



SUBMISSION
to
Sub-Committee E (Law and Institutions),
House of Lords

on the

The European Commission Proposal for a
Regulation of the European Parliament and the Council
on the Law Applicable to Non-Contractual Obligations (Rome II)
Focus on Defamation

by
ARTICLE 19
Global Campaign for Free Expression

London
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1. Introduction

- 1.1 As part of its efforts to harmonise private international law in civil and commercial matters, the European Commission has developed a proposed regulation relating to the choice of law for non-contractual obligations (Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (the proposed Regulation)).¹
- 1.2 The proposed Regulation has been amended based on an initial round of comments received. This Submission is based on an amended draft circulated in September 2002.

¹ Brussels, 22.07.2003 Com (2003) 427 final 2003/0168 (COD).

- 1.3 The proposed Regulation generally provides for cases to be heard according to the law of the jurisdiction in which the damage occurred, regardless of where the case is filed (the Article 3 rule). It does provide an exception to this, at Article 6(1), so that courts are not required to apply defamation laws which would breach their own jurisdiction's freedom of expression rules. Unfortunately, the defamation laws of many EU Member States, as well as those of the 10 accession States, do not comport with international freedom of expression standards. The exception, while welcome, does not protect a publisher against suit in a foreign country, where the plaintiff claims to have suffered harm in that same country. This can result in the application of harsh defamation laws, including laws which breach Article 10 of the European Convention on Human Rights.² This is a particular problem for Internet publications, which are effectively universal in nature.
- 1.4 The comments below address this problem in detail. The comments also address, briefly, certain difficulties relating to Article 6(1) and the special problem of criminal defamation laws.

2. Summary Of Conclusions

- 2.1 ARTICLE 19 recommends an exception to the Article 3 rule – mandating application of the law of the jurisdiction where the damage occurred – for defamation actions based on material published on the Internet. We recommend that, in Internet-based defamation cases, the applicable law be the law of the country in which the Internet publisher uploads the allegedly defamatory material or, alternatively, the law of the country where the publisher is established. We note that other exceptions to the Article 3 rule currently found in the proposed Regulation have been justified by reference to EU objectives and we are of the view that the exception we are recommending is similarly warranted, based on the EU's commitment to protecting freedom of expression.
- 2.2 Article 6(1) generally protects against mandatory application of foreign law by the forum, or jurisdiction in which the case is brought, if that foreign law would violate the forum's fundamental freedom of expression or information protection. We recommend that Article 6(1) make it clear that the burden is on the plaintiff in a defamation action to show that the law mandated by the Article 3 rule *is not* contrary to the fundamental principles of the forum as regards freedom of expression and information, rather than on the defendant to show that the Article 3 law *is* contrary to these principles.
- 2.3 Finally, the Article 6(1) rule is not watertight and could lead to the application of harsh foreign criminal defamation laws, even where these have implicitly been recognised to be inappropriate in the forum. We therefore suggest that criminal defamation laws be excluded altogether from the coverage of the proposed Regulation.

² Article 10 guarantees the right to freedom of expression.

3. Overview of Relevant Stipulations

- 3.1 The proposed Regulation is intended to harmonise among EU Member States the various national rules stipulating which national law applies to the determination of issues relating to non-contractual obligations arising out of an act other than a tort or delict. It therefore attempts to ensure reasonable foreseeability as to the outcome of such cases and to dissuade parties from forum shopping. As a Regulation, it would have direct effect in domestic legislation, although it would not presently apply to Denmark, Ireland or the UK.
- 3.2 The general rule, as set out in Article 3, is applicable to defamation cases. It provides generally that the law of the case shall be “the law of the country in which the damage arises or is likely to arise”.³ The Explanatory Memorandum makes clear that, for defamation actions, the damage arises, as a general matter, in the jurisdiction in which the allegedly defamatory material has been distributed.⁴
- 3.3 Article 6(1) establishes a limited exception to this general rule, providing that in cases involving a violation of privacy or rights relating to the personality, the law of the forum shall apply instead of the law of the jurisdiction where the damage arises if, but only if, the application of the law of that jurisdiction “would be contrary to the fundamental principles of the forum as regards freedom of expression and information”.

4. Internet Communications

- 4.1 The proposed Regulation does not sufficiently recognise the unique characteristics of communication by Internet. Pursuant to this Regulation, Internet publishers and communicators would be at risk of potential liability for defamation, libel and related offences in jurisdictions far removed from the ones in which they live and publish, even where these defamation laws fail to meet international standards of respect for freedom of expression.
- 4.2 A key feature of the Internet is that when a person uploads material to a website, that material is available for download, in principle, by individuals everywhere in the world. Once material is uploaded in one jurisdiction, there is very little that can be done, particularly by small publishers with limited means, to prevent the material from being downloaded anywhere else. This is in contrast to the case of print and broadcast media, where there is arguably a reasonable degree of control over where publications are distributed.⁵

³ Articles 3(2) and 3(3) provide for some limited exceptions from this general rule which are not applicable to the concerns raised in this Memorandum.

⁴ The Explanatory Memorandum refers to *Fiona Shevill v Presse Alliance* [1995] ECR I-415 and (1996) 3 All ER 929 (the latter decided on a reference from the House of Lords of England for clarification of the meaning of Article 5(3) of the Brussels Convention), which held that the meaning of “the place where the harmful event occurred”, in the context of defamation actions, includes any Member State in which an allegedly defamatory publication is *distributed*.

⁵ In *Gutnick v. Dow Jones* [22] HCA56, the Australian High Court found that downloading an article in Australia provided a basis for jurisdiction for a defamation action in that country, even though the material was uploaded in the United States. In that case, however, the article was available only by paid subscription

4.3 Although the Explanatory Memorandum of the proposed Regulation does not explicitly take the matter up, existing case law and practice suggests that in the case of Internet publication, distribution, and hence defamation liability, occurs at any place where material is downloaded.⁶

4.4 For example, Internet material may be produced and uploaded in State A, under whose laws it is clearly not defamatory. If that material is downloaded in State B, the law applicable to that material, pursuant to the Article 3 rule (subject to exceptions not relevant here), is the law of State B, even if that State has harsh defamation laws which do not comport with international freedom of expression standards. Moreover, under the existing jurisdictional rules of Article 5(3) of the Brussels Convention, the complainant is able to assert jurisdiction in any country in which the allegedly offending material has been “distributed”.⁷ Since, as noted, in the case of the Internet this would likely be the country in which the material was downloaded, the complainant will in fact succeed in having the courts of State B assert jurisdiction over the case, with the case being judged pursuant to their laws.

4.5 Thus, pursuant to the Article 3 rule, all those who publish over the Internet need to know (and comply with, on pain of potential liability) the laws of defamation in all EU Member States. This applies regardless of whether or not those laws are compatible with international standards of freedom of expression, including the standards established by the European Court of Human Rights, or the freedom of expression laws where the publisher is established or where the material is uploaded. This situation is particularly onerous for Internet ‘publishers’, including individuals and small organisations which, collectively, maintain millions of websites at any given time.

4.6 Furthermore, the “saving clause” of Article 6(1) does not alleviate this burden. Article 6(1) states:

The law applicable to a non contractual obligation arising out of a violation of privacy or rights relating to the personality shall be the law of the forum where the application of the law designated by Article 3 would be contrary to the fundamental principles of the forum as regards freedom of expression and information.

4.7 Article 6(1), while welcome, fails to go far enough to ensure adequate protection of freedom of expression. In our example above, if the plaintiff brought the case in State B, Article 3 would mandate that the applicable law would be that of State B. Article 6(1) would not be applicable in this context since, obviously, State B’s law is

and so the publisher had a greater degree of control over distribution than is normally the case with Internet material.

⁶ See, for example, *Gutnick v. Dow Jones* [22] HCA56, discussed above in note 5.

⁷ Article 5(3) provides that, in the case of torts, “the place where the harmful event occurred” has jurisdiction in addition to the court of the defendant’s domicile. As noted above, the Court in *Fiona Shevill* interpreted this phrase, in the context of defamation actions, to include the place where the allegedly defamatory publication is distributed.

not “contrary to the fundamental principles of [State B] as regards freedom of expression and information”.

4.8 A further problem with Article 6(1) is that it requires a showing that application of the laws mandated by Article 3 would breach the protection for freedom of expression provided in the forum. It may be noted that the proposed Regulation is effectively forcing courts to apply foreign laws. Furthermore, there is a very real possibility of cases relying on Article 3 involving defamation laws which improperly restrict freedom of expression, as attested to by the numerous successful challenges to defamation liability at the European Court of Human Rights. As a result, we recommend that the Regulation make it clear that, in such cases, the plaintiff bears the burden of showing that application of the law mandated by Article 3 would not be contrary to the protection for freedom of expression provided in the forum.

4.9 Article 3 subjects Internet publishers who produce and upload their materials in jurisdictions with appropriately narrow defamation regimes to potentially much more onerous foreign defamation regimes. The inevitable result will be a chill on the use of the Internet to publish information, particularly information critical of others. We therefore recommend the creation of an exception from the general rule of Article 3 for defamation actions relating to Internet publications. The exception should provide that the law applicable to such actions is the law of the country where the material was uploaded or, alternatively, the law of the country where the publisher is established.

The Product Liability Rule and the Internet

4.10 The proposed Regulation already recognises that there may be cases where the Article 3 rule should not be applied, based on overriding EU objectives or interests. In particular, Article 4 provides that the applicable law in the case of product liability (generally speaking) is the law of the habitual residence of the person sustaining the damage, not the law of the jurisdiction in which the damage occurred.

4.11 The Explanatory Memorandum provides the rationale for excepting product liability cases from the general rule set out in Article 3 as follows:

The rule in Article 4 corresponds not only to the parties’ expectations but also to the European Union’s more general objectives of a high level of protection of consumers’ health and the preservation of fair competition on a given market. By ensuring that all competitors on a given market are subject to the same safety standards, producers established in a low-protection country could no longer export their low standards to other countries, which will be a general incentive to innovation and scientific and technical development.⁸

4.12 This establishes the important principle that the Article 3 rule may be overridden where countervailing EU objectives or interests come into play. In relation to product liability, protection of consumer health and the preservation of fair competition warrant an exception to Article 3 to prevent the exportation of standards in “low

⁸ Explanatory Memorandum at 14-15.

protection” countries to countries whose protections are more closely in line with EU goals.

- 4.13 An analogous argument can be made with respect to the rule we are recommending for Internet publications. The EU clearly sees promoting and protecting freedom of expression as an important “general objective”. It therefore has a strong interest in ensuring that jurisdictions which fail sufficiently to protect freedom of expression (including through harsh defamation regimes) are not able effectively to “export their low standards to other countries”. Yet, as noted above, Article 3 effectively does this for Internet publishers, potentially subjecting them to lowest common denominator laws. To avoid this result, contrary to an important general EU objective, we recommend the exception noted above.

5. The Threat of Criminal Libel

- 5.1 Defamation in some EU Member States, as well as in a number of countries that are soon to become Member States, is subject to criminal sanction, often including imprisonment. Criminal defamation laws are, of course, left unchanged by the proposed Regulation. Yet, it is widely recognised that criminal sanctions for defamation, and particularly imprisonment, are not legitimate.
- 5.2 The problem here, quite simply, is that Article 6(1) may not have its desired effect in this context. The case of the UK illustrates the problem well. Criminal defamation laws are formally in force in the UK, although they have not been used for many years. Because such laws are still in force in the UK, it would be difficult for a defendant to prove that they are “contrary to the fundamental principles of the [UK] as regards freedom of expression and information”. As a result, Article 6(1) may not be applicable and the UK courts could be required to apply penal sanctions, potentially even imprisonment, for material published (or downloaded) in one of the many EU States where criminal defamation laws are regularly applied. Furthermore, the law in many EU States authorises “private enforcement” of criminal defamation laws.
- 5.3 This, we believe, is an unintended gap in the proposed Regulation’s coverage. Accordingly, we recommend that the proposed Regulation should make it clear that Article 3 does not apply to cases involving criminal defamation laws.