU Member State or in a contracting party of the Lugano Convention, the English courts have international jurisdiction if they are

> *"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."*[124]

The use of the traditional *forum non conveniens* ground by English judges could mitigate the effects of some excessively wide grounds of international jurisdiction, but the British courts are usually not in favor of admitting the ground in these cases. Usually, they consider that the plaintiff has a reputation to protect in England and that is why he or she starts a legal action in England.[125]

Celebrities such as Elton John, Cameron Diaz, David Hasslehoff, Kate Winslet and Jason Donovan have brought legal actions for defamation before the English courts in order to claim damages as a consequence of violations of their personality rights.[126] The actress Cameron Diaz sued American Media Inc. for reporting in the *National Enquirer* that she was having an affair. The *National Enquirer* was never published in a printed edition in Britain, but the online version was accessible throughout the internet in the entire world and thus, also in the UK. That was sufficient for the English courts to affirm their international jurisdiction over the case.[127]

(b) in another Member State ; or
(c) in a state which is for the time being a contracting party to the Lugano Convention.
(2) A court does not have jurisdiction to hear and determine an action to which this section applies unless the court 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.
(3) The references in subsection (2) to the statement complained of include references to any statement which conveys the same, or substantially the same, imputation as the statement complained of. (Defamation Act 2013 (c. 26)."

[124] Section 9 English Defamation Act.

[125] Mills (2015), p. 4 ff.

[126] González (2016), p. 287 & Ames, "*Where Have All the Defamation Cases Gone*?"

[127] Global Campaign for Free Expression (Article 19), *Civil Defamation: Undermining Free Expression* (December 2009).

5.2.2 A lex fori conflict rule

States promoting libel tourism have a conflict of laws rule that leads to the application of the *lex fori*, i.e. the substantive law of the country whose courts are seised. For instance, in the case of libel tourism, the English courts always apply English law due to the Double Actionability Rule[128], and English law is generally favorable for the claimant.[129]

5.2.3 Substantive laws favorable to libel victims

The third element of libel tourism is the fact that some State laws, such as English laws, are very favorable to the alleged victim of libel. Other countries also offer advantages for the plaintiff in this sense, e.g. Canada.[130] Libel tourism is thus not exclusively limited to the UK, although this is arguably the best-known case of libel tourism in the world. Some even call London the "Libel/Defamation Capital of the World".[131]

5.3 Differences between libel tourism and forum shopping

In the context of private international law abuse is often synonymous and discussed in terms of forum shopping.[132] In some ways libel tourism gives rise to the same juridical complications traditionally associated with forum shopping, but there are three attributes of international libel tourism that add complexity to this kind of forum shopping.[133]

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[128] Originally established in Phillps v Eyre (1870) LR 6 QB 1 the Double Actionability Rule is a doctrine of PIL which holds that an action for an alleged tort committed in a foreign jurisdiction can be successful in a domestic (English) court only if it would be actionable under both the laws of the home jurisdiction (*lex fori*) and the foreign jurisdiction where the act was committed (*lex loci delicti*). The rule wasn't designed for defamation cases, but defamation has been specifically excluded from two rounds of reforms to choice of law in tort, the first through a UK statute (Section 10 of the Private International Law (Miscellaneous Provisions) Act of 1995 which specifically excludes defamation claims) and an EU Regulation (The Rome II Regulation of 2007.)

[129] See, e.g., McFarland (2009), p. 2 f and Wheatcroft *British libel law means our press is vulnerable and the wealthy are shielded from criticism* in The Guardian (2008).

[130] González (2016), p. 288.

[131] Ibid., p. 288, McFarland (2009), p. 8, Svantesson (2016), p. 117 and therein referenced works.

[132] Svantesson (2016), p. 115 and Vischer (1992), pp. 224-228.

[133] McFarland (2009), p. 12 ff and González (2016), p. 286 ff.

Firstly, libel tourism appears in the era of global instantaneous communication. This gives the 'libel tourist' the possibility of theoretically choosing any forum in the world. Almost all content placed on the internet is available anywhere in the world. This, in turn, enables the courts of any State to affirm their international jurisdiction in accordance with *forum delicti commissi* or similar grounds.[134]

Secondly, libel tourism is complex given the great diversity in the various normative approaches to defamation in private international law. Defamation actions present difficult choice of law issues. The complexity of these issues in the context of defamation law is highlighted by the failed efforts to achieve consensus regarding the recognition of foreign libel judgments. For example, efforts to ratify a new convention on the recognition of foreign judgments at The Hague fell apart, in part, due to differences regarding libel actions.[135]

The third, and perhaps most important, differentiating attribute of libel tourism is the fact that it exposes an international conflict regarding the scope of free expression in the age of global communication. An American citizen can publish statements with the expectation of rights secured by the First Amendment whereas in the UK an individual's interest in privacy and reputation are given precedence over the right of freedom of expression.[136] If the English courts have international jurisdiction concerning a dispute between an American publisher and a defamation victim, the American publisher can then be deprived of the rights as secured by the First Amendment.

The third attribute very much relates to the conflict posed between freedom of expression and information and personality rights. As illustrated, it differs very much – even in states that are members of the EU. It boils down to deciding the scope of freedom of speech and the rights relating to personality in the world. It is a true conflict of values between the regulations that apply to the media (represented by the freedom of speech and information in this context) and the regulations of each persons' rights (represented by their personality rights.) The traditional, classic conflict of laws device consisting in localizing the damage in a specific country in order to confer international jurisdiction upon its courts does not solve the underlying conflict of values. A possible *de lege ferenda* solution to this conflict may be come by the means

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[134] McFarland (2009), p. 13.
[135] Ibid., p. 13.
[136] Ibid., p. 13f.

of international conventions among affected States or by other means of communications between the courts – specifically an increased and stricter adherence to *forum non conveniens*. Litigation would then be concentrated to the courts of the country where the victim has suffered a substantial attack on his/her reputation.

6 Choice of law and defamation

6.1 European perspecive

Regulation of choice of law in tort has long been on the agenda of EU. The Rome II Regulation on the law applicable to non-contractual obligations[137] applies from 11 January 2009 and applying to events which occur after that date. Defamation, however, was excluded from the scope of application of the Rome II Regulation, under Art. 1(2)(g), alongside violations of privacy. The exclusion is intended to be temporary and Art. 30(2) of the Regulation required the Commission to carry out a study on choice of law in the context of privacy and defamation no later than 31 December 2008. This study was duly completed in February 2009 and consisted largely of a comparative analysis of existing choice of law rules applicable to privacy and defamation in the Member States.[138] Despite prompting from the European Parliament the Commission has not yet taken any further steps in the matter.[139]

In June 2010, the European Parliament produced a report to follow up on the study mentioned above.[140] The Parliament argues, in particular, for the inclusion of personality rights in the Regulation as it would counter the threat of the "chilling effect" on the press of libel tourism.[141]

The 2010 EP report has not advanced things. Rather than focusing on concrete and possible solutions it provides for a round-up of various views and possibilities. Complete as it may be, it does nothing to advance the choice for a specific conflicts rule. Following the *eDate*-judgment which added an additional jurisdictional rule on the basis of COI, Wallis issued a new

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[137] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), EU OJ L 199, 31 July 2007.
[138] JLS/2007/C4/028, Final Report.
[139] Mills (2015), p. 12.
[140] Working document of 23 June 2010 on the amendment of the Rome II Regulation, Rapporteur Diana Wallis MEP, PE 433.025.
[141] EP Committee on Legal Affair Draft Report of 2 December 2012 (Diana Wallis MEP), with recommendations to the Commission on the amendment of Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II), 2009/2170 INI, recital C & D.

report[142], which this time round does include specific proposals and calls upon the Commission to issue a proposal for amendment to the Rome II Regulation. On the conflicts rule, Wallis proposed the following rule:

Article 5a – 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 in which 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 have foreseen 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 that 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. […]*

This proposed rule thus suggests "direct and substantial impact" as the criterion for determining applicable law. This inspiration which this report thus takes from the *eDate*-case does not lie directly in any kind of recycling the COI criterion of the CJEU but rather in the Court's view on predictability. This can be seen in the correction to the main rule, namely that the law applicable be the law of the country in which the person claimed to be liable is habitually resident if he could not reasonably have foreseen substantial consequences of his act in the country designated by the "direct and substantial impact" test. As of now, however, no recent advances have been made.

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[142] EP Committee on Legal Affair Draft Report of 2 December 2012 (Diana Wallis MEP), with recommendations to the Commission on the amendment of Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II), 2009/2170 INI.

6.2 Regulation Rome II

Applicable from 11 January 2009 in all Member States (except Denmark), the Rome II Regulation addresses choice of law in non-contractual obligations. The Rome II Regulation can be seen as an extension of the work already done within the EU.[143] The Brussels I bis Regulation covers jurisdictional issues relating to both contractual and non-contractual obligations, but the Rome Convention (replaced by the Rome I Regulation) dealt only with contractual obligations. The Rome II Regulation was designed to fill that gap.[144] The Rome II Regulation was delayed, and its development took account of public consultation rendering approximately eighty replies and at least one public hearing.[145] During that process, it was suggested that it would make more sense to approach the problems addressed by the Rome II Regulation on an international level rather than on a Union level.[146] However, the Rome II Regulation is now in place as a Union instrument.

The motivation for the Rome II Regulation was less a matter of modifying the choice of law rule of any particular state and more a question of ensuring that the same choice of law rule would be applied in all Member States – the principal goal of the Rome II Regulation was harmonization in pursuit of decisional harmony, itself in pursuit of improving the efficient functioning of the internal market.[147] Although the Rome II Regulation is not applicable to defamation, several features of the Regulation may briefly be highlighted is such a way as to contribute to explaining the absence of defamation from its Scope of Application.

The Scope of Application of the Rome II Regulation is rather broad. The first aspect of the Regulation to observe is that it replaces domestic choice of law rules and is applicable whether or not the parties are habitual residents of a Member State of the European Union. This means that the Regulation can designate as applicable law the law of a state that is not a Member State of the EU.[148]

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[143] Svantesson (2016), p, 359.
[144] Ibid., p. 359.
[145] Ibid., p. 359.
[146] Svantesson (2016), p. 359. Originally from Position paper by the EU Committee of the American Chamber of Commerce Belgium (which cannot be accessed).
[147] As seen in Recital C Rome II Regulation.
[148] Art. 3 of the Rome II Regulation.

Of note in the context is that the Regulation contains a number of specific choice of law rules for particular torts which could represent a determination that different torts may have different policy interests and concerns that ought to be reflected in specialized choice of law rules. The exclusion of defamation is partially the product of a determination that there does not need to be a 'one size fits all' rule of choice of law in tort.[149]

The general choice of law rule in tort is stipulated in Art. 4 of the Regulation. Art. 4(1) specifies that a tort is generally governed by the law of the place of the tort, which is defined as the place in which direct damage is suffered (*lex loci damni*). Art. 4(2) specifies that this general rule is displaced in favor of the law of common habitual residence of the parties, should they have one. Finally, Art. 4(3) specifies that if another law is "manifestly more closely connected" than the law chosen under Art. 4(1) or (2), which may be the case when the parties have a pre-existing contractual relationship governed by a different law, then that law applies instead. The effect is a rule which combines a number of elements and considerations such as accepting and mediating uncertainty between the possibility of giving effect to the law of the place of the tort or the law common to the parties (or another law), but excluding any necessary role for the law of the forum.[150]

6.3 Member States' conflict rules

The exclusion of defamation from the Rome II Regulation is due to the fact that the Member States did not reach a satisfactory agreement on which law should be applied to the civil liability derived from damage to personality rights. The UK refused to accept a conflict rule based on the classic approach of *lex damni* with regard to the rights relating to personality. An explanation to this is that some media publishers based in the UK did not want to be sued, in application of the Brussels I bis Regulation, before the English courts yet in accordance with the foreign law of the country where the damage to the personality rights have taken place (*lex damni*).[151]

Due to the lack of a uniform European conflict rule in the Rome II Regulation, at present, the applicable law derived from the violation of personality rights on the Internet as well as on other media must be determined in accordance with the national conflict rules of each Member State. Almost none of the

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[149] Mills (2012), p. 12.
[150] Ibid., p, 12.
[151] González (2016), p. 391 and Kuipers (2011) in *German Law Journal*, p. 1692.

Member States have specific PIL rules determining the law applicable to the personality rights.[152] In most cases, national PIL systems contain a general conflict rule determining the law governing extracontractual obligations.[153] Sweden, as a Member State of the European Union, is bound by several intra-European instruments relating to private international law (such as the Brussels I bis Regulation.)[154] The relevant instruments have been shown to have direct effect in relation to their respective scope of application but they can also be said to have an indirect effect going beyond the formal scope.[155] Swedish private international law could be said to show that the differences between Civil and Common Law countries are not as great that some make them out to be.

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[152] Excepting Belgium, see Arts. 99-100, Belgian Act Private International Law, 2004.

[153] EU Commission, Comparative Study on the Situation…

[154] Svantesson (2016), p. 263.

[155] See for example NJA 1994 page 81 in which the Supreme Court of Sweden (*Högsta domstolen*) concluded that the Lugano Convention expresses commonly accepted principles in relation to jurisdictional disputes between the courts of different states. Note also that Bogdan (2014), p. 118 writes that the indirect effect of European conventions should expand, and not restrict, the domestic Swedish jurisdictional rules. However, in NJA 2007 page 482 the Supreme Court of Sweden stated that there is no general principle that the Brussels and Lugano rules be applied analogously.

7 A Swedish perspective

7.1 International jurisdiction

Sweden, being a Civil law country, has most of its law in statutes, and judgments by the courts do not construe law in the same manner as can be said for a Common Law country. At the same time, when it comes to private international law, several important issues are not regulated by law and it's left to the courts to 'fill the gaps' in the legislation.[156]

Swedish statues don't always provide rules specifically governing jurisdiction in international disputes. Instead, guidance is found in the statute that regulates procedural questions in domestic disputes.[157] This can be called a *double functionality* of the Swedish legislation in the sense that if connection between a dispute and a certain Swedish forum is such that the forum in question has jurisdiction over the dispute it probably follows that the dispute also has a strong connection to Sweden, and Swedish courts can claim jurisdiction.[158]

In the event that a suit is filed against a defendant that is not domiciled in a Member State, the question of the court's jurisdiction is decided according to that Member State's autonomous rules regarding national forum rules, see art. 6.1 Brussels I bis Regulation. This is also applicable if the defendant is domiciled in the USA (and the Regulation is not applicable.)

Rättegångsbalken provides for some jurisdictional grounds of interest for situations involving defamation. If a suit is filed in Sweden, the Swedish Code of Judicial Procedure[159] chapter 10 is applicable. This chapter contains the domestic internal Swedish forum rules. The chapter has a dual function, partly as a demarcation of the Swedish courts geographical areas of jurisdiction and partly as a guide where there is no forum rule to use. The Swedish forum rules should however be used with caution since they are only applicable as an analogy.[160] Of special interest for this thesis is the forum rule for non-

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[156] Svantesson (2016), p. 264.
[157] Rättegångsbalk (1942:740), in English The Swedish Code of Judicial Procedure.
[158] Svantesson (2016), p. 266 and Bogdan (2014), p. 115.
[159] Rättegångsbalk (1942:740).
[160] Bogdan (2014), s. 115.

contractual tort, the so-called *forum delicti* in chapter 10, section 8 in the Code of Judicial procedure. It states that:

> *"An action regarding injurious actions may be instituted in the court at the place where the act was done or the injury occurred. When the act was done or the injury occurred in two or more court districts, the action may be instituted in any of those districts."*[161]

The principal venue rule in Swedish private international law is based upon the defendant's domicile.[162] The court where the defendant is domiciled may claim jurisdiction over a case. This jurisdictional ground overlaps with Art. 4(1) of the Brussels I bis Regulation, but in accordance with Swedish law the defendant's domicile should ordinarily be determined under the Swedish definition in its domestic application.[163] The Swedish definition of domicile differs from the definition found in Common Law.[164] In Swedish law, domicile is defined as the place where a person has his/her residence provided that the residence is habitual.[165]

To decide whether or not the residence should be considered as habitual, several factors are considered, amongst them the duration of the residence etc. Bogdan states that this definition is relevant in relation to Swedish PIL.[166] Swedish law focuses on one objective and one subjective criterion: A person should reside at the location he/she is said to be domiciled (objective) and the person in question should intend to remain at that place for, at least, a foreseeable future (subjective).[167] Whenever a person has more than one habitual residence (e.g. when commuting on a weekly basis between two cities), the domicile is found by establishing the main habitual residence. This is done by evaluating the connecting factors to the different possible habitual residences.[168]

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[161] The Swedish Code of Judicial Procedure is available in English in Ds 1998:000

[162] Rättegångsbalk (1942:740) section 10 paragraph 1.

[163] Bogdan (2014), p. 118.

[164] Svantesson (2016), p. 267.

[165] Lag (1904:26) om vissa internationella rättsförhållande rörande äktenskap och förmyndarskap, section 7 § 2 and Lag (1990:272) om vissa internationella frågor rörande makars förmögenhetsförhållande, section 14.

[166] Bogdan (2014), p. 134-139.

[167] Ibid., p. 134-135.

[168] Ibid., p. 134-139.

7.2 Choice of law

While lacking legislative foundations, Svantesson writes, it would seem beyond dispute that some form of *lex loci delicti* rule constituted the main choice of law rule in Sweden in torts, prior to the introduction of the Rome II Regulation.[169] As mentioned above, the Rome II Regulation excludes defamation from its scope of application. The most influential case in Sweden in torts, prior to the introduction of the Rome II Regulation, is the *Cronsioe* Case[170]. In *Cronsioe*, the Supreme Court of Sweden stated that according to Swedish private international law, the law of the place where the damaging act was committed should be applied regardless of whether Swedish law would be applicable in the criminal law context.[171] The case related to a car accident in the Netherlands but it had strong connections to Sweden since both the parties were Swedish citizens domiciled in Sweden, the car was registered in Sweden, etc.

The Court concluded that while there were certain factors connecting the case to Swedish law, these connecting factors were not of the nature that would cause the common rule (i.e. *lex loci delicti commissi*) to be departed from. This could, according to Svantesson, perhaps be read to mean that, in exceptional cases, there can be connecting factors of the kind that would cause the court to depart from the *lex loci delictii commissi*.[172] Adding to the uncertainty is the fact that the Court in the *Cronsioe* did not have to decide whether the *lex loci delictii* was to include both the place where the damaging act was committed and the place where the damages arose, or if the Swedish rule is limited to *lex loci delictii commissi*. In light of this, Svantesson writes that it seems reasonable to conclude that Swedish law is unsettled in relation to this question.[173] Bogdan outlines three different alternatives for how Swedish law may develop on this question and favors an option which would mean that Art. 4 of the Rome II Regulation would be applied by analogy to cross-border defamation actions.[174] As Sweden's government strongly opposes addressing defamation in the Rome II Regulation, the likelihood of

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[169] Svantesson (2016), p. 290.
[170] NJA 1969 p. 163.
[171] Svantesson (2016), p. 171.
[172] Ibid., p. 290.
[173] Svantesson (2016), p. 290 and Bogdan (1998) Gränsöverskridande förtal i Cyberspace, SvJT 1998. Note that Swedish choice of law rules, regarding non-contractual obligations, have been harmonized with the other EU Member States through the Rome II Regulation.
[174] Bogdan (2010), p. 29.

Swedish courts adopting the approach suggested by Bogdan can be called into question.[175]

In *Tyldén*[176] the Supreme Court of Sweden had to decide if it had jurisdiction, using Art. 7.2, in a dispute regarding an alleged infringement of the moral rights.

A Swedish company, MEAB, sued a Norwegian company, Tyldén, at the disctrict court of Stockholm (Stockholms Tingsrätt), claiming that the court should settle that Tyldén were liable for damages for using a picture that MEAB had sole rights to. The picture had been used on a record cover in Norway and on Tyldén's website in connection to marketing the CD-record online. Both the district court and the court of appeal (*Hovrätt*) denied the application by stating that the courts of Sweden lacked jurisdiction to try the case.[177]

The Supreme Court had to decide whether the courts of Sweden could exercise jurisdiction in this case. As it was a dispute between a party in Sweden and a party in Norway, the Court initially stated that the Lugano Convention is applicable. The court observed that its interpretation of the Lugano Convention ought to be guided by the CJEU's interpretation of the parts of the Brussels I Regulation (as it then was) as far as the provisions are identical.

7.3 Concluding remarks

When the Supreme court discussed the material question, it should be stated that the general rule regarding jurisdiction is the defendant's domicile (which in this case was in Norway) but that Art. 7(2) of the Brussels I bis Regulation allows for a special jurisdictional rule implying that an action for damages in non-contractual situations can be brought in the court at the place where the damage occurred. The rule is justified with reference to that there in some cases can be a close connection between the dispute itself and the court that is assigned to try it. The Supreme Court stated that an injurious act has to have taken place in Sweden in order for Swedish courts to exercise jurisdiction in accordance with Art. 7(2).

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[175] Svantesson (2016), p. 291.
[176] NJA 2012 p. 483.
[177] It should be mentioned that MEAB during litigation went bankrupt, but that the owner's company took over the action.

After this, the Supreme Court looked to the case law from *Shevill* and stated that this case concerns a distribution via the internet, which makes the publication global and instantaneous and that this can bring some special issues regarding questions of jurisdiction. At this point, *eDate* is relevant, even if this relates to infringements of personality rights. In their assessment, the Supreme Court states that intellectual property protection in Sweden has two elements, one economical and one immaterial and moral. The moral element contains, e.g., a right to be named and a right of respect.[178] Infringements of these moral rights, the Supreme Courts stated, are liable grounds for damages. The Copyright Act[179] regarding the immaterial part serves the purpose of protecting a copyright holder against infringements of their image, which in broad strokes can be equated to the protection of personality rights. For this reason, the Supreme Court states, the principles from the *eDate* are applicable in this specific case.[180] The Supreme Court subsequently establish that M.E. (the owner of MEAB) has his COI in Sweden, thus establishing the jurisdiction of Swedish courts in this case.[181]

Neither *Wintersteiger* nor *Pickney* were concluded at the time of *Tyldén* which might be why they looked to the case law from *eDate*, and seen in the light of the *eDate* case, the judgment is reasonable. If looked at in the light of the case law from the *Wintersteiger* and *Pickney* cases, the conclusion might be different. In the *Wintersteiger* case, the CJEU stated that a fundamental reason for COI to be used in *eDate* was because personality rights were protected in all Member States.[182] From the *Pickney* case it's shown that this is not sufficient, since there cannot be any territorial delimitation in the protection[183]. In conclusion, it is my opinion that it is not solely the tort of defamation that enables the application of the jurisdictional ground COI, but the absence of territorial delimitation of the protection.

Because of the above mentioned the Supreme Court's judgment in the *Tyldén* case might not be correct in relation to Union law as of today. In the argumentation discussing the applicability of COI the Supreme Court compare the similarities of the protection of personality rights and the moral rights of intellectual property law, but fail to discuss whether the moral rights

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[178] NJA 2012 p. 483, para. 28.
[179] Upphovsrättslagen, Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk.
[180] NJA 2012 p. 483, para. 30.
[181] NJA 2012 p. 483, para. 31.
[182] *Wintersteiger*, paras. 21-25.
[183] *Pickney*, paras. 36-47.

are protected in all Member States or if they are subordinated to the territoriality principle. This is in itself not peculiar since none of these conditions are accounted for in the *eDate* case. However, looking at the case law as of today, in order for the usage of COI to be in accordance with Union law it seems necessary that moral rights are protected in all Member States at the same time as not allowed under the principle of territoriality. This thesis does however not delve any deeper into the realms of intellectual property law, but from case law moral rights follow from the principle of territoriality.[184] Because of this, the use of COI should not be allowed in intellectual property law contexts.

[184] See above in section 4.2.2.

8 Conclusion and analysis

8.1 Centre of Interest

The limitations and reach of Centre of Interest

The Court's argumentation in *eDate* is based upon online distribution of allegedly defamatory content. This raises the question whether the jurisdictional ground is applicable to distribution via other media than the internet. Several factors give reason to assume that's the case. Firstly, the CJEU justifies the creation of COI as a ground of jurisdiction in cases of distribution on the internet not because of the internet itself, but because the internet has several distinguishing features (some of them mentioned above in section 4.5) such as that the content can be partaken of by numerous persons (since almost everyone can access it) nearly anywhere in the world where there's connection to the internet. From this it follows that distribution via means of another media that have similar, if not the same, distinguishing features as the internet, also should actualize COI as a ground for jurisdiction. However, no judgment in this area except *eDate* exist as of now, rendering the conclusions somewhat uncertain.

Regarding the reach of COI, the following can be concluded from the case law of the CJEU. Firstly, it seems necessary that the source of distribution causes the information to reach an unlimited audience and that it is technically difficult to quantify the extent of the distribution in a given Member State. Secondly, concerning the types of infringement and violations that can be imagined to be covered by COI, it does not seem that it is a violation of the personality rights *per se* that caused the CJEU to create COI. Instead, it seems it is because the fact that the protection of personality rights is maintained in all Member States that makes it possible to use the jurisdictional ground (see above regarding *Wintersteiger*.)

Thus – with a relatively high degree of certainty - the conclusion can be drawn that COI can be actualized when the distribution of the allegedly defamatory material happens via means of media with the same distinguishable features as the internet, if it is a violation or an infringement of a right that is protected in all Member States and, simultaneously, is not territorially limited. Because of this, I join Bogdan in the opinion that the spread through short-wave radio and satellite TV should be covered.

Establishing COI

The CJEU is somewhat laconic concerning the question of how to establish COI. The guidance given is that COI in general is the place where the plaintiff is habitually resident but also that other factors such as professional activities can give reason draw another conclusion. Because of this it is hard to, with certainty, predict how such an assessment should be made. A discussion regarding this, perhaps in the form of a statement *obiter dictum*, would have been beneficial in order to provide some guidance for actors within the judicial field.

Regarding the harmful act there are no examples of CJEU case law where COI was found to be applicable in any other context except violation of personality rights. In the Swedish *Tyldén* the Supreme Court of Sweden stated that COI should be applicable also in relation to violation of the moral rights under intellectual property law but as of now, the CJEU has not confirmed this approach. I believe that the Supreme Court of Sweden is correct to recognize the similarities between moral rights and personality rights but remain doubtful whether this is in line with Union law.

Firstly, moral rights are seemingly subordinated to the territoriality principle and secondly, a system in which the economic rights in intellectual property law would not be subject to the same jurisdictional grounds as the moral rights would create impractical consequences, since an infringement of intellectual property rights can concern moral and economical rights simultaneously. A single infringement could then actualize different jurisdictional grounds, leading to a litigation where the part related to moral rights can be tried in the Member State in which the plaintiff has his/her COI but the economical part somewhere else.

Multiple COIs?

The CJEU doesn't offer a completely clear answer as to the possibly singular nature of COI but the wording "*a person may also have the centre of his interests in a Member state in which he does not habitually reside…*" can be argued to imply that a person can have multiple COIs. The usage of the word "also," in my opinion, gives reason to assume that the CJEU implies that a person can have COI in multiple countries. [185] If the Court would have meant that a person can only have one COI, but that this doesn't necessarily have to

[185] A comparison with the wording of the French version (*une personne peut avoir le centre de ses intérêts également dans un État membre où elle ne réside pas de manière habituelle*) and the Swedish version (*en person* [kan] *ha sitt centrum för sina intressen även i en medlemsstat där han eller hon inte är stadigvarande bosatt*) doesn't give reason for another interpretation.

be in the same state as the one where the person is habitually resident, a more appropriate term instead of "also" could have been e.g. "instead." If the Court would have used the latter term, there wouldn't exist any doubts about the singularity of COI. Naturally, the Court might just have been awkward in their choice of wording and lacked the intention of enabling multiple COIs.

Since the Court doesn't further elaborate their line of reasoning, this is the wording that's left us to elaborate upon. Bogdan holds the opinion that, even if not explicitly stated in the judgment, every person should be able to have only one single centre of interests, but I believe that it is closer at hand to interpret the writing in such way as to enable multiple COIs. I believe that it's appropriate that a person's COI can vary, depending on circumstances.

COI depending on circumstances?

If we proceed with the assumption that a person can have a varying COIs, are we to assume that a single person can have multiple COIs simultaneously or should we understand it in such a way so that a single person can have different COIs depending on the circumstances in a particular case? If the former was the case, it would defeat the purpose of establishing COI as a *lex specialis* ground for jurisdiction and weaken *forum domicilii* as a general rule. This points to the latter interpretation being correct.

An example

Imagine the following. A person in Sweden with his family. The person works in real estate with the acquisition and sales of real estate. The person has realized that there's a major market for vacation homes in Croatia and thus exclusively works with real estate in Croatia. On weekends, the person returns to live with his family in Sweden.

In the above situation, establishing a COI for this person poses some difficulty, considering that COI can vary. If we imagine a situation where a newspaper, with circulation in England, on their website publishes pictures and information that implies that the person has an extramarital affair, it seems reasonable to assume that the damages affect the family life and private sphere, thus implying that the COI should be Sweden. If, on the other hand, the published information concerns the systematic bribing of officials in Croatia, the situation changes. In this latter scenario, there's no damage to the private life in Sweden but rather Croatia where the professional activities take place. Thus, COI should be Croatia.

The above-mentioned is how I believe COI could be established. As previously mentioned the Court has not elaborated further on the topic of

establishing COI, so my proposal remains uncertain. It might be that the Court holds the opinion that no consideration should be given to the specific interests/spheres damaged, or that it in some other aspect might not be in accordance with the future reasoning of the Court, but I deem it plausible.

8.2 Legal certainty

Even though the Court in its ruling seem to presuppose that the infringing party knows where the infringed party has his/her COI, I remain doubtful whether that is the case. Partly, because of the lack of guidance the CJEU gives on the topic of assessing COI. What can be said to be known is that the plaintiff's domicile, in general, is synonymous with the plaintiff's COI, but also that other factors, such as professional activities, *may* give reason to accept that there is a particularly close connection to another Member State.

In this regard, the reasons given by the CJEU leaves us wanting. Is it, for example, enough that a person simply works abroad for its COI to be in that state (as in the example above), and what are the "other reasons" that can become relevant for the assessment of COI? Likely, the Court means that all factors must be taken into consideration in every single case, but because of the relatively few known considerations one has to act upon, it cannot be easy for a defendant to predict where the plaintiff has his/her COI. Take, as an example, internationally renowned actors. In the case of Martinez (in *eDate*), where the publication concerned him as well as the artist Kylie Minogue, jurisdiction based upon COI would be different depending on which of the violated parties elected to sue. Since it – at least according to me – is not completely clear whether a person can have one, or several COIs is just another reason that the current wording doesn't fulfill the criterion of legal certainty.

Bogdan stated that the Court's judgment in *eDate* exemplifies the interpretation of pre-existing rules so that they are aligned with the conditions of the contemporary information society and that this seems "*welcome and necessary*."[186] In general, I would like to agree to his statement as Art. 7(2) was originally created long before the internet reached the size of today. The question is whether the judgment fulfills the demand for legal certainty that stems from the purpose of the rules for jurisdiction.[187] The ruling of the CJEU is, in my opinion, contrary to two principles: firstly, the principle that

[186] See above in section 4.6.

[187] See chapter 2, specifically sections 2.1 and 2.4.

jurisdiction, to the extent possible, should not be granted in the country where the plaintiff resides. Secondly, the ruling cannot be said to agree with the principle that Art. 7(2), as an exception to the general rule in Art. 4, should be interpreted restrictively.

The Court does shows a great measure of creativity in its ruling and even if that, from a practical point of view, can be reasonable, it does contribute to diminished legal certainty. For example, regard *eDate* from the point of view of the company eDate before the ruling was issued. Taking into consideration the law at that time, the most probable outcome was that the German courts only would have jurisdiction to try the damages that happened in Germany and that the Austrian courts would have jurisdiction to try the damages in their entirety. The verdict was that, contingent upon X having COI in Germany, Germany had jurisdiction to try the entire damages.

8.3 The place where the harmful event occured

Litigational considerations

The preliminary ruling in the *eDate* case should be looked at in a bigger context. The ruling can be criticized for being too harsh on the defendant while simultaneously granting too much leeway for the plaintiff. The sought-after balance between the protection of the right to freedom of expression and private individuals right to privacy created in the *Shevill* case was shifted via the case law from *eDate*, through which the plaintiff gained a stronger position. Even if the *Shevill* doctrine needed revision because of the developments of the information society, one can ask whether the court went too far in its protection of individual's right to privacy by creating a completely new ground for jurisdiction, which if applicable allows for the settlement of the entire damages at the place where the plaintiff has his/her COI.

In favor of such a solution are the easily accessible and in principle irrevocable nature of internet publications that can leave the plaintiff exposed and vulnerable. It is also understandable that considerations of a moral nature have a place in cases concerning violations of personality rights via the internet, where extra consideration is given the plaintiff's situation. Moreover, the freedom of expression can, to a certain extent, be utilized without damages to individuals. For example, in *eDate* the publisher could possibly have satisfied public interest concerning the case in question without actually naming X.

Thus, circumstances exist that can further complicate the court's judgment to establish a ground for jurisdiction to the plaintiff's advantage and *eDate* is lacking a further analysis regarding what position this puts the defendant in. In many cases the economic consequences of being involved in foreign litigation can be a major liability for the publisher, especially in the cases where the publisher in question has a relatively small operation. In practice, this could lead to a diminishing number of publishers willing to publish information of potential public interest. An alternative to the ruling of the CJEU could have been to give the plaintiff right to sue at the place where he/she has COI but only for the partial damage that occurred at that place.

Geographical distribution

An important difference between the *Shevill* and *eDate* cases is the importance of the actual distribution of information. In *eDate*, the degree of distribution was given less consideration than in *Shevill* which might have been one of the reasons for the court deciding to change the then current case law. The publisher in *Shevill* was most likely conscious to the fact that by taking certain editorial decisions, most importantly the decision what Member States to distribute the paper to, could actively predict what courts could possibly have jurisdiction if a litigation was at hand. As mentioned above, when it concerns publishers of information online, they can be said to have a more passive role in contrast to the users of the internet who actively choose to find and partake in the published matter. Of course, the access to information happens thanks to the publisher but the publisher does not consciously target the information towards certain geographical locations. It can be argued that the publisher, by using a specific language or publishing a certain type of information, targets a specific audience and should in doing so be conscious that he/she can also be sued at that place.

Compare to Art. 17(1)(c) Brussels I bis Regulation (regarding consumer marketing.) The CJEU has regarding the provisions elected to look to the purpose of the publication rather than the factors such as language and currency choice. This indicates that the publisher should not have to predict jurisdiction in certain states based on factors such as the publication being in a certain language. If possible, perhaps some sort of analysis of intent regarding the actions of the publisher might be advisable from a *de lege ferenda* perspective. If the publisher had the intent that the internet publication should be distributed to a certain state, then the publisher should predict the possibility of being sued in that Member State.

The jurisdiction also is not limited based on the character of the publication – i.e. no consideration is given to the language of the publication or what suffix the domain address has.[188] An example would be that of Martinez, where the publication was written in English as well as published on an English domain. A not completely unjust assumption is that few in France, where the plaintiff resided, read the article as it was published by an English publisher and in English. The circumstances in themselves implied that jurisdiction should befall the English courts rather than the French and based on this, it is hard to reach the conclusion that French courts had jurisdiction. Thus, the CJEU's solution to the problem was not in any sense as easy to predict for the defendant as could have been the case.

Shevill* and *eDate

Worth noting is that the mosaic principle of *Shevill* has been neither limited nor rejected, because it is still an alternate ground for jurisdiction for a plaintiff that wants to sue in his/her place of residence. One can even say that it has expanded and is more favorable for the plaintiff than before since according to *Shevill* an active distribution in a certain territory was a prerequisite for the application of the principle. As of now, regarding violations taking place online, the plaintiff can, simply by calling attention to a website's availability in a certain territory utilize the mosaic principle from *Shevill*. It is enough that the website is present online and accessible from a certain country's territory. Most websites are available globally which makes the condition of publication in a certain country somewhat hollow. Especially internationally famous persons, with a reputation in all Member States, can in practice sue in a Member State of their choosing. The criterion of distribution has in this sense been hollowed out because of the rapid development of the internet.

Note that the existence of countries that systematically censors certain content online, most famous among them perhaps China, does not have any specific meaning as the *Shevill* criteria demands that the place of harm be in a Member State. Instead, one should also look to others actual access to the defamatory information. For example, the fact that a website has a "members-only" policy does not mean that the member are the only parties partaking of the information. Access for others than the members can be at hand though downloaded print screens or the distribution of the password to the website. Even if the plaintiff is awarded damages only for the part of the infringement

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188 E.g. *.com*, *.se*, *.de*, *.co.uk* etc.

that occurred in that forum, the threat itself and potential costs of processing can have an inhibitory effect on freedom of expression.

The risk of forum shopping, or in this particular context libel tourism, on the part of the plaintiff also has to be taken into consideration. The pluralism and diversity of fora allows the plaintiff possibilities of processing before the courts they can predict will render a, for them, positive verdict. Overall, this can be a problem because the chosen forum's values and principles will be leading in the cases at hand. Especially in this question of law that to a large part is based upon case law and doctrine (see e.g. the section above on Sweden.)

The AG in *eDate* proposed a technology-neutral solution but the Court elected to instead change *Shevill* in the parts that related to the allegedly defamatory information published online. Thus, different rules apply depending whether the infringement/violation was published online or instead in a printed media. There's an argument to be made that such a division is not optimal as it can lead to some confusion as to what ground of jurisdiction is applicable – a lot of the printed media of today also has websites, meaning that the information often can have a dual character (published online as well as printed). Moreover, such an interpretation by the Court is contrary to the system of the Brussels I bis Regulation.

8.4 Concluding remarks

Rights towards one another

The case law described above examines the concrete issues of law in every case, but also the limits of the rights of freedom of information and expression before they have to be subject to limitations with regard to people's right to privacy. In particular Art. 8 and Art. 10 of the ECHR should be discussed in this context:

ARTICLE 8 - Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. […]

ARTICLE 10 - Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. […]

It's not unfeasible that these two provisions (and the ideals they represent) can conflict. In determining the balance between these two important interests the purpose of freedom of expression must be taken into account. In general, the investigation and subsequent reporting on public persons and elected officials along with making available information of public interest are goals to be pursued. In my reckoning, what a public person (e.g. an actor or an artist) does within his or her private life holds less public interest than the latter case, and perhaps justifying distribution of such information should be subject to limitations per the right to privacy.

When the Brussels convention was remade into the Brussels I Regulation, the ground of jurisdiction in Art. 15 of the Regulation was construed in a more flexible manner so the rule also could apply to consumer contracts concluded online. The answer to why other provisions, amongst them the provisions on damages, didn't get the benefit of being technology-neutral might be that at that time, online defamation wasn't a major issue, whereas the internet trade towards consumers was in dire need of legislation. The legislator has thus shaped the consumer provision so that it's applicable in both cases (deals made online or by any other means) while persons who have suffered an infringement of personality rights has two interpretations to follow depending on whether the defamatory information was published online or offline.

Reasons remain for them to clarify the area further, not least because of the need for legal certainty. I do believe that the AG's proposed solution with jurisdiction based upon the '*centre of gravity of the conflict*' would be an improvement to the current regime, as it is more predictable especially for the defendant. If the distributed information is of no relevance in the state where the plaintiff has his/her COI but is of major relevance in another state, it seems more predictable that the courts of the latter state should have jurisdiction. These courts would also be most appropriate to try the dispute in its entirety as they probably have a better possibility to establish the reach of the injurious act.

To summarize, the borderless internet has collided with the world of jurisdiction that is defined by physical boundaries. The fallout is felt sharply in defamation law, where views on the appropriate balance between free press/freedom of expression and the protection of personality rights clash. Defamation plaintiffs and defendants likely will continue to differ over where their dispute beginning on the internet should continue in geographical space.

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