

Submission from Dan Svantesson^{*}, in relation to the European Commission's 'CONSULTATION ON A PRELIMINARY DRAFT PROPOSAL FOR A COUNCIL REGULATION ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS'

First of all it should be noted that this project is a commendable initiative of the European Commission. Harmonisation of private international law is of great urgency, perhaps especially within the European Union. Although the Brussels Convention/Regulation¹ has successfully² addressed the questions of jurisdiction and recognition and enforcement, there will not be a sufficient degree of harmonisation until also the question of choice of law is settled.³

This submission will focus solely on the problems surrounding choice of law in cross-border defamations.

The Brussels Regulation 44/2001

The question of choice of law in cross-border defamation cases cannot be addressed in isolation. The first step is to determine in which forum(s) the question of choice of law will potentially arise. This issue is presently regulated by the Brussels Regulation.⁴ The general rules concerning claims relating to the civil tort of defamation are found in Article 5(3). Article 5(3) provides that:

“A person domiciled in a Member State may, in another Member State, be sued in matters relating to torts, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur”⁵

To fully understand this Article, it is vital to define what the “harmful event” is in a defamation case. This issue was resolved through the European Court of Justice’s decision in *Shewill v. Presse Alliance SA*⁶. It was held that:

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¹ Brussels Convention 1968 and Brussels Regulation 44/2001

² Although certain aspects of the Brussels Convention/Regulation has been criticised, these instruments are generally regarded a success.

³ The question of choice of law is already settled in relation to contractual obligations through the Rome Convention of 19 June 1980 on the law Applicable to Contractual Obligations.

⁴ It should be noted that Denmark is not a signatory to the Brussels regulation 44/2001.

⁵ Brussels Regulation 44/2001 Article 5(3)

“the victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State 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.”⁷

Consequently, a potentially large number of forums might come in question. The right to seek damages for the entire publication in the state where the publisher is established, provided for through *Shewill v. Presse Alliance SA*, is of particular importance in relation to the issue of applicable law. In that context it is to be noted that the judges in *Shewill v. Presse Alliance SA* stated that:

“The criteria for assessing whether the event in question is harmful and the evidence required of the existence and extent of the harm alleged by the plaintiff in an action in tort, delict or quasi-delict are not governed by the Convention but are determined in accordance with the substantive law designated by the national conflict of laws rules of the court seised on the basis of the Convention, provided that the effectiveness of the Convention is not thereby impaired.”⁸

From this, it can be concluded that, in deciding the *Shewill v. Presse Alliance SA* case, the judges assumed that the substantive law, nominated by the existing choice of law rules of the court in question, would apply to the dispute. That assumption will no longer be valid under the instrument currently under construction as its very aim is the harmonisation of the different national choice of law rules (i.e. the choice of law rules of the court in question will be those of the instrument currently under construction). In order to maintain the application envisaged in *Shewill v. Presse Alliance SA* it is therefore important that the choice of law rule of this new instrument does not impair the effectiveness of the Brussels Regulation.

Having illustrated that, under the model developed through *Shewill v. Presse Alliance SA*, a potentially large number of different forums might be entitled to exercise jurisdiction over a cross-border defamation, it should be noted that also other grounds for jurisdiction might be applicable. The general rules concerning civil claims for damages following a criminal defamation proceeding are found in Article 5(4). Article 5(4) states that:

“A person domiciled in a Member State may, in another Member State, be sued as regards a civil claim for damages or restitution which is based on an act giving rise to

⁶ *Shewill v. Presse Alliance SA* (Case C-68/93) [1995] 2 WLR 499. Note that this case was decided under the Brussels Convention. However, since Article 5(3) is virtually the same in both the Convention and the Regulation, the decision in the *Shewill v. Presse Alliance SA* is no less relevant than if decided under the Regulation.

⁷ *Shewill v. Presse Alliance SA* (Case C-68/93) [1995] 2 WLR 499 at 500

⁸ *Shewill v. Presse Alliance SA* (Case C-68/93) [1995] 2 WLR 499 at 500

criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings”⁹

Furthermore, it is also possible that a defendant, in a defamation proceeding, could be sued in another court “where he is one of a number of defendants”¹⁰. In such circumstances the defendant could be sued “in the courts for the place where any one of them [the relevant group of defendants] is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings”¹¹. It is easy to think of examples where a plaintiff in a defamation case may choose to sue a number of defendants. For example, in relation to a newspaper article the range of defendants could at least include the author, the editor, the publisher and the printer.

Finally, it is also possible that a defendant in a defamation action could be sued in his/her forum of domicile.¹²

To summarise, the plaintiff is potentially free to choose any forum amongst the following:

- The defendant’s home forum Article 5(3));
- The defendant’s forum of domicile (Article 2(1));
- A court in which criminal defamation proceedings take place against the defendant (Article 5(4));
- A forum in which one defendant, of a group of defendants, is domicile (Article 6(1); and
- Any forum in which the relevant publication was distributed and where the plaintiff claims to have suffered injury to his/her reputation.

From the above, it can be concluded that, an action in defamation may be initiated in any one of a potentially large number of forums, each with a different connection to the defendant. It is against this background the discussion of the choice of law question must take place.

Article 7 of the draft proposal

The current draft proposal contains the following rule relating to choice of law in defamation proceedings:

⁹ Brussels Regulation 44/2001 Article 5(4)

¹⁰ Brussels Regulation 44/2001, Article 6(1)

¹¹ Brussels Regulation 44/2001, Article 6(1)

¹² Brussels Regulation 44/2001, Article 2(1)

“The law applicable to a non-contractual obligation arising from a violation of private or personal rights or from defamation shall be the law of the country where the victim is habitually resident at the time of the tort or delict.”¹³

There are some important benefits that follow from this model. Firstly, a publisher would only have to look at one set of laws (i.e. the laws of forum in which the potential victim is habitually residing in) in relation to each publication. Thus, as long as the ‘habitual residence’ is not in dispute, the suggested model should give rise to a considerable degree of predictability, as far as the publisher is concerned. Secondly, a ‘victim’ could feel confident that he/she could rely on the protection of reputation, provided for in the substantive legislation of his/her forum of habitual residence, regardless of the location of the publisher. It would thus seem that the proposed model would provide a reasonable foreseeability for both parties. Such foreseeability is of great value, perhaps in particular in relation to on-line publications.

Currently, an on-line publisher is potentially subjected to any or all of the substantive laws of the States of the European Union.¹⁴ The choice of applicable law will depend on the domestic choice of law rules of the court that has jurisdiction. This situation is obviously highly undesirable, and the model suggested in the proposal would provide a cure for this lack of predictability, while at the same time uphold the fair protection of the right of reputation.

However, there are also potential dangers with the suggested model as it may give rise to undesirable outcomes in certain situations. A person’s reputation is perhaps ordinarily, but not necessarily, connected to his/her habitual residence. In a situation where a person, X, is habitually residing in state A, but has his/her reputation in state B (perhaps due to a previous career in that state), it would arguably be undesirable to have a publication solely to an audience in state B, by a publisher located in state B, concerning X’s activities in B, be governed by the laws of state A (a forum with no connection to the publication what so ever, except the perhaps rather random fact that X has decided to become a habitual resident there). This type of situation was discussed, in the context of jurisdiction, in *Shewill v. Presse Alliance SA*.¹⁵

Choosing to base the choice of law on the location of the plaintiff’s habitual residence is not a reasonable approach in all situations. One example of this would be where the plaintiff chooses to sue the publisher in the latter’s home forum under Article 5(3), or perhaps under Article 2(1), of the Brussels Regulation. The possibility of being awarded damages for the entire publication would be a tactically sound reason for the plaintiff to take this approach, despite the fact that it potentially incurs higher costs than if the plaintiff sued the defendant in the plaintiff’s home forum. The consequence of the suggested model would be that the plaintiff can sue in the defendant’s home

¹³ Article 7

¹⁴ As a matter of fact, on-line publishers are actually potentially subjected to any and all laws of all states in the world, from which the Internet can be accessed. However, for the scope of this discussion, it is sufficient to focus on the European scene.

¹⁵ [1995] 2 WLR 499 at 519 – 529. A hypothetical example, of the kind discussed above, was presented by the government of the United Kingdom, and was expressly approved by Darmon AG.

forum and be awarded damages for the entire publication while still enjoying the benefit of having the law of his/her home forum apply – this is utterly unfair to the defendant. For the suggested model to work fairly, it is therefore necessary to provide for exceptions to the main rule, at least when the plaintiff sues the publisher in the latter's home forum where damages may be awarded for the entire publication.

Even if the limitation suggested in this submission was to be implemented, the model suggested in the proposal would, when combined with existing choice of forum rules, lead to a situation where the plaintiff can go forum shopping while 'bringing along, as a personal law', the substantive law of his/her home forum. All forums, other than the defendant's home forum, would apply the substantive law of the plaintiff's home forum.

Another undesirable consequence of the suggested model is that the courts would be likely to have to interpret and apply foreign law in a large number of cases. Although this is not a new phenomenon, it would certainly add to the already heavy burden placed on the various legal systems of the European Union. On the other hand, it could be argued that the fact that courts increasingly will have to interpret and apply foreign law, simply is a result of the ever increasing globalisation.

In summary, a model leading to the undesirable consequences outlined above is unacceptable, and a better alternative must necessarily be found

A better alternative?

A possible alternative to the model suggested in the draft proposal, would be to place the focus on the *lex fori* – the law of the forum. Such a solution would have many benefits; the most obvious, but perhaps least convincing, being that the courts would not have to interpret and apply foreign law.

As has been noted, it is vital to discuss the question of choice of law in light of the Brussels Regulation, as the two instruments necessarily will work closely together. Indeed it can rightfully be said that it is these two instruments that together will ensure a fair system within the European Union regulating cross-border non-contractual disputes. Based on this, it would only be natural to take the existing instrument, the Brussels Regulation, as the point of departure in the construction of this latter choice of law instrument.

As illustrated above, it would be utterly unfair for the defendant to have the court of his/her home forum apply the law of a foreign forum (i.e. the law of the forum in which the plaintiff is a habitual resident) in determining whether or not to award global damages in relation to an act that the defendant, committed in that forum. The better view would be for the court to apply *lex fori*. This would ensure that publishers only have to abide by the laws of their home forum, laws the publisher should be familiar with, to avoid the risk of damages relating to the entire publication being awarded at one single defamation action. This would provide for predictability for the publisher.

Furthermore, the model advocated here would mean that also other forums than the defendant's home forum would apply their own *lex fori*. The motivations for this is that, just as the court of the forum in which damages allegedly have been suffered is best suited to determine the dispute,¹⁶ the laws best suited are the laws of that forum.

In placing the focus on the *lex fori*, the publishers admittedly do not gain the foreseeability provided for under the model suggested in the proposal. However, it would seem reasonable to presume that a publisher would prefer the *lex fori* option anyhow in order to avoid the risk of the issue of damages relating to the entire publication being determined under the laws of the plaintiff's home forum.

A potential negative side effect of this model is that publishers might chose to try to avoid readers in certain forums. Such a development could harm the free flow of information.

To summarise, although the model advocated here would mean that a publisher potentially can be subjected to any substantive law of the States of the European Union, this model still provides for a greater protection of the freedom of speech than the model suggested in the proposal.

A compromise

A third option is to combine the two models outlined above. In doing so, a system providing for predictability and reasonable protection of both the publisher's freedom of speech and the victim's right of reputation could be created. The provision, of the instrument currently under construction, dealing with defamation could, for example, state that:¹⁷

Article 7 – Defamation

1. When a suit is brought in a forum, other than the forum in which the defendant is established, the law applicable to a non-contractual obligation arising from a violation of private or personal rights or from defamation shall be the law of the country where the victim is habitually resident at the time of the tort or delict.
2. When a suit is brought in the forum in which the defendant is established, the law applicable to a non-contractual obligation arising from a violation of private or personal rights or from defamation shall be the law of that forum.

Under this model, the law of the plaintiff's forum would apply in all situations except when the dispute is determined by a court of the defendant's home forum. The publisher would then enjoy virtually the same degree of predictability as under the proposal, while not being subjected to the risk of damages relating to the entire

¹⁶ *Shewill v. Presse Alliance SA* (Case C-68/93) [1995] 2 WLR 499 at 540

¹⁷ The term "established" was chosen to reflect the terminology used in *Shewill v. Presse Alliance SA*. In relation to individuals, the term is possibly inadequate, but would presumably coincide with the individual's habitual residence. Thus, it would arguably be desirable to replace "established" with "habitual residence" as also businesses has a location of habitual residence. Furthermore, the meaning of the term "established" would need clarification in relation to on-line publications.

publication, being awarded under a law other than the law of his/her home forum. Before publication, the publisher would only have to consider the law of the home forum of the person that the publication risks defaming, and the law of the publishers own home forum (a law the publisher should be aware of, and abide by, anyhow). The victim could feel confident that he/she could rely on the protection of reputation, provided for in the substantive legislation of his/her forum of habitual residence, regardless of the location of the publisher. The only exception would be when the victim would seek damages relating to the entire publication in the publisher's home forum.

It should, however, be remembered that this solution is a compromise. As mentioned above, just as the court of the forum in which damages allegedly have been suffered is best suited to determine the dispute, the law best suited to determine the dispute is the law of that forum since that is the law with the closest connection to the dispute. An example will illustrate this:

Let us say that A, residing in Sweden, publishes an article on the Internet. B, residing in Finland feels defamed by the article and sues A in France (Brussels Regulation, Article 5(3)). The question for the French court would then be whether or not B has suffered damages to his/her reputation in France. The law with the closest connection to such a dispute is obviously the law of France.

If the compromise is adopted, the French court would decide the matter based on Finish law (i.e. a law less closely connected to the dispute than *lex fori*). However, such a trade-off might be necessary if predictability is deemed important.

One aspect of the compromise, that may be a cause for worry, is the fact that a court of a forum that emphasises freedom of speech might have to apply the law of a state with less emphasis on freedom of speech. With that in mind, the compromise might not be desirable in a wider international context. However, as the defamation laws of the member states of the European Union are harmonised through the European Convention for the Protection of Human Rights and Fundamental Freedoms, at least on a fundamental level, there should arguably not be any cause for worry.

Conclusions

The model for choice of law in defamation proceedings, suggested in the proposal, provides for a reasonable foreseeability for both plaintiffs and defendants. Such foreseeability is of ever increasing importance with the expanding use of the Internet as a tool for publication. However, the model is inadequate in its current form. It creates a situation where a plaintiff can sue a publisher in the latter's home forum and be awarded damages relating to the entire publication under the law of the plaintiff's forum of habitual residence. Such an outcome is utterly unfair to the publisher.

As an alternative the law applicable in defamation suits could be the *lex fori*. Although such a solution is preferable to the model suggested in the proposal, it would mean that the foreseeability was largely lost.

The better view, in the European context, seems to be a compromise of the two models outlined above. The law of the plaintiff's forum should apply in all situations except when the dispute is determined by a court of the defendant's home forum (i.e. the only forum in which damages relating to the entire publication can be awarded).

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