

Brussels I and Rome II

Cross-border cases of defamation and privacy - Which Court takes the case? Which law applies?



The legislation

Both Brussels I and Rome II are EU *Regulations dealing with International Private Law*. They set rules to determine which Court should hear a case (Brussels I), and which country's Law should be applied (Rome II) when there is a cross-border conflict. The international elements in matters of private law cover such matters as family law and law of contract, including in the case of Brussels I, cases brought against the media for defamation and violations of privacy. **At present, Rome II does not apply to the media, whereas Brussels I does.**

However, because in all cross-border cases of defamation and privacy violations, the *jurisdiction* under Brussels I is the first matter to be settled, the absence of a rule to determine thereafter which country's *law* should apply is an issue for media companies when defending cases of defamation and violations of privacy in countries outside the place of editorial control because under Brussels I, media companies find themselves defending cases according to foreign laws, often in multiple jurisdictions (see Case ECJ C-68/93 *Shevill and Others* [1995] ECR I-415, paragraph 19 where the claimants were established in England, France and Belgium and the alleged libel was published in a French newspaper with a small circulation in England. The ECJ held that, in the case of a libel in the press:

- the place where the damage occurs is the place where the publication is distributed, when the victim is known in that place (paragraph 29); and
- the place of the event giving rise to the damage takes place is the country where the newspaper was produced (paragraph 24)^[1].

The ECJ also held in *Shevill* that as regards the assessment by the English court applying Article 5(3) of Brussels I of whether "damage" actually occurred or not, the national court should apply national rules provided that the result did not impair the effectiveness of the general objectives of the Regulation.

Furthermore the ECJ held that where a libel causes damage in several different EU Member States, the victim may sue in any of the jurisdictions where the libel is published in respect of the damage suffered in that jurisdiction.

Brussels I is under review at the moment

The European Commission adopted on the 21 April 2009 a Report and a Green Paper on the review of Council Regulation (EC) No [44/2001](#) launching a consultation among interested parties on how to improve the operation of the Regulation. The new Commissioner in charge, Viviane Reding spoke on the subject in March 2010.

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/92&format=HTML&aged=0&language=EN&uiLanguage=en>. Meanwhile Parliament's Rapporteur, MEP Zwiefka as well as MEP Diana Wallis who is Rapporteur for Rome II, believe that even though Brussels I is grounded in International Private Law now express doubt as to whether the Brussels I instrument should have ever dealt with the media at all questioning in particular whether the intention of regulation should ever have been to mediate this sort of conflict between freedom of press and rights of individual. MEP Zwiefka is now suggesting that an entirely separate instrument should be developed to specifically deal with this (combining Brussels and Rome). In the light of the current situation (following

jurisprudence from the ECJ, forum shopping etc), he feels the best solution would be *forum non conveniens*.

EPC Concerns

Media companies need the legal certainty that when they publish – whether in print or online, the editorial content complies with the law and any self-regulatory codes which apply where the final editorial decisions are taken. As more and more content is made available outside the country of first publication this legal certainty is ever more important in order to uphold the freedom of expression.

The current Brussels I regulation creates the very opposite – uncertainty and disproportionate risk of law suits in multiple jurisdictions.

Although there are no specific references in the current consultation to the article which affects the media - 5(3), we must take this opportunity to call for amendments to Brussels I to remove the uncertainty which 5(3) and *Shevill* have together created. A separate instrument as suggested by MEP Zwiefka may be acceptable.

The most proportionate approach would be to remove the media from the scope of article 5(3) which, together with *Shevill* gives rise to legal uncertainty and the dangers of both forum shopping and multiple actions. Instead we are asking that the media should be subject to the general rule in Article 2.1 which allows plaintiffs to bring cases in their home country for cross border claims of defamation and privacy violations.

Rome II has yet to be reviewed by the Commission but aspects concerning the media are under special attention because of the review of Brussels I and following the publication of the Study to look at elements of the law and its application with regard to defamation, privacy and freedom of expression. Diana Wallis MEP organised a hearing in the EP in January 2010 to discuss aspects of the Study.

Useful Links

- http://europa.eu/legislation_summaries/justice_free_dom_security/judicial_cooperation_in_civil_matters/l33054_en.htm
- [Final Version of Study JLS/C4/2005/03](#) on Brussels I from university of Heidelberg
- **Rome II Regulation** (EC) No [864/2007](#) defines the law applicable to non-contractual obligations in situations involving a conflict of laws but excludes the media
- <http://www.europarl.europa.eu/activities/committees/hearingsCom.do?language=EN&body=JUR1>
- EPC Positions [Jurisdiction and applicable law](#)

talk to use

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