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Choice of Law for Defamation, Privacy Rights and Freedom of Speech

Peter Arnt Nielsen

Professor, Copenhagen Business School.
pan.law@cbs.dk

ABSTRACT

The conflict between defamation and privacy rights on the one hand and freedom of speech on the other in international litigation is very controversial in the EU. The phenomenon, also known as libel tourism, is caused by a mixture of national and EU rules of jurisdiction, choice of law and recognition and enforcement of judgments, even though the former and latter are harmonised by the EU. The problem is that the EU has not yet harmonised the choice-of-law rules for defamation and privacy rights. Thus, proposals for reform of the EU choice-of-law rules are discussed.

Key words

Defamation, privacy, rights, freedom of speech

1. DEFAMATION, PRIVACY RIGHTS AND FREEDOM OF SPEECH

In national legal systems, freedom of speech sometimes clashes with defamation and privacy rights. Here, the dispute will be decided according to the law of the State in which the two parties are domiciled.

However, the situation is far more complex where the parties are from different States. Then, the first question is in which State the claimant can institute court proceedings against the defendant. This is the question of international jurisdiction. In most cases, the defendant can be sued in the State where the defendant is domiciled, but sometimes there is also a possibility to sue in the State where the harmful event occurred. If this is in the State where the claimant is domiciled, the claimant will often prefer to sue in his own country. Furthermore, the place where the harmful event occurred could also be in a State where defamation is ranked higher in terms of legal protection than freedom of speech, which will tempt the victim to sue in that State.

The second question in international defamation cases is: which law should decide the case? This is the choice-of-law issue, which is decided by the forum State's choice-of-law rules. Many States prefer to apply the law of the State where the harmful event occurred, whereas others prefer to apply the law of the State to which the closest connection exists. Whereas the former rule is strict and thus predictable as to which law will be applied, the latter is discretionary and to a large degree unpredictable.

The third question in international defamation cases is the question of recognition and enforcement of a judgment in such a dispute. If States cooperate on this question, for instance through Conventions or supranational law as in the EU, such judgments will normally be recognised and enforced. However, if the judgment is against public policy in the State where recognition and enforcement is sought for, it may be denied recognition and enforcement. Public policy covers fundamental rights, such as freedom of speech, and basic principles of law that are crucial for a State.

Within the EU, the Brussels I Regulation (Brussels I) governs international jurisdiction and recognition and enforcement of judgments in civil and commercial matters.[1] The Regulation also covers defamation and privacy rights. It only applies where the defendant is domiciled in a Member State, and national law on international jurisdiction applies if the defendant is domiciled in a Non-Member State. Brussels I also covers recognition and enforcement of judgments in civil and commercial matters, where the judgment is from a Member State. On the other hand, in the EU, national law applies to recognition and enforcement of judgments from Non-Member States. As far as the choice-of-law issue is concerned, the EU Rome II Regulation on choice of law for torts and delicts (Rome II) deals with choice of law for tort claims, but it does not apply to defamation and privacy rights given the controversial nature of this subject.[2] As a consequence, each Member State can apply its own choice-of-law rules on defamation.

2. SOME CONTROVERSIAL CASES

2.1 Introduction

The conflict in international cases between defamation and privacy rights on the one hand and freedom of speech on the other has been highlighted in a number of controversial cases, in particular from the UK, Denmark and the United States. They highlight questions of international jurisdiction, choice of law, and recognition and enforcement of judgments in these matters.

In the UK, 'libel tourism' has emerged as a phenomenon as part of forum shopping, where in libel litigation the victim sues the wrongdoer in the UK because English law, for a number of reasons, has generally been favourable to the victim. In Denmark, however, freedom of speech is highly regarded and protected in the Constitution, which means that

1. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L12/1.
2. 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) [2007] OJ L199/40.

a foreign libel victim is unlikely to institute court proceedings in Denmark, even if the wrongdoer is domiciled in Denmark, because freedom of speech in most cases will take priority over defamation and privacy rights. In the US, which is generally favourable to recognising and enforcing foreign judgments, legislative action has been taken to avoid recognising judgments violating freedom of speech, which, as with the case of Denmark, is protected by the Constitution.

2.2 The UK Perspective and Libel Tourism

English courts can relatively easily assume jurisdiction in international libel suits either under English law or Brussels I. And English choice-of-law rules will apply, and in most cases designate English law as the law governing the libel case, because Rome II does not apply to defamation. Last but not least, hitherto English libel law has been very favourable to the libel victim. The victim has a prima facie case once he has established that the wrongdoer has published a defamatory statement about him. The victim does not need to prove that the statement is false, or that the defendant acted out of malice. In addition, damages and costs of the proceedings under English law are high by international standards, so the legal system may be relatively costly for persons of limited means.[3]

As a consequence of this 'cocktail', 'the rich and famous come from the four corners of the globe to bring libel actions in England'. In addition, English libel judgments may have an effect on free speech in other States, especially in the EU, as other EU Member States under Brussels I as a general rule are obliged to recognise and enforce British judgments, and in the US, which generally has a very open attitude to foreign judgments.[4]

Possibly in part due to the focus on English libel tourism, in 2012 the British legislator proposed a new Defamation Bill.[5] The aim of the Bill was to reform the law of defamation to ensure a fair balance between the right to freedom of expression and the protection of reputation, and to deal with libel tourism. On 25 April 2013, this controversial Bill was adopted as the Defamation Act 2013. The Act makes a number of substantive changes to the law of defamation. In general, the Defamation Act 2013 is likely to make it less attractive to institute libel proceedings in England due to the changes of the law of defamation. However, the Act does not introduce new choice of law rules for defamation, but only limits

3. For English law, see Trevor C Hartley, 'Libel Tourism and Conflict of Laws' (2010) 59 (1) *International and Comparative Law Quarterly* 25 <https://doi.org/10.1017/S0020589309990029> accessed 17 January 2019; Robin Morse, 'Rights Relating to Personality, Freedom of the Press and Private International Law: Some Common Law Comments' (2005) 58 *Current Legal Problems* 133 <https://doi.org/10.1093/clp/58.1.133> accessed 17 January 2019; Robert D Balin, Laura R Handman and Erin Reid, 'Libel Tourism and the Duke's Manservant – American Perspective' (2009) 3 *European Human Rights Law Review* 303; Richard Garnett and Meghan Richardson, 'Libel Tourism or Just Redress? Reconciling the (English) Right to Reputation with the (American) Right to Free Speech in Cross-Border Libel Cases' (2009) 5(3) *Journal of Private International Law* 471 <https://doi.org/10.1080/17536235.2009.11424367> accessed 17 January 2019.
4. See, for instance, 'Libel Tourism. Writ large. Are English Courts Stifling Free Speech around the World?' *The Economist* (London, 8 January 2009) <www.economist.com/node/12903058> accessed 17 January 2019.
5. Defamation Bill 2012-13 of 10 May 2012. The third reading of the Bill took place before the House of Lords on 25 February 2013, and it received royal assent on 25 April 2013.

the jurisdiction of English courts in cases where the defendant is domiciled outside the UK or an EU Member State.[6]

2.3 The Danish Perspective

Freedom of speech is a fundamental part of Danish society. However, a number of cases have challenged that principle following international publications of articles, editorials, and cartoons by newspapers on the internet.

In 2005, the Danish newspaper *Jyllands-Posten* published 12 editorial cartoons, most of which depicted the prophet Muhammad, a key figure in Islam. It was an attempt by the newspaper to contribute to a debate about criticism of Islam and self-censorship. Danish Muslim groups complained, and the issue eventually led to protests around the world, including violent demonstrations and riots in some Muslim countries. Subsequently, following a threat by a Saudi Arabian lawyer, who represented the descendants of Muhammad, to institute libel proceedings in London, the newspaper apologised and entered into a settlement.[7]

In 2008, another Danish newspaper, *Ekstrabladet,* settled a claim having been sued in London by the Icelandic bank Kaupthing for defamation.[8] The newspaper had published a critical article in English on the internet in which the journalist accused the bank of tax evasion.

In 2010, a settlement was agreed between an international healthcare company and a Danish Professor of Radiology. The company had brought libel proceedings against the Professor in London after he had made a presentation at a radiology conference in Oxford, and he had published an article in a scientific journal for radiology. In both cases, he asserted that a product marketed by the claimant had very serious adverse effects.[9]

2.4 The US Perspective

A British court delivered a judgment in 2005 in a dispute where an Israeli-American author claimed in a book, *Funding Evil*, published in the US, that a Saudi Arabian businessman was responsible for financing international terrorism. The book was not marketed in the UK, but 23 copies were sold in the UK via the internet. The businessman and two of his

6. Defamation Act 2013 also provides for a single publication rule, but it does not directly deal with jurisdiction, choice of law and forum non conveniens, see *Explanatory Notes to the Defamation Bill as introduced in the House of Commons on 10 May 2012* [Bill 5], 11, and *Explanatory Notes to the Defamation Bill as brought from the House of Commons on 21 September 2012* [HL Bill 41], 12.
7. Joint Press Release about the Prophet Mohammed Cartoon Drawing. Politikken (Copenhagen, 26 February 2010).
8. Ekstrabladet and Kaupthing settled the case on 13 February 2008. The newspaper agreed to carry an apology on its news site for a month. On 9 October 2008, the Icelandic Financial Supervisory Authority took control over the bank.
9. Press Release of 18 February 2010, 'Henrik Thomsen – GE Healthcare' <http://clinical-mri.com/wp-content/uploads/textbooks/media_updates/Henrik_Thomsen-Press_Release-180210.pdf > accessed 17 January 2019.

sons instituted libel proceedings in London. However, the author was not able to afford to defend herself and decided not to participate in the proceedings. A default judgment was rendered ordering her to pay compensation of £30,000 and costs of £115,000.[10]

As the author feared that the judgment would be taken to New York for recognition and enforcement, she successfully pursued the matter at the political and legislative level, which resulted in the New York State Legislature adopting 'The Libel Terrorism Protection Act' in 2008. According to the Statute, a court can deny recognition and enforcement of foreign defamation judgments, unless the defamation law applied by the foreign court provided at least as much protection for free speech as would have been provided by the Constitutions of the US and the State of New York.[11]

The legislative initiative of New York led to the adoption of similar legislation by California in 2010, and Illinois and Florida in 2008.[12] At the federal level, the SPEECH Act was adopted in 2010 making foreign libel judgments unenforceable in US courts, unless those judgments are compliant with the First Amendment of the US Constitution, which guarantees freedom of speech.[13]

From the viewpoint of international defamation litigation, these cases illustrate that the conflict between defamation and privacy rights on the one hand and freedom of speech on the other can be tackled in different ways.

The American Acts address the problem, but only when after the litigation the judgment holder seeks recognition and enforcement of the judgment in the United States. These acts neither eliminate nor limit the phenomenon because English courts can still take jurisdiction and apply their own choice-of-law rules.

In the following section, the question of choice of law for defamation and privacy rights versus freedom of speech is discussed in order to find a workable solution. However, the question of international jurisdiction, which is closely related to the choice-of-law issue, is not analysed.[14] Furthermore, the question of recognition and enforcement of judgments is also beyond the scope of this paper.[15]

10. *Bin Mahfouz v Ehrenfeld* (2005) EWHC 1156 (QB).
11. See, for instance, Sarah Staveley-O'Carrol, 'Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment?' (2009) 4(3) *New York University Journal of Law & Liberty* 252 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1350994> accessed 17 January 2019.
12. For New York, see 'The Libel Terrorism Protection Act' Laws of New York, 2008, Chapter 66, CPLR §§ 302(d) and 5304(b)(8); for California, see: Californian Code of Civil Procedure, Sections 1716 and 1717, as amended by Chapter 579, Statutes of 2009 (SB 320-Corbett), for Illinois, see: 35 ILL. COMP. STAT 5/12-621 (b)(7) (2009); 735 ILL. COMP. STAT. 5/2-209 (b-5) (2009); for Florida, see: Florida Statutes 55.605 (2)(h); 55.6055.
13. The Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act, adopted on 10 August 2010, P.L. 111-223, codified at 28 U.S.C. §§ 4101-4105.
14. It has proposed that in a revised Article 7(3) of Brussels I (n 1), in case of violations of privacy local jurisdictions should be deleted. Furthermore, in such cases a revised provision should provide for jurisdiction only in the Member State where the victim has the centre of his interests and the Member State where the publisher is established. See futher Peter Arnt Nielsen, 'Libel Tourism: English and EU Private International Law' (2013) 9(2) *Journal of Private International Law* 279 <https://doi.org/10.5235/17441048.9.2.269> accessed 17 January 2019.
15. In respect of libel tourism, it seems possible to conclude that the CJEU, if asked, may find that freedom of expression, as safeguarded by Article 10 of the European Convention on Human Rights and Article 11 of the EU Charter of Fundamental Rights, is also part of or within the limits of the concept of public policy under Brussels I (n 1), which will lead to a denial of recognition and enforcement of a judgment: see Nielsen (n 14) 285, 287.

3. THE ROME II REGULATION

3.1 The Rules of Rome II

In the EU, Rome II governs choice of law for non-contractual obligations. Any law specified by the Regulation shall be applied whether or not it is the law of a Member State. Consequently, the law of a non-European State may be applied.

The general rule of Rome II is that the law applicable to a non-contractual obligation arising out of a tort or delict is the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred, and irrespective of the country or countries in which the indirect consequences of that event occur (Article 4(1)). However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply (Article 4(2)). Finally, Article 4(3) provides for a general, but narrow exception to the two rules in paragraphs 1 and 2; if it is clear from all the circumstances of the case that the tort or delict is manifestly more closely connected with a country other than what is indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question. Article 4(3) is a narrow and discretionary 'escape clause'.

In addition, Rome II provides for special choice-of-law rules for special torts such as product liability, unfair competition and acts restricting competition, environmental damage, infringement of intellectual property rights, industrial actions, unjust enrichment, *negotorium gestio*, and *culpa in contrahendo*. Generally, these rules are strict choice-of-law rules in line with the policy behind Article 4.

Although Rome II applies to almost all non-contractual obligations, it does not apply to non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation; see Article 1(2)(g).

3.2 The Rome II Negotiations

At the time Rome II was negotiated, the question of defamation and privacy rights was very sensitive to a large number of Member States due to the conflict between freedom of expression and the right to privacy. The subject has been called 'the perfect arena for cultural clashes', as strong media interests and strong political interests are involved. In addition, the global and instant nature of the internet makes cross-border defamation and violations of privacy rights a frequently occurring event. The cases presented above in section 2 indicate that.

As the general rule in Rome II leads to the application of the law of the country in which the damage occurs, it will in most defamation cases lead to the application of the law of country in which the victim has his habitual residence. Indeed, the first specific proposal for a choice-of-law rule for defamation during the negotiations on Rome II was to apply *the law of the habitual residence of the harmed person.* This was presented as a strict rule based on a single-connecting factor. Not surprisingly, it was met by very strong opposition by media interest groups.

Consequently, a new proposal was tabled in order to cater to the interests of the media adding an exception to the above-mentioned rule. Under the proposed exception, the *lex loci delicti* could be disregarded if *that law was contrary to the forum's fundamental rights principles, in which case the court could apply its own law.* This proposal was also not accepted. And the proposal seems to do no more than emphasise the general public policy rule, which, from a drafting perspective, is unnecessary.

During the negotiations with the EU Parliament, the Parliament proposed a closest connection rule leading to the application of the law of the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised. This proposal was too sympathetic to the media, according to the Commission and the Member States. Nevertheless, the European media sector was also sceptical towards this proposal as it considered this solution to be a violation of the freedom of expression.

As a final compromise, it was agreed to leave defamation, violations of privacy and personal rights out of the scope of Rome II. Consequently, in the EU, choice of law for defamation is governed by the national choice of law rules of each Member State. It was also decided to revisit the issue in the sense that the Commission, by the end of 2008, would submit to the EU Parliament and the Council a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media

3.3 Post-Rome II Initiatives

As the Commission failed to submit a study on choice of law and violations of privacy and rights relating to personality, the Committee on Legal Affairs of the EU Parliament tried to forward the matter. Thus, in 2012, the Committee proposed a choice-of-law provision on privacy and rights relating to personality in Rome II and a recital.[16]

The recital (32a) states that Rome II 'should not prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media', and that, depending on the circumstances of the case and the legal order of the Member State of the court seized, public policy may be applied. This seems unnecessary to state in a recital, but as such it does no harm.

Under Article 5a(1) of the proposed choice of law provision 'the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur shall apply.' However, according to Article 5a(2), 'the law applicable shall be the law of the country in which the defendant is habitually resident if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated by paragraph 1.'

16. Report of the Committee of 2 May 2012 with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) (2009/2170 INI).

One may question whether it is appropriate to apply the habitual residence of the defendant as the connecting factor, because in doing so, the law applicable will depend on whether it is the victim or the wrongdoer who institutes court proceedings. Most likely, in this part of the proposal, the Committee wanted to apply the habitual residence of the wrongdoer.

In addition, the proposed Article 5a(3) contains a special rule for 'violations caused by the publication of printed matter or by a broadcast'. For such cases:

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

Finally, Article 5a(4) of the proposed provision deals with the law applicable to:

> the right of reply or equivalent measures and to any preventive measures or prohibitory injunctions against a publisher or broadcaster regarding the content of a publication or broadcast and regarding the violation of privacy or of rights relating to the personality resulting from the handling of personal data.

For such matters, the Committee proposes application of 'the law of the country in which the publisher, broadcaster or handler has its habitual residence.'

The proposal of the Committee on Legal Affairs of the EU Parliament is an interesting attempt to strike a fair balance between freedom of expression on the one hand and privacy and defamation on the other. It seeks to strike a balance between the closest connection of the case and the interests of the wrongdoer. However, the proposal is very detailed and complex. The most important objection is that the closest connection test is too flexible and open-ended.

4. OTHER SOLUTIONS

The law and proposed reforms of the law of choice of law of a few other countries may be interesting to examine in order to find a workable choice-of-law rule for defamation and privacy rights. These countries are England, Switzerland, and Norway.

In England, the choice of law rules of torts were codified in the Private International Law (Miscellaneous Provisions) Act 1995, but defamation was – as in Rome II, and for the same reasons – excluded from the scope of the statute.[17] Therefore, the common law, as developed by the courts, applies to defamation. As a general rule, an act committed in a foreign

17. Private International Law (Miscellaneous Provisions) Act 1995, Chapter 42, adopted on 8 November 1995.

country is a tort and actionable as such in England, only if it is both actionable as a tort according to English law, or in other words is an act that, if committed in England, would be a tort and actionable according to the law of the foreign country where it was done (the rule of double actionability). However, if the tort was committed abroad, the law of the country that has the most significant relationship with the occurrence and the parties may govern the dispute.[18]

In most international libel cases in England, the victim acting as a claimant limits his claim to a remedy for publication in England in order to ensure that the court takes jurisdiction. In such cases, and because the exception to the rule of double actionability only applies to torts committed abroad, English law will apply. This has caused the phenomenon of libel tourism.

In order to avoid libel tourism and to get a more balanced choice-of-law rule, Trevor Hartley has proposed a new choice-of-law rule for defamation. According to him, the law applicable shall be the law of the country to which the tort is most closely connected.[19] While this proposal is sound in principle because it corresponds to the closest connection test, it is in contrast to the general rule in Article 11 of the Private International Law Act, which provides that the applicable law is the law of the country in which the events constituting the tort or delict in question (the *lex loci delicti*) occurred. In addition, application of the closest connection test will often lead to a 'homeward trend', and tempt the courts to apply the *lex fori*, and then English libel law will still – as today – apply.

In Swiss law, the choice-of-law rule for defamation is 'victim-friendly' in the sense that the victim can choose between the law of the State where the wrongdoer has his habitual residence, or the law of the State where the victim has his habitual residence, or the law of the State where the harmful event occurred; see Article 139 of the Swiss Code on Private International Law. Application of the two last options require that it was foreseeable that damage would occur in these States.

In Norway, choice of law for tort cases, including defamation and violations of privacy is governed by case law and doctrine. No legislation exists. However, the Norwegian Ministry of Justice has asked Professor Giuditta Cordero Moss to write a report on choice of law for contractual and non-contractual obligations, and to propose legislation based on the EU Regulations on choice of law for contractual and non-contractual obligations. In her proposal, which is extremely well-structured and clear, Professor Moss also proposes a choice-of-law rule for defamation proposed some years ago by Lars Anders Heimdal.[20]

18. James Fawcett, Janeen M Carruthers and Peter North authors of Cheshire, North & Fawcett, *Private International Law* (14th ed, 2008), 766-767. The key judgments for the flexible exception are *Boys v Chaplin*, (1971) AC 356 and *Red Sea Insurance Co. V Bouygues SA*, (1995) 1 AC 190 (PC).
19. Trevor Hartley (n 3) 35.
20. Giuditta Cordero-Moss, *Utredning om formuerettslige lovvalgsregler* (2 June 2018) 166 <https://www.regjeringen.no/contentassets/aa11d98c5c144dac8361c7af7677f303/enpersonutredningen-om-formuerettslige-lovvalgsregler.pdf> accessed 17 January 2019. See Lars Anders Heimdal, *Rettsvalg ved erstatning for krenkende ytringer* (Gyldendal juridisk 2013).

Article 20 of the Draft Bill, dealing with defamation, states:

> Non-contractual obligations arising out of defamation is governed by the law of the country where the harmful event occurs. If damage occurs in more than one country, the obligation is governed by the law of the country where the victim has his habitual residence, unless the damage is more significant or expected to be more significant in another country.

The wrongdoer can demand that the law of the country where the harmful action was done shall be applied if:

> a) The wrongdoer could not understand that the statement would lead to damage in the country appointed under the first or second part above, or failed to understand that the statement would be harmful under the law of that country, or
>
> b) The wrongdoer has done what could reasonably be expected by him to avoid that the statement was accessible in the country appointed under the first or second part above.
>
> Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based on the fact that the parties are habitually resident in the same country or that there is a pre-existing relationship between the parties that is closely connected with the tort/delict in question.

The first paragraph of this proposal is an alignment with the general rule of Rome II, the *lex loci delicti*. However, the second sentence of paragraph 1 does not exist in Rome II, and it is based on the 'center of interest' concept developed by the CJEU in the e-Date judgment for defamation over the internet.[21] Here, the idea is to align choice of law with jurisdiction for defamation and avoid the 'mosaic principle', which is very appropriate.[22]

The third paragraph of the Norwegian proposal is to some extent inspired by Swiss law. The purpose is to apply the law of the country where the harmful action was done if so requested by the wrongdoer and provided that the wrongdoer either could not foresee that his statement would cause damage in another country, or he did what he reasonably could have done to avoid that the statement would be received in that other country (for instance by geo-blocking). This part of the provision is also fair and balanced.

Finally, the Norwegian proposal contains an escape clause identical to Rome II, Article 4(3) and combined with Article 4(2) of Rome II, which ensures the necessary flexibility.

The conclusion is that the Norwegian proposal seems to be the best one so far. The general rule in Article 20 of the Norwegian Draft Bill combined with the narrow escape clause is an excellent policy choice, and, of course, in line with the general approach of Rome II. The proposal for multi-state defamations establishes a presumption in favour

21. Case C-509/09, *eDate Advertising and Others*, judgment of 25 October 2011 (ECLI:EU:C:2011:685).
22. Cordero-Moss (n 20) 168.

of the law of the country where the victim has his centre of interests, a presumption that should be disregarded if the case has a substantially closer connection to another country or if the wrongdoer did not intend to publish his statement in the country where the victim has his centre of interests, or did what he could to avoid publication in that country, in which case the law of the country where the action was done shall apply. The general rule in this proposal brings about parallelism between jurisdiction in Brussels I and the law applicable, as the decisive connecting factor for both jurisdiction and choice of law is the centre of interests of the victim when proceedings are instituted in the Member State where the victim has his centre of interests.