

Jurisdiction in On-line Defamation and Violations of Privacy: In Search of a Right Balance

JERCA KRAMBERGER ŠKERL

Abstract This article will address the rules of EU private international law regarding the international jurisdiction in defamation and the violations of the right to privacy committed via the internet. Being that there is no common conflict of laws rule regarding these issues and a number of different courts hold jurisdiction, great efforts are being taken to prevent the so called 'forum shopping', or, as regards to defamation, 'libel tourism'. It is namely very hard to strike a fair balance between the procedural rights of both parties, since this is strongly connected with striking a balance between the freedom of speech, on one hand, and personality rights, on the other, all of which are fundamental rights. During the internet era, the problems regarding cross-border issues on defamation and privacy cases rose to a whole new dimension. The interpretation of the traditional connecting factor, the place where the harmful event occurred, became very difficult. Over the years, the Court of Justice of the EU has issued several milestone judgments interpreting Article 7(2) of the Brussels I Recast Regulation in such a way that the particularities of violations committed via the internet are taken into account.

Keywords: • defamation • personality rights • privacy • jurisdiction • private international law • libel tourism • forum shopping • Brussels I Recast • torts • delicts •

CORRESPONDENCE ADDRESS: Jerca Kramberger Škerl, PhD, Associate Professor, University of Ljubljana, Faculty of Law, Poljanski nasip 2, 1000 Ljubljana, Slovenia, e-mail: jerca.kramberger@pf.uni-lj.si.

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1 Introduction

1.1 General Remarks

With the development of mass media, such as the newspaper, radio and television, which enabled the spreading of content across the borders of particular countries, the violations of privacy and personality rights, a very delicate legal field, became a big problem in private international law. States and international bodies started developing their own unique solutions for the fundamental questions regarding this legal branch, ie. in which country should the proceedings be conducted, which law should be applied and where should the judgments in such disputes be recognized and enforced.

Then came the internet and the problem became exponentially more complex. In one single instance, different statements and opinions could (without any charge) be published at the same moment everywhere in the world (the ever more capable internet translation tools also mitigate the language problem), and the sharing and the transferring of information is largely made easier. Naturally, the apparition of internet did not only influence the legal areas of defamation and the violations of privacy. It is also possible to cause damage via the internet by violation of other legal rules, above all intellectual property rights and antitrust laws. Because of the dispersion of the damage, such a way of causing the damage is also similar to environmental damage. However, the problem with the violations of the personality rights and the right to privacy differs significantly from cited examples, because of the broad number of potential perpetrators and victims, and especially because of the conflict between the personality rights and the freedom of expression which must be balanced in each case. That is why it is necessary to tackle these problems separately.

This article focuses on the question of international jurisdiction in the violations of privacy and of the personality rights committed via the internet. In the subchapters of the introduction, we briefly explain the impact of the internet on the substantive law regulating these torts, as well as the influence of the internet on the private international law issues in this area. In the second chapter, the frequently used terms of *forum shopping* and *libel tourism* are tackled. The third chapter is dedicated to the interpretation of Article 7(2) of the Brussels I Recast Regulation,¹ the subchapters dealing with the interpretation of the place where the perpetrator acted and the interpretation of the place where the damage was sustained. Throughout the article, special focus is given to the specific issues raised by the application of “traditional” rules in the context of the internet and the search for new solutions more adapted to this medium.

1.2 The influence of internet on substantive regulation of defamation and violations of privacy

The question of international jurisdiction is important, because the competent court applies its own conflict of laws rule which tells them which substantial law to apply. The conflict of laws rule in defamation and violations of privacy is not unified on the EU level,² which means that courts in different states might apply different choice of laws

rules (or interpret the same rules differently) and therefore apply different substantial law.³ To understand the importance of determining the international jurisdiction, it is useful to show to which extent the substantial law can differ.

Because of its accessibility, the internet enlarges the potential audience, but also the circle of potential perpetrators. These are no longer only persons with a known identity, who made it through the editorial process of different media companies and for whose liability the substantial law of different countries prescribes clear rules. On the internet, anyone can publish an article, even hidden behind a pseudonym, which, given the lack of education concerning potential legal issues and given the unclear or non-existent sanctions, brings us to an exponential growth of defamatory statements and the dissemination of facts from a person's private sphere. Through the parallel development of the so-called connected objects, especially mobile phones, everybody can be recorded or filmed even in relatively private circumstances. There are more and more lawsuits directed against bloggers and persons who published contentious material on social networks, e.g. on Facebook or Twitter.⁴

The circle of perpetrators is not broadened only in number, but also new categories of wrongdoers appear. Besides the lawsuits against authors and editors of web pages there already appear judgments against the intermediaries, such as the owners of the internet search engines which offered contentious material among the results of the web search (even though the offered results are generated automatically, without the control of an individual)⁵ or which automatically complete the searched words with such materials (auto-completion).⁶ In the United Kingdom the court accepted its jurisdiction in proceedings against Google with registered office in the United States (US) in a case of an alleged violation of the right to privacy, because the company has, on the basis of the data collection about the individual's use of the internet applications, created commercial offers which then appeared on that individual's devices.⁷ The (non)liability of such intermediaries is determined by substantial law. As a consequence, the circle of potentially liable persons can influence the claimant's choice of court, as this choice is crucial for the determination of the applicable substantial law.⁸

Although the substantial laws of the countries differ, the international courts give some guidance as to the common frame of regulating the liability for the on-line violations. In regard to the Court of Justice of the European Union (CJEU), the notorious *Google Spain*⁹ judgment also influences the substantial obligations of the search engine provider regarding the preservation of privacy and personality rights. The European Court of Human Rights (ECtHR) judged in *Delfi*¹⁰ that holding the owner of a news website liable for the defamatory statements which figured in the commentaries by anonymous commentators below certain articles was not contrary to Article 10 of the Convention.¹¹ In 2016 the ECtHR, however, reached a different conclusion in a factually similar case filed against Hungary.¹² In 2018, the General Data Protection Regulation ("GDPR")¹³ will enter into force and unify certain aspects of substantive law on the protection of privacy in the EU countries, which will also be important in cross-border disputes.

Beside the often difficult detection of the perpetrators and the questionable liability of such perpetrators, the choice of court can also be influenced by the difference of the concepts of damages in different legal systems. There is the so called continental concept of damages as being of a “satisfactory” nature, prohibiting the so called punitive damages, and the English concept which allows for punitive damages (regarding the violations discussed in this article, the prohibition of punitive damages is problematized in numerous national legal systems of EU Member States and some of them have at least partly departed (or plan to depart) from it).¹⁴ There are also big differences in the amount of damages one can expect in different countries as a consequence of a similar breach, as well as in the legal costs one will have to spend for conducting the proceedings, on the claimant and on the defendant side.

1.3 The influence of internet on the private international law issues regarding defamation and the violations of privacy

In the described context it would be very useful to have a common conflict of laws regulation providing predictability as to the applicable law. However, despite much effort of the European legislators and different stakeholders, there is, for the time being, no such rule, since defamation and violations of privacy are expressly excluded from the scope of application of the Rome II Regulation.¹⁵ National conflict of law regulations thus apply, which entails the possibility of different applicable laws and, as a consequence, different results depending on the trial venue. The latter is determined, in EU law, under Article 7(2) of the Brussels I Recast Regulation and has been over the years the subject of an interesting case-law evolution which will be presented later in this article.

It is interesting to mention that this topic has also proven to be problematic in the third classical field of private international law – the recognition and enforcement of judgments. To mention only the most obvious example: many countries which do not regulate punitive or preventive damages in civil cases hesitate to recognize and enforce foreign judgments which adjudicate such damages.¹⁶ Often the effects of a foreign judgment are (partly) refused on the basis of the public policy defence, since there is a conflict between two fundamental rights: the freedom of speech and the right to privacy and to human dignity, which the states try to put in balance in different ways.

On the EU level, this awkwardness has clearly shown in the process of the adoption of the recast Brussels I Regulation. Following the proposal of the EU Commission,¹⁷ the recast Regulation was supposed to abolish the possibility to refuse the enforcement of a judgment from another EU Member State on the basis of the so called substantial public policy (where also the refusal of the punitive part of the damages could be ranged). However, the Commission wanted to make an exception from this mechanism precisely for the judgments in the disputes over the violations of personality rights and of privacy (and the judgments in the so called collective redress). In the final wording of the recast Regulation the same regime was enacted for all civil and commercial matters, whereas the possibility to invoke the public policy exception remained intact in all cases.

2 Forum shopping and libel tourism

Before tackling the EU rule on international jurisdiction for the abovementioned violations, it is necessary to explain the concepts of *forum shopping* and of *libel tourism* which often figure in discussions about the search for the best possible rules.

The word *forum shopping*, which is used also in non-English literature, means the well thought-of choice of the plaintiff of one of the competent courts, before which such plaintiff can aspire the easiest and most successful conduct of the proceedings. Regarding the expected success in the proceedings it is most important to figure out substantial law that the court will apply. If, under the regulation in force, the plaintiff has the choice, we cannot blame them for informing themselves in advance of which court will offer them the most benefits. On the contrary, it would have been irresponsible if they did not do so and in offering multiple jurisdictions, the legislature also allows the *forum shopping* to a certain extent. However, the problem arises (and the term gains a pejorative meaning) if the result of such process departs too much from the basic aim of the legislature which enacted several optional jurisdictions so as to include all courts which have a connection with the subject matter of the proceedings (especially the closeness and the availability of evidence),¹⁸ and not so as to enable the plaintiff to choose by their own personal preferences. The jurisdiction for the place where the harmful event occurred, which applies to torts, is an optional jurisdiction which is an exception to the general jurisdiction in the place of the defendant's domicile, which is why it should be interpreted strictly.¹⁹

The Anglo-Saxon systems try to avoid such problems with the use of the *forum non conveniens* doctrine, which enables the competent judge to refuse their jurisdiction if they deem that it would be better that another court decide over the dispute at hand.²⁰ The so-called continental legal systems do not apply this concept, and, in view of ascertaining the predictability, the CJEU also forbade it in the application of the Brussels I Regulation.²¹

The notion of *libel tourism* has a similar meaning, but which regards specifically the lawsuits for defamation. The alleged victim of defamation files the lawsuit in the state where they can aspire for the best result of the proceedings, i. e. to win the proceedings and to gain the highest amount of damages.²² England and Wales have long been known as a very "popular" forum for cross-border defamation suits, since they easily accepted their jurisdiction and applied their national substantive law which is (or at least was until 2013) very protective towards the victims of such acts and has therefore gained much international criticism.²³ Auda defined such *libel tourism* as concerning "a libel claim which has a tenuous connection to England" (Auda, 2016: 107). For the time being, English national rules on jurisdiction in cross-border cases do not affect defendants domiciled in the EU, but in view of the Brexit this might change. Nevertheless, even in the EU context, English courts apply national choice of law rules being there is no common rule.

Before internet, at least the jurisdiction of English courts (for the damage which occurred in England) was predictable for the defendants on the basis of the distribution of the

media to England.²⁴ The internet crucially influenced this predictability and provided fertile soil for what we now call *libel tourism*. The most cited English case in this context is *Bin Mahfouz v. Ehrenfeld* from 2005,²⁵ in which a Saudi Arabian businessman sued a US citizen in England because the allegedly defamatory statements in a book published in the US. The English court accepted jurisdiction because 23 copies of the book were ordered via the internet from England, and condemned the defendant to relatively high damages and even higher litigation costs. Authors pointed out that such condemnation, although limited to the damage which occurred in England, has much wider consequences on the possibilities of the author to publish and sell their work, as well as regarding their financial situation (Auda, 2016: 107; Nielsen, 2013: 270).

Since this situation has also been recognized as problematic in England and Wales, in 2013, a new Defamation Act was adopted which entered into force in January 2014 and is applicable for violations committed after that date.²⁶ The new Act introduces stricter substantial criteria for the invoking of the liability for damages,²⁷ and it also regulates the international jurisdiction for such disputes (for defendants domiciled outside the EU). It provides that, outside of the scope of application of the Brussels I Regulation and the Lugano Convention, the English court can only accept jurisdiction in a dispute against a foreign defendant if it is obvious that such court is the most appropriate among all courts in the states where the defamatory statement was published (Article 9). Nevertheless, Auda warns that the new Act provides a wide discretionary power to the judges, so it is not yet clear whether it will actually resolve the *libel tourism* problem (Auda, 2016: 111–113).

The case of the (criminal) charges of the Israeli scientist Karine Calvo-Goller against the editor of the on-line legal journal European Journal of International Law Joseph H. H. Weiler is also known. Mr. Weiler namely refused to withdraw an unflattering commentary of Mrs. Calvo-Goller's book on the website of this journal (whereas Mr. Weiler was not the author of this commentary). Since the plaintiff also has French citizenship and the defendant had his domicile in the US at the time of filing the charges, under the French law she could file the charges in France (the plaintiff chose criminal charges, but there is a jurisdiction of French courts for lawsuits filed by French citizens also for civil lawsuits)²⁸. The court deemed that this was a typical case of *forum shopping* and *libel tourism*, i. e. that there was an abuse of rights. The court thus rejected the lawsuit, as well as granted damages to the defendant.²⁹

Most countries regulate the public policy defense as a possibility of refusal for the recognition and enforcement of a judgment from a state which would, to resolve the dispute at hand, apply rules which are in contradiction with the fundamental principles of the state where such recognition or enforcement is sought. However, the public policy is a legal standard in which content is determined by the courts in each individual case, so that it is often impossible to predict with certainty the future decision of the court.

In this context, the reaction of the US, where the freedom of speech is very strongly protected,³⁰ to the phenomenon of *libel tourism* is very interesting. In 2008, as a result of the aforementioned *Bin Mahfouz* judgment which was declared unenforceable in New

York, the State of New York enacted an act, named “the Libel Terrorism Protection Act” (S.6687/A.9652),³¹ in addition to the already available public policy defense. This Act enabled the American defendants in foreign proceedings to obtain a declaration that the possible condemnatory judgment of the foreign court would not be enforceable in the US. Other federal states followed and in 2010, President Obama signed the federal Speech Act which prevents recognizing and enforcing foreign defamation judgments if the freedom of speech was not equally protected in the state of origin of the judgment as it would have been in the US.³²

The fraudulent *forum shopping* (i. e. such choice of court which can constitute abuse of rights) and *libel tourism* are problems which can be limited in three ways (being that the *forum non conveniens* doctrine is refused in the EU context). The first one is the limitation of the number of the potentially competent courts, which will be described further on within this paper. The second, more effective way, is the unification of the choice of law regulation, so as to oblige all competent courts to apply the same substantive law. As it was already mentioned, the violations of privacy and of personality rights are excluded from the scope of application of the Rome II Regulation. There is naturally also a third solution, i. e. the unification of the substantial law in these fields. One step in this direction was made with the above mentioned GDPR Regulation. Finally, we can mention a very interesting Auda’s proposal to make an end to libel tourism by adopting an international convention on recognition and enforcement of libel awards, following the example of the New York Convention regarding arbitral awards; the author even suggests the exact wording of such convention (Auda, 2016: 120-122).

Lastly, it is interesting to mention a recent ECtHR judgment in which it sanctioned what seems to have been Sweden’s attempt to limit *forum shopping* in the field of defamation via television. In *Arlewin v Sweden*,³³ the plaintiff wished to institute defamation proceedings in Sweden against a Swedish TV personality. The defamation allegedly occurred via a television show produced in Sweden (in Swedish language), but sent to a UK company which in turn broadcasted it back to Sweden via satellite. The plaintiff asserted the jurisdiction of Swedish courts on the basis of the Brussels I Regulation and the CJEU case-law which will be presented below. The Swedish court, however, rejected its jurisdiction on the basis of national rules which precluded such jurisdiction in defamation suits regarding programmes emanating from a foreign country. In these circumstances, the ECtHR found a violation of Article 6, since the case had such a strong connection to Sweden that this country should have offered the applicant access to court, without regard to the question whether UK courts would (also) hold jurisdiction under Brussels I Regulation.

3 Article 7(2) of the Brussels I Recast Regulation

3.1 General remarks

It has been explained that, in the absence of a unified choice of law rule, the rules on the jurisdiction in cross-border cases regarding defamation and the violations of privacy are of a paramount importance for both parties. Beside the practical reasons related to costs,

time, language etc., the competent court will apply its own conflict of law rules which will determine the applicable substantial law. As it was already discussed above, the national substantial provisions differ greatly. The question of the international jurisdiction can thus be crucial not only for the expected amount of the damages (and the amount of litigation costs), but even for the positive or negative result of the dispute for each of the parties.

In the EU, Article 7(2) of the Brussels I Recast Regulation determines the international jurisdiction in the disputes over non-contractual liability, when the defendant is domiciled in a Member State (otherwise, the national jurisdictional rules prevail). Since the definition of the notions tort, delict and quasi-delict differs among the Member States, the CJEU interprets it autonomously. Among them are also disputes related to the violations of privacy or personality rights.³⁴ For the application of Article 7(2) of the Regulation it is not important how the delict is committed, which means that it can also be committed via the internet as the CJEU judged in 2011.³⁵

Article 7(2) states that the person domiciled in a Member State can 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 provision is not limited to international jurisdiction (as is usually the case in the provisions regarding international jurisdiction and is true also for most of the provisions of the Brussels I Recast Regulation), but also determines the territorial jurisdiction and thus excludes the application of the national legislation regarding the latter.³⁶ The jurisdiction regarding non-contractual liability is optional³⁷, which means that the plaintiff can exercise it alongside the general jurisdiction in the State of the domicile of the defendant under Article 2 of the Regulation.³⁸ The question of whether there was a delict or quasi-delict is not only important for the determination of the jurisdiction, but also for the decision on the merits – this is a so-called double relevant fact, (Ger. *Doppelrelevante Tatsache*) where it suffices to assert that the delict was committed to determine the jurisdiction.³⁹

In 1976, in the case *Bier*,⁴⁰ the CJEU judged that the place where the harmful event occurred regarding Article 7(2) is the place where the harmful act was committed, as well as the place where the damage occurred. It is a so called *forum loci delicti commissi vel laesionis*. In *Shevill*,⁴¹ the CJEU deemed that each of the mentioned places “could, depending on the circumstances, be particularly helpful in relation to the evidence and the conduct of the proceedings” (paras. 20 and 21). Article 7(2) also explicitly applies to the damage which might still occur, where it is especially important that the plaintiff brings evidence as to the close connection between the forum and the potential damage (Ten Wolde, Knot, Weller, 2012: 255).

The CJEU has thus already resolved many important questions. However, from the point of view of international jurisdiction and the applicable law in internet delicts, the definitions of the place of the harmful action and especially the place of the damage can still prove very problematic; therefore the development of the doctrine and case-law regarding these two connecting factors will be presented further on.

3.2 The place of the harmful action

In internet delicts the determination of the place where the harmful act was committed causes several problems, but, different than regarding the place of the harmful consequence, there is not an indefinite number of places where the harmful action could have been committed.

Nevertheless, an agreement is necessary as to the place which will be deemed as the place where the perpetrator has acted. Regarding the printed media, this question was resolved by the CJEU in the already mentioned *Shevill* case; this is the place where the editor of the newspaper has their headquarters. On the internet, the parallel of the editor's headquarters could be the place of the server via which the contentious content has been made accessible to the public. But, since this can be anywhere in the world (and can be unknown or unpredictable even to the perpetrator), such a connecting factor is not appropriate for determining the international jurisdiction.⁴² We agree with the opinion that it is more appropriate to choose the place where the perpetrator has (physically) acted, i.e. where they uploaded the litigious content to the internet.⁴³ It is thus not important where the perpetrator wrote or produced such content or the internet page where the content was published (Možina, 2002: 516, 517). However, since it is often difficult to ascertain where the perpetrator was located at the moment of the uploading, the doctrine proposes a rebuttable presumption that the perpetrator acted in the place of their domicile or registered office (Možina, 2002: 517). If the action is directed towards the administrator, who can be liable under the applicable substantial law, the place of the harmful action is again the registered office or the domicile of the defendant (Ten Wolde, Knot, Weller, 2012: 269).

3.3 The place where the damage occurred

3.3.1 General remarks

In internet delicts it is especially difficult to determine the place where the damage occurred, or, more accurately, reasonably limit the number of the legally relevant places where the damage occurred. We are namely in the presence of the so-called "scattered tort" (Ger. *Streudelikt*),⁴⁴ where the damage occurs in different places at the same time. Regarding the internet we can even speak of the omnipresence or an ubiquitousness of the damage. Where the damage will actually occur is mainly outside the perpetrator's control (it depends on who will access the litigious content, how will it spread via the sent links, citations etc.).

Because of the special features of the internet (the internet is an essentially different medium than, for example, newspapers and television) the question has thus arisen whether it would be necessary to set additional criteria regarding the basis for the international jurisdiction in a certain state. Under the criteria applicable to the "usual" delicts, namely the courts of all states in the world could be competent, which is certainly not in line with the principles otherwise followed when determining the international

jurisdiction. These are the predictability (for the perpetrator and for the victim),⁴⁵ the connexity⁴⁶ (the connection between the harmful event and the consequence, but also the proximity of evidence, the possibility of enforcement of the judgment etc.), and the prevention of abuse of procedural rights (the above discussed *forum shopping* and *libel tourism*).

In part, the mentioned problems have already shown in printed media and television. In the 1970s and 1980s some national case-laws have developed the concept of the *directed dissemination*: if the perpetrator could predict that in a specific state the consequences of their act will occur, then the courts of such state have jurisdiction over these actions.⁴⁷ The question of the predictability of the fact that the damage would occur in a certain place is partially rhetoric in internet delicts: it is namely difficult to deny that the perpetrator knew or must have known that the content would be accessible to the whole world (except if it is appropriately protected by passwords etc., because in such cases, the provider can limit subscriptions to specific states and therefore exercises control over the accessibility of the website)⁴⁸. Nevertheless, also in information published on the internet could we ask the question of the directed dissemination – from the content, language etc. we could often deduce the targeted public for specific content. However, the doctrine warns that this criterion is not generally applicable (e.g. regarding an internet page in English with information which is of interest for a larger public).⁴⁹ The CJEU has developed a rich case-law about the “directing” of the webpage contents to a certain country in the field of protective jurisdictions in consumer contracts.⁵⁰ Although those are very different legal fields, we can at least deduce from the mentioned case-law that not every state where the content was accessible can automatically be a legitimate venue for judicial proceedings regarding the content. Today, it is commonly accepted that also in internet publications, we can try to formulate a certain reasonable expectation where and where not a legally relevant damage can occur, and connect to this expectation the rules on jurisdiction.

One possibility would be to simply strike out the *forum loci damni* and only retain the place where the harmful action was committed. In the so-called *global damage* such solution was adopted in Article 13 of the Vienna Convention on Civil Liability for Nuclear Damage.⁵¹ Under this rule, only courts in the state where the event giving rise to the damage occurred have jurisdiction and not the courts of the states where the damage occurred. Also the commentators of Article 7(2) of Brussels I Recast Regulation deem that in a case where the plaintiff invokes the so-called global damage, there is no jurisdiction for the place of the damage, there only remains the general jurisdiction for the state of the domicile of the defendant and the optional jurisdiction for the place where the harmful action was committed (Ten Wolde, Knot, Weller, 2012: 275). Regarding a similar (contrary) problem of the so called *pure economic loss*, the CJEU held in *Universal Music* that also in such cases, the jurisdiction cannot be based in the place where damage occurred, but only in the place where the harmful action was committed or in the state of the defendant’s domicile.⁵²

However, such a solution would be imbalanced in the internet violations of personality rights, because it would excessively favour the perpetrator. As Mežnar warns, regarding

the conflict of laws regulation of such violations, the application of the mentioned theory could result in media owners' moving the registered offices of their companies to states which are legally more favourable for them (Mežnar, 2004: 25); in doing this they would directly influence the international jurisdiction, and indirectly the substantial law applicable to the potential violations. Auda claims that the place of the "centre of interests" is fairer, since it prevents the danger of the defendants moving to places with most favourable law and of plaintiffs suing in places with very little connection to the dispute (Auda, 2016: 115).

Ideally, the interpretation of the same connecting factor should be the same in international jurisdiction and in the conflict of laws. It is true that the conflict of law regulations for the violations of privacy and personality rights are not yet unified in the EU, but the preparations for the adoption of a common rule have been in drafting stage for years. The common view on this question regarding the already unified jurisdiction rule could also serve as inspiration to national courts when they interpret their choice of law rules.

3.3.2 Case Shevill (1995)

In the already mentioned case *Shevill* of 1995 the CJEU has, when interpreting the Brussels Convention of 1968 (the predecessor of the Brussels I and the Brussels I Recast Regulations) regarding the violations of personality rights via mass media, established the so-called *mosaique system*: the plaintiff can demand damages in all countries where the newspaper was distributed (this is the so-called orientation theory, which is expressly applied for example by the French Court of Cassation also in internet delicts)⁵³ and in which the plaintiff is known, however the latter can only demand in each state damages for the damage which occurred there; the damages for the whole damage can only be demanded in the state of the defendant's domicile or in the place where the harmful action was committed.

The *mosaique system* was surely a welcome step in the direction of the restriction of the number of possible jurisdictions and the preventing of the fraudulent *forum shopping* where the plaintiff would demand the whole amount of damages in a state where maybe only a minor part of the damage occurred, but where the most favourable law for the plaintiff will be applied.⁵⁴ Because the rules on civil liability differ in different states, it is, in the mind of the CJEU, the best to let each state decide over the damage which occurred in its territory. On the other hand, the doctrine warns of the deficiencies of such a solution, especially of the impractical nature for the plaintiff who would want to invoke the damage in states where the damage occurred and would therefore have to file several lawsuits. The authors also questioned the reasonableness and possibility of the "dissection" of the impecuniary damage into different parts, as well as the justification of the condition that the victim had to be known in the place of the occurrence of the damage before the litigious act.⁵⁵

3.3.3 Cases *eDate* and *Martinez* (2011)

The problem with multiple places where the damage could be asserted to have occurred is much bigger when the litigious content is published in the internet, so that the additional criteria of the *Shevill* case do not suffice. The CJEU first encountered the problem of the violation of personality rights via the internet in the cases *eDate Advertising* and *Martinez* and issued in 2011 the long awaited judgment by which it posed a new milestone in the determination of the international jurisdiction for these delicts.⁵⁶ It found out that “the placing on-line of content on a website is to be distinguished from the regional distribution of media such as printed matter in that it is intended, in principle, to ensure the ubiquity of that content. That content may be consulted instantly by an unlimited number of internet users throughout the world, irrespective of any intention on the part of the person who placed it in regard to its consultation beyond that person’s Member State of establishment and outside of that person’s control. It thus appears that the internet reduces the usefulness of the criterion relating to distribution, in so far as the scope of the distribution of content placed on-line is in principle universal. Moreover, it is not always possible, on a technical level, to quantify that distribution with certainty and accuracy in relation to a particular Member State or, therefore, to assess the damage caused exclusively within that Member State” (paras. 45 and 46).

Therefore, the CJEU upgraded the *mosaique system* in a way that the whole damage can also be claimed (i.e. besides the state of the domicile of the defendant and the state where the perpetrator acted) in the place where there is the centre of dispute i.e. the centre of the conflict between the right to information (as a part of the freedom of speech) and the right to privacy. This is the place where the victim has the centre of life and activity and where the litigious content is “especially relevant and therefore the plaintiff’s interests are especially harmed there” (Ten Wolde, Knot, Weller, 2012: 256).⁵⁷

The CJEU described the centre of the victim’s interests as follows: “The place where a person has the centre of his interests corresponds in general to his habitual residence. However, a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State” (par. 49). Furthermore, it justified the jurisdiction of the court in this place as follows: “The jurisdiction of the court of the place where the alleged victim has the centre of his interests is in accordance with the aim of predictability of the rules governing jurisdiction [...] also with regard to the defendant, given that the publisher of harmful content is, at the time at which that content is placed on-line, in a position to know the centres of interests of the persons who are the subject of that content. The view must therefore be taken that the centre-of-interests criterion allows both the applicant easily to identify the court in which he may sue and the defendant reasonably to foresee before which court he may be sued [...]” (par. 50).

It is thus still important not to automatically equate the place of the centre of interests of the plaintiff with the place of the plaintiff’s domicile,⁵⁸ whereas it is true, as the CJEU also admits, that these two places usually coincide. The situation is namely not identical

as in the case of the so-called continued damage, for example a non-pecuniary damage suffered by the victim of a traffic accident, where it is generally accepted that only the court in the place where the traffic accident occurred has jurisdiction and not also, for example, the court in the place of the victim's domicile where the victim actually suffered most of their physical and/or psychological pain.⁵⁹ The damage suffered as a result of a violation of privacy or of personality rights namely occurs in the victim's social and professional environment. Whereas the victim of a traffic accident would have suffered the same pain anywhere they would move after the accident, the victim of the personality rights violation suffers the damage in their domestic environment and only rarely also (or exclusively) elsewhere.⁶⁰ The criterion from the judgment in *Shevill*, that the plaintiff must be previously known in the place where the damage is asserted to have occurred, can also be understood in this direction.

The connection of the jurisdiction for the entire damage to the place of the centre of the violation has not been invented by the CJEU. Some authors have already proposed this connecting factor years ago,⁶¹ and it was applied by the US Supreme Court in *Calder v Jones* in 1984.⁶² Also the combination of the *mosaique system* and the jurisdiction in the centre of the violation is not new – a similar provision was already contained in the proposal for a Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters in the 1990s, which was a project of the Hague Conference on Private International Law.⁶³ In contrast to the mentioned judgment of the CJEU, this proposal contained a protective clause under which there was no jurisdiction in the place of the centre of the violation if such a place was unpredictable to the perpetrator.

In 2013, the criterion from *eDate* was applied in an Irish case, where the alleged defamation happened via contents published outside Ireland (but by a defendant with registered office in the EU) and on a webpage which was only accessible to the subscribers (*CSI Manufacturing Ltd v Dun and Bradstreet*)⁶⁴. The High Court held that, given that the contents were published on a subscription webpage, it could not be asserted that the publication automatically happened (also) in Ireland. The evidence showed that it was only accessed by one subscriber in Belfast and no access was proven in Ireland. The centre of interests criterion could, however, only be applied once it is established that the contents were published and accessible in a certain state.

The judgment in *eDate* was largely welcomed by the doctrine, however, some authors rightfully point out that it has one weak point, which is that although creating a new rule, it does not abolish the *mosaique system* in on-line violations, which still provides opportunities for *libel tourism* and problems arising from it and discussed above in this article (Auda, 2016: 113; Nielsen, 2013: 279).

3.3.4 Case Bolagsupplysningen (2017)

In October 2017, the CJEU issued a judgment in the *Bolagsupplysningen* case,⁶⁵ which further developed the interpretation of the application of Article 7(2) for the internet defamation cases. The main questions in this case were first, whether a corporate entity could invoke the jurisdiction under Article 7(2) regarding the protection of its reputation,

and second, where was the centre of interests of such entity located (for the purposes of the application of the criterion from *eDate*). The plaintiffs were namely a corporate entity with a registered office in Estonia (and an individual domiciled in the same state) which conducted most of their business in Sweden, where the defendant also had their registered office. The plaintiffs demanded, in an Estonian court, damages and the removal of content from the internet site.

The Grand Chamber of the CJEU first confirmed the application of the criteria from *eDate* to legal entities, stating that “a legal person claiming that its personality rights have been infringed by the publication of incorrect information concerning it on the internet and by a failure to remove comments relating to that person can bring an action for rectification of that information, removal of those comments and compensation in respect of all the damage sustained before the courts of the Member State in which its centre of interests is located”. Second, it gave the interpretation of the centre of interests regarding legal entities: “When the relevant legal person carries out the main part of its activities in a different Member State from the one in which its registered office is located, that person may sue the alleged perpetrator of the injury in that other Member State by virtue of it being where the damage occurred.”

And third, the CJEU (for the first time) ruled on the application of Article 7(2) to the actions for rectification or removal of information and comments from the internet page. Such action can only be filed in the Member State where the whole damage can be claimed and not “before the courts of each Member State in which the information published on the internet is or was accessible”. Namely, in contrast to damage, which can be (to a certain extent) dissected in parts, a motion to rectify or remove the information on the internet cannot be divided and partially invoked in different states, but can only be invoked before the court competent for the whole damage.

4 Conclusion

The general problems relating to the invoking of the violations of privacy and personality rights in mass media are strongly emphasised in the context of the internet. In the EU the combination of multiple jurisdictions under the Brussels I Recast Regulation and the absence of a common conflict of laws regulation causes limited predictability for the (direct) perpetrators and their intermediaries regarding the (un)lawfulness and possible consequences of their on-line publications. The CJEU tries to search for the proper balance of the legal situations of both parties, which is particularly important when dealing with disputes where the defendants are often the media who play a very important role in the society (the so called fourth branch of power).⁶⁶

It is impossible to guarantee total predictability in cross-border legal relationships. However, the defendant’s procedural position can be notably balanced with the plaintiff’s if the number of possible forums are limited so that it is only possible to sue before the courts in the state and in the place which are importantly connected with the dispute. Such is certainly the court in the state of the defendant’s domicile, which holds general jurisdiction under Article 4 of the Brussels I Recast. Under the CJEU interpretation of

Article 7(2) of the Regulation, also the courts in the place of the harmful action and of the damage hold jurisdiction in torts.

However, especially the place where the damage occurred has been very difficult to define when the violations happen via the Internet. When speaking of the connection with the dispute and the predictability in disputes over on-line content it is necessary to only select the fora which hold a sufficiently strong connection and reject those where it was possible to access the litigious internet content but which only have a minor connection with the dispute at hand. With its case-law regarding Brussels I Recast Regulation, the CJEU brought a very important contribution to the attaining of these goals, especially in determining the place of the centre of interests of the victim as the most important place where the damage occurred and thus connecting factor concerning international jurisdiction.

The rules regarding jurisdiction and the enforcement of judgments in on-line defamation and violations of privacy are thus unified in the EU. The jurisdiction falls under the general rule on torts in Article 7(2) of the Brussels I Recast Regulation, and the attempts of the Commission to differentiate the rules on recognition and enforcement of judgments in these cases from judgments in other torts has failed. Although the idea has been advanced that the mass media and on-line violations of the right to privacy and defamation could be the object of a separate set of private international law rules,⁶⁷ it seems that the evolution will pursue in the direction of refining the interpretation of Article 7(2) of the Brussels I Recast regarding the jurisdiction,⁶⁸ of the search for an appropriate rule to be included in the Rome II Regulation regarding the choice of law,⁶⁹ and the interpretation of the public policy defence from Article 45(1)(a) of the Brussels I Recast regarding the recognition and enforcement of judgments.⁷⁰ The latter has not yet been interpreted by the CJEU in the context of the issues tackled by this article, even if the proper balance between the right to privacy and the freedom of speech, as well as the issue of punitive damages clearly could show problematic.

Notes

¹Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351 of 20 December 2012.

²The search for a unified rule has, however, been in track for more than a decade. See, among other documents, the European Parliament resolution of 10 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)), OJ CE 261/17 of 10 September 2013.

³ See also the Comparative Study on the Situation in the 27 Member States as Regards the Law Applicable to Non-contractual Obligations Arising out of Violations of Privacy and Rights Relating to Personality, JLS/2007/C4/028. Final Report, February 2009, http://ec.europa.eu/justice/civil/files/study_privacy_en.pdf (accessed on 3 December 2017).

⁴ See e. g. Ardia, 2016: 0. For the choice of law dilemmas in such disputes, see Mills, 2015.

⁵ The former Formula 1 chief Max Mosely succeeded with such lawsuit against Google.fr in France (Tribunal de grande instance, Paris, judgment of 6 November 2013) and against Google.de in Germany (Landgericht Hamburg, judgment of 24 January 2014).

⁶ The German Federal Supreme Court judged in May 2013 that the administrator of the search engine is not liable until the victim does not notify them of the autocompleting which violates their right to privacy; but when the victim has notified this, the administrator must prevent such autocompleting, otherwise they are liable for damages. See Bundesgerichtshof, judgment No. VI ZR 269/12 of 14 May 2013.

⁷ The plaintiffs asserted that not only the gathering of the data is problematic, but the presented offers reveal such data so that third persons who watch or use the same devices can see them. The British court accepted its jurisdiction for the lawsuit of the British plaintiffs against Google having its registered office in the US (Google.uk was not involved), so the court did not apply the Brussels I Regulation. The court could thus apply the *forum non conveniens* doctrine but it judged that this would not have been justified. See High Court, *Vidal-Hall and Others v Google Inc* [2014] EWHC 13 (QB).

⁸ For the information on national substantive laws regarding the liability of the intermediaries, see e. g. the Stanford Law School web page called World Intermediary Liability Map (WILMap) (<http://cyberlaw.stanford.edu/our-work/projects/world-intermediary-liability-map-wilmap>, accessed on 3 December 2017).

⁹ Case C-131/12, *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, ECLI:EU:C:2014:317.

¹⁰ *Delfi AS v Estonia*, judgment of 10 October 2013, confirmed by the Grand Chamber in a judgment of 16 June 2015.

¹¹ For more detail on the judgment and on its influence in the Slovenian law see Mežnar, 2013: 6–8. It is interesting that the court judged that the intermediary was liable for damages, despite the removal of the defamatory commentaries right after the notification by the victim.

¹² *Magyar Tartalomszolgáltatók Egyesülete and Index.hu ZRT v Hungary*, judgment of 2 February 2016. The ECtHR found the determining difference between the case in the fact that in *Delfi*, the commentaries on the web page amounted to hate speech and incitement of violence, whereas in the Hungarian case, the commentaries were not evidently unlawful so that the mechanism of removing the commentaries following the notice of the injured party sufficed so as to protect the latter's right to privacy.

¹³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119 of 4 May 2016.

¹⁴ For more on this question in the Slovenian theory see Mežnar, 2008 and Mežnar, 2006.

¹⁵ Article 1/2 g of the 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), OJ L 199 of 31 July 2007.

¹⁶ Until 2010, French courts systematically refused to recognize US judgments containing punitive damages. The French Court of Cassation (First Civil Chamber) partly reversed this doctrine in the Judgment No. 1090 of 1 December 2010 (No. 09-13.303) where it held that in principle, punitive damages were not contrary to the French public policy, but they still needed to be proportionate to the sustained damage and the breach of contract.

¹⁷ Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), 14 December 2010, COM(2010) 748 final, Article 37/3/a.

¹⁸ See e. g. Ten Wolde, Knot, Weller, 2012: 254, 255.

¹⁹ Ibid.: 255. Auda speaks about “primary” jurisdiction in the place of the defendant’s domicile, and “secondary” jurisdictions in other places which have a strong connection with the dispute and which are also predictable for the defendant; Auda, 2016: 109.

²⁰ Regarding the application, in England, of *forum non conveniens* to defamation suits, see Nielsen, 2013: 273, 275.

²¹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12 of 16 January 2001. Case C-281/02, Andrew Owusu v N. B. Jackson, ECLI:EU:C:2005:120.

²² Cf. Nielsen, 2013: 269, Meier, 2016: 492.

²³ Nielsen explains that the attractiveness of English courts results from »a cocktail« of circumstances, namely that English courts easily assume jurisdiction, that under the English substantive law the plaintiff does not have to prove that the statements were false or that the defendant acted maliciously, as well as that the awarded damages and the costs of the legal proceedings are high (Nielsen, 2013: 269).

²⁴ See eg. *Berezovsky v Michaels* [2000] UKHL 25; [2000] 1 WLR 1004; [2000] 2 All ER 986; [2000] EMLR 643, in which the House of Lords allowed the lawsuit of Russian plaintiffs against a US journal before a court in London, although the vast majority of the subscribers were in the US and the allegedly defamatory statements related to the activities of the plaintiffs in Russia.

²⁵ [2005] EWHC 1156 (QB).

²⁶ The act is accessible at <http://www.legislation.gov.uk/ukpga/2013/26/contents/enacted> (accessed on 3 December 2017).

²⁷ For a summary of the modifications, see e. g. Nielsen, 2013: 272.

²⁸ Article 14 of the French Civil Code expressly provides for a jurisdiction of the French courts regarding French plaintiffs in contractual matters, but the Court of Cassation broadened this rule to entail almost all sorts of lawsuits, also the lawsuits in torts (1st Civil Chamber, judgment of 27 May 1970, *Weiss*, No. 68-13643).

²⁹ All information on the proceedings and the judgment are accessible at <http://www.ejltalk.org/in-the-dock-in-paris-%E2%80%93-the-judgment-by-joseph-weiler-2/> (accessed on 3 December 2017).

³⁰ The milestone case in the creating of strict standards for the lawsuits of public persons was *New York Times Co. v Sullivan*, 376 U.S. 254 (1964).

³¹ <http://acdemocracy.org/the-libel-terrorism-protection-act/> (accessed on 3 December 2017).

³² More about this development: Little, 2012: 23–27.

³³ ECtHR, judgment of 1st June 2016.

³⁴ Case C-68/93, *Shevill and others v Presse Alliance SA*, ECLI:EU:C:1995:61.

³⁵ C-509/09 and C-161/10, *eDate Advertising GmbH v X and Olivier Martinez and Robert Martinez v MGN Limited*, ECLI:EU:C:2011:685. The case-law of national courts in the EU can be found in e.g. Ten Wolde, Knot, Weller, 2012: 260, footnote No. 56.

³⁶ Thoroughly about this Galič, 2012: 10. The Appellate Court in Ljubljana wrongly held that the mentioned article of the Regulation only refers to international jurisdiction and not also the territorial one: Judgment No. VSL I Cp 3289/2010 of 2nd February 2011 (the case was about the violation of personality rights via a foreign television show which was showed in Slovenia).

³⁷ The fact that this jurisdiction is elective or special (the terms are synonyms in the field of jurisdiction) follows from the title of Section 2 (Special Jurisdiction) which also contains Article 7.

³⁸ The plaintiff can thus still decide to invoke the whole damage before the court in the state of the defendant's domicile.

³⁹ More about this: Galič, 2012: 24, 25.

⁴⁰ Case 21/76, *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA*, ECLI:EU:C:1976:166.

⁴¹ Case C-68/93, *Shevill and others v Presse Alliance SA*, ECLI:EU:C:1995:61.

⁴² Case C-523/10, *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH*, ECLI:EU:C:2012:220.

⁴³ See e.g. Možina, 2002: 516–517, Ten Wolde, Knot, Weller, 2012: 269 and other authors cited there.

⁴⁴ See e.g. Ten Wolde, Knot, Weller, 2012: 255.

⁴⁵ Recital 11 to the Brussels I Regulation of 2000 reads: “The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. [...]” See also eg. case C-256/00, *Besix SA v Wasserreinigungsbau Alfred Kretzschmar*, ECLI:EU:C:2002:99 (the obligation of omission), and case C-168/02, *Rudolf Kronhofer v Marianne Maier and others*, ECLI:EU:C:2004:364 (the relevance of the first place where the damage occurred and not all the places where the victim suffered the consequences).

⁴⁶ Already in *eDate* and *Martinez* (par. 40) the CJEU wrote: “It is settled case-law that the rule of special jurisdiction laid down, by way of derogation from the principle of jurisdiction of the courts of the place of domicile of the defendant, in Article 5(3) of the Regulation is based on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings [...]”

⁴⁷ In more detail: Možina, 2002: 513, 514.

⁴⁸ The full predictability for the publisher in situations where subscription is necessary has, however, been contested. See e.g. Auda, 2016: 117.

⁴⁹ In more detail: Možina, 2002: 519.

⁵⁰ Joined cases C-585/08 and C-144/09, *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v Oliver Heller*, ECLI:EU:C:2010:740; case C-190/11, *Daniela Mühleitner v Ahmad Yusufi and Wadat Yusufi*, ECLI:EU:C:2012:542; Case C-218/12, *Lokman Emrek v Vlado Sabranovic*, ECLI:EU:C:2013:666.

⁵¹ Convention on Civil Liability for Nuclear Damage of 29 July 1960, <http://www.iaea.org/Publications/Documents/Conventions/liability.html> (accessed on 3 December 2017).

⁵² Case C-12/15, *Universal Music International Holding BV v Michael Tétéreault Schilling, Irwin Schwartz, Josef Brož*, ECLI:EU:C:2016:449.

⁵³ See eg. the judgment of the Commercial Chamber of the Court of Cassation of 29 March 2011 in the case *Ebay Inc, Ebay Europe and Ebay France v Maceo*. The court held that “the accessibility of the internet page in the French territory does not suffice by itself for the existence of the jurisdiction of French courts”; it must be examined whether the French internet users were the public to which this page directed their contents. In the case *LICRA v Yahoo! France and Yahoo! Inc.* the first instance court (Tribunal de grande instance) in Paris (judgments of 22 May and 10

November 2000) accepted its jurisdiction (and applied French law) also against a defendant from the US, because this defendant showed their awareness of the accessibility for the French users by showing French advertisements. In the US these judgments could later not be enforced since this would be contrary to the American understanding of the freedom of speech.

⁵⁴ Even if the defendant does not have any assets in this state from which the plaintiff could be repaid, the judgment can namely often be enforced in other states, even though it would not be possible to reach the same result on the merits of the case in those states.

⁵⁵ More on this Možina, 2002: 515.

⁵⁶ Joined Cases C-509/09 and C-161/10, *eDate Advertising GmbH v X and Olivier Martinez and Robert Martinez v MGN Limited*, ECLI:EU:C:2011:685.

⁵⁷ CJEU wrote that “in the event of an alleged infringement of personality rights by means of content placed on-line 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 on-line 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.”

⁵⁸ The jurisdiction in the place of the plaintiff's domicile is namely in principle considered as an exorbitant jurisdiction (see also Annex I to the Brussels I Regulation of 2000 which defines Articles 14 and 15 of the French Civil Code as exorbitant jurisdictions). More on that Galič, 2012: 17, 18.

⁵⁹ Under the generally accepted rule the place where the damage occurred is only the first place where the damage occurred following a certain action or event, and not also all other places where subsequent consequences appear. Case C-364/93, *Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company*, ECLI:EU:C:1995:289.

⁶⁰ As Mills points out, the identification of a relevant public becomes ever more difficult in the era of the social media (Mills, 2015: 3).

⁶¹ Certain German authors who proposed that solution in the 1990s are cited in Možina, 2002: 520, footnote No. 53. In the Slovenian doctrine Damjan Možina was in favour of that solution, see Možina, 2002: 522; regarding the choice of law rule Špelca Mežnar proposed that the place where the damage occurred should be the place of the habitual residence of the victim at the time of the violation, see Mežnar, 2004: 26.

⁶² *Calder v Jones*, 465 U. S. 783 (1984). In the judgment written by Justice Rehnquist, the Court wrote that the court in California has jurisdiction because the newspaper was directed to the Californian audience, because the perpetrator (the editor-in-chief) knew that the victim is domiciled in California and because the damage to her career would occur in California (the newspaper said that Jones was an alcoholic). It the same year, the Supreme Court reached a decision in the case *Keeton v Hustler Magazine Inc.*, 465 U.S. 770 (1984) where the plaintiff sued in the federal state where the newspaper was distributed but she did not live there (she only chose that state because under its laws the statute of limitations still permitted the lawsuit to be filed, and because she could aspire the biggest amount of damages). The Supreme Court again unanimously held that the plaintiff could demand the whole damage there (also the damage which occurred in other federal states) because the newspaper was distributed there. In spite of this decision, the case *Calder* counts as the most important judgment of the US Supreme Court and the courts accept their jurisdiction on the basis of three criteria: “the defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.”. More in: Little, 2012: 7.

⁶³ See e.g. Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission and Report by Peter Nygh and Fausto Pocar, avgust 2000, <http://www.hcch.net/upload/wop/jdgm11.pdf>. The project has later been

limited to the recognition and enforcement: the last version of the Draft Convention is of November 2017, and accessible at <https://assets.hcch.net/docs/2f0e08f1-c498-4d15-9dd4-b902ec3902fc.pdf> (both internet pages accessed on 8 December 2017).

⁶⁴ [2013] IEHC 547.

⁶⁵ Case C-194/16, *Bolagsupplysningen OÜ, Ingrid Ilsjan v Svensk Handel AB*, ECLI:EU:C:2017:766.

⁶⁶ Meier explains: “Freedom of speech protects the interests of the wrongdoer, while the victim enjoys a right to private life. Member States balance these competing fundamental rights differently on the grounds that they reflect a particular view on how democracy should work.” Maier, 2016: 494, who also cites Kuipers, 2011: 1681, 1682.

⁶⁷ See e. g. Nielsen, 2013: 279. Regarding the choice of laws rule see e.g. Maier, 2016: 511 ff.

⁶⁸ The violations of privacy and personality rights are expressly mentioned only in Recital 16 to the Brussels I Recast Regulation, concerning the need for the foreseeability of the jurisdiction for the defendant.

⁶⁹ For the time being, the prevailing opinion regarding the conflict of laws rule seems to opt for the centre of interests of the victim as a connecting factor, with the possibility for the defendant to raise the so called foreseeability defence and for the court to apply the public policy defence (Meier, 2016: 517, 520).

⁷⁰ Regarding the possible application of the public policy defence in the context of the recognition and enforcement of judgments regarding defamation and violations of privacy, see e. g. Nielsen, 2013: 286, 287.

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